THE HIGH COURT

[2017 586 JR]

[2024] IEHC 315

BETWEEN:

PATRICK McCAFFREY AND SONS LTD

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 14th of June, 2024

1. Introduction

1.1 This Applicant Company, the owner of a limestone quarry in Donegal, asks the Court to quash two decisions of the Planning Appeals Board: one was a decision to dismiss an application for substitute consent to continue its quarrying operations and the other a decision to refuse conventional planning permission for further development at the same site. The quarry, to some extent, has been in operation since the 1940's.

1.2 The application for substitute consent was made pursuant to a statutory direction given by the planning authority. The parties dispute the extent of the quarry captured by this direction. The quarry involved in this application comprises three identifiable areas. The quarry covers a total area of over 33 hectares. The main issue raised is whether or not the planning authority (and subsequently the Respondent) was entitled to treat the quarry as a single planning unit and to direct that the Applicant apply for permission to continue to use the entire quarry. It is argued that the Applicant was only required to apply in respect of one part and not the other two parts of the quarry. This position is confirmed, the Applicant claims, by the representation of a council employee to the effect that only one part of the quarry was to be the subject of the

relevant application. It is also argued that the other areas are exempted development and did not require substitute consent.

1.3 The interpretation urged upon the Court by the Respondent Board, that the direction required an application which encompasses the entire quarry and not just one part of it, is the most reasonable one and is in line with the planning history of the quarry. This conclusion is in accordance with the express terms of the direction given by the planning authority, which was not appealed, and is in accordance with formal clarification later given by the Board. Any other interpretation is incompatible with the plain meaning of the direction and with the legislative trend towards more rigorous environmental conservation.

1.4 The refusal of permission for further development was reasonable and proportionate.

1.5 The application for certiorari is refused.

1.6 A number of points were argued in written and oral submissions which had not been pleaded. No such arguments can be considered unless there is a successful application to amend the statement of grounds and no such application was made here.

2. Substitute Consent: Brief History and Recent Cases

2.1 The Local Government (Planning and Development) Act, 1963 ("the 1963 Act") created an obligation to obtain planning permission for the carrying out of any development which was not exempted development. The carrying out of development without permission, or outside the terms of the permission granted, could constitute a criminal offence. However, a person who developed land without obtaining permission, could apply for "retention permission", obtaining retrospective permission for the retention of such development.

2.2 The Planning and Development Act, 2000 ("the 2000 Act") replaced the 1963 Act but the concepts of retention permission and the prospective nature of the earlier Act remained features of the new Act. The Planning and Development (Amendment) Act, 2010, ("the 2010 Act") amended the 2000 Act. This introduced greater powers to regularise pre-existing quarries, in line with more recent environmental measures.

2.3 A detailed history of these provisions is set out by McKechnie J., in *An Taisce v. An Bord Pleanála* [2021] 1 IR 119, [2020] IESC 39. He noted that quarries posed particular

difficulties for planning authorities due to the nature of their work. Section 261 of the 2000 Act introduced registration requirements for every quarry from its operative date in 2004. This enabled the planning authorities to collect more reliable information from the owners as to the extent of the operation and its effects on the local environment. After the registration process, the planning authority decides if further regulation of the quarry is required and if an environmental impact statement ("EIS") must be submitted. There is a notification process to ensure transparency and consultation with the applicants and with the public, and, finally, a decision as to the appropriate outcome. This may be a decision to close the quarry or a direction, under s.261(7) of the 2000 Act, as amended, for substitute consent. This means that an element of retrospective permission remains in our legislative scheme.

2.4 The 2000 Act was amended, comprehensively, in 2010 and an already complicated process was made even more intricate but the motivating force behind all these amendments was clear. The word "*omnishambles*" was suggested during the oral hearing to describe these legislative developments, but this is unfair to the draftsmen. Those charged with drafting these measures had to weld together several overlapping regimes, created by parliamentarians with different priorities, with an updated system embodying more modern principles and informed by EU policy. The drafters of the 2000 and 2010 Acts were required to devise methods whereby quarries would be subject to the more rigorous EU law requirements, in other words. In an effort to do so, the concept of "substitute consent" was created. This is a variation of retention permission which allows certain quarries to remain in operation subject to conditions, with an emphasis on environmental protection which has been strengthened by the rigorous approach taken in the EU, both when drafting the relevant directives and deciding cases of the Court of Justice of the European Union ("CJEU") over the last 15 years. The Directives most relevant to this area of law are the Environmental Impact Assessment ("EIA") Directive (2011/92/EU as amended by Directive 2014/52/EU) and the Habitats Directive (92/43/EEC).

2.5 The section at the heart of this case, s.261A of the 2000 Act, as amended in 2010, was introduced following the decision in *Commission v. Ireland* (Case C-215/06, judgment of 3rd July, 2008, ECLI:EU:C:2008:380). There, the ECJ held that national measures

could permit retrospective regularisation but stated that such provisions could not allow developers to circumvent or disapply the rules of development and that retrospective regularisation "*should remain the exception*".

2.6 McKechnie J. commented on Case C-215/06 in *An Taisce v. An Bord Pleanála*, confirming these objectives. He added (at para 75):

> "*Arguably … 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, pursuant to the principle of cooperation and good faith as laid down in Article 4 TEU, must nullify the unlawful consequences caused by a failure to implement or properly implement or utilise the Directive (*Corridonia*: Cases C-196/16 and C-197/16, paras. 35 and 43). 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*."

2.7 Section 261A of the 2000 Act, as amended, aims to control the development of pre-1964 quarries. It provides, *inter alia,* that where a planning authority is satisfied that development was carried out on a relevant site after the relevant dates, in respect of which an EIA or Appropriate Assessment ("AA") was required, but was not carried out, it can serve a notice on the owner or occupier requiring her to apply to the Board for "*substitute consent*." This is, effectively, an opportunity to regularise, retrospectively, the operations of the relevant quarry.

2.8 In *Fursey Maguire and Ors. v. An Bord Pleanála*, [2022] IEHC 707, Hyland J. outlined the history of s.261 and its purpose, namely, to regulate quarries in light of evolving environmental laws imposed by the EU and to find a way to ensure that the EIAs and AAs under the relevant Directives were conducted, even in respect of businesses and activities long established, acknowledging that their activities were ongoing and the effects on the environment ever-changing and capable of remediation.

2.9 Section 261A of the 2000 Act, as inserted in 2010, begins with provisions about public notification of its effects. At subsection (2), it continues:

"(2) (a) Each planning authority shall, not later than 9 months after the coming into operation of this section examine every quarry within its administrative area and make a determination as to whether—

(i) development was carried out after 1 February 1990 […] which development would have required, having regard to the Environmental Impact Assessment Directive, an environmental impact assessment or a determination as to whether an environmental impact assessment was required, but that such an assessment or determination was not carried out or made, or

(ii) development was carried out after 26 February 1997, […] which development would have required, having regard to the Habitats Directive, an appropriate assessment, but that such an assessment was not carried out.

(b) In making a determination under paragraph (a), the planning authority shall have regard, to the following matters:

(i) any submissions or observations received by the authority not later than 6 weeks after the date of the publication of the notice under subsection (1)(a).

(ii) any information submitted to the authority in relation to the registration of the quarry under section 261;

(iii) any relevant information on the planning register;

(iv) any relevant information obtained by the planning authority in an enforcement action relating to the quarry;

(v) any other relevant information."

2.10 Subsequent provisions deal with other notification requirements. Section 261A provides at every stage of the process that the owner or operator of the quarry may apply to the Board for a review of the determination or decision of the planning authority within 21 days. S.261A(14) of the 2000 Act, as amended, provides:

"Where an application for substitute consent is required to be made under this section it shall be made in relation to that development in respect of which the planning authority has made a determination under subsection (2)(a)."

In other words, the Act restricts the application for substitute consent to the specific development outlined in the relevant determination by the planning authority and there is no process whereby the development may be enlarged or reduced.

2.11 In *Fursey Maguire*, Hyland J. discussed and followed the judgment of Ní Raifeartaigh J. in *Flood v. An Bord Pleanála* [2020] IEHC 195, which dealt comprehensively with the history and implications of s.261A. Charleton J. in *McGrath Limestone v. An Bord Pleanála* [2014] IEHC 382, also considered these provisions. All three cases were referred to in submissions and provide an extensive commentary on the background to the national legislation in this field and explain the approach of the Irish courts to the objections raised in respect of this more restrictive regime on the part of the affected quarrymen. In *Maguire*, the quarry owners put forward several propositions based on historic and continuous use of the land and conditions set by the Council since 2004, on which basis quarrying for ten years had been permitted. This last led to the expectation, it was argued, that neither an EIA or AA was required.

2.12 The arguments were rejected by Hyland J. who noted that the planning authority's view of the facts was never contested by the applicant quarry owners. That view was confirmed by aerial photography, which showed that the site had not been used as a quarry until the 1990's. Hyland J. noted that it required but never sought planning permission, and she concluded that the conditions imposed after registration of the quarry could not, in law, create a legitimate expectation on the part of these applicants that they would not have to get substitute consent to continue their activities. As Hyland J. confirmed, no state body can confer immunity from the law on a citizen or legal entity in Ireland. As she put it, the key word and the basis for any such estoppel is the word "legitimate". Any assurance that the law will not be applied could not create a legitimate expectation. Hyland J. also followed the *Flood* case.

2.13 In *Flood*, the owners of the relevant quarry argued that if a quarry was a pre-1964 development, and had stayed within that user, it remained exempt from the requirement to obtain permission, even under the substitute consent provisions of the new s.261A. This argument was rejected. In the words of Ní Raifeartaigh J.,

> "*…the whole of the statutory scheme relating to substitute consent is premised upon the view that a developer may be operating lawfully under domestic law but that the situation may be defective from an EU law perspective and that development consent therefore needs to be obtained retrospectively. The existence of provisions such as s.177B and s.177C clearly demonstrate this. So, too, does s.261A(3) itself insofar as it*

envisages that a developer who actually has planning permission may be directed to apply for substitute consent just as much as a developer who has a pre-1964 user. It is inconceivable that a developer who has planning permission could be in a worse position than a developer who has a pre-1964 user."

2.14 The Court went on to comment that the use of the phrase "*unauthorised development*" denotes illegality under domestic planning law but that these cases concerned compliance with EU directives and national law dictated by those EU measures. It is helpful to consider the comments of Ní Raifeartaigh J. in this context as they apply equally to this Applicant:

> "*The issuing of a direction to apply for substitute consent is not a form of penalty or sanction. Rather, it is in ease of a quarry operator in that it opens a gateway to the regularisation of the planning status of the lands, with the necessity of having to apply for leave to apply from An Bord Pleanála by reference to the criteria under s.177D. I agree with Charleton J. [in McGrath Limestone] when he states that a s.261A direction cannot be considered a declaration of criminality or a condemnation of the conduct of the developer. I also agree with him when he states that it constitutes recognition of a state of affairs that is not in conformity with European law and that requires rectification. This conclusion is re-enforced when one considers that the legislation specifically provides that the development will become unauthorised if the developer does not apply for substitute consent; such a provision would be unnecessary if the serving of a s.261A direction itself had already had that effect. However, I agree with the applicants' argument to the extent that a direction under s.261A is a declaration that the quarry is, as a matter of fact, in breach of EU law insofar as it is operating without having submitted to an EIA or AA. The situation could perhaps be described as a declaration that the state of affairs is unlawful under EU law and now requires to be rectified by using one of the mechanisms available under domestic law, and that if this mechanism is not used, it will in due course become unauthorised under Irish law too*."

2.15 In *McGrath Limestone*, the case concerned a quarry which had exceeded its pre-1964 user rights. That judgment was neatly summarised in *Flood*:

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

3. <u>The History of the Quarry</u>

3.1 The quarry has been in operation since the 1940's with the current owners operating in the quarry since 1969. The relevant areas in the quarry will be referred to as sites A, B and C. This does not imply that these are separate planning units or even legally different phases of the overall quarrying activities at the quarry, rather the terms are used simply to achieve clarity of description. The activities and areas of the quarry are described in more detail below.

3.2 In his report of May 2015, the relevant Inspector noted that on two previous occasions the planning authority considered applications from this Applicant, one to extend and the next to retain permission for quarrying activities, and that on both occasions and an EIS was sought but never received. A warning letter was subsequently sent to the Applicant alleging unauthorised development, including extension of the existing quarry, but there do not appear to have been enforcement proceedings.

3.3 It is important to note that the sites have been described by at least two different systems in planning reports and in written submissions, including A, B and C, but referring to different sites on each occasion. This judgment may not help matters as it does not conform with the reports in this regard but with the oral submissions. The first area of the quarry addressed in submissions was called Site A and the rest flowed from there. In fact, this site was called Site B in a report from 2013. Reader, beware.

3.4 The total area of the quarry is 33.9 hectares and there is a road which runs east to west and divides the quarry into north and south. The portion to the south is the greater land mass and encompasses Sites B and C. Site A lies to the north.

SITE A

3.5 Site A, for the purposes of this judgment, is also referred to as the North Quarry. Site A accommodates an area of 4.4 hectares. The Applicant contends that this was the only part of the quarry in respect of which there was a direction to apply for substitute consent. Quarrying activity has ceased on Site A and it has been allowed to flood. Site A was excavated to a depth of approximately 140 metres below existing ground level and 50 metres below the existing water table. Only the area around the perimeter and a small section on the northwestern of the site remain unexcavated. The surrounding area is agricultural land. Glasbolie lies to the immediate north of Site A and at least one report refers to Site A as the Glasbolie part of the quarry. Ballymccgroarty Hill lies to the east. The road is immediately south, with Sites B and C directly south again.

SITE B

3.6 Site B lies south of the road that divides the quarry, and is otherwise adjacent to Site A. Quarrying began on Site B pre-1964 and continues today. The site covers approximately 6 hectares. Site B accommodates active excavation of limestone through drilling and blasting. There is a processing area and a concrete batching plant on the site. The material, including ready mix concrete, is processed on site and raw aggregate and finished product are transported off site from this area.

SITE C

3.7 Site C is the subject of the latest application for planning permission. It lies immediately to the west of Site B and is the subject of a proposal under s.37L of the 2000 Act, as amended, to extend the activities of the quarry. This land is currently used for grazing livestock. The area is approximately 250 metres long and 250 metres wide. The nearest dwelling houses are on a local road about 200 metres from the boundary of the proposed extension. That extension would involve development to include blasting of rock for processing in the main quarry at Site B. The proposed quarry would be excavated to a depth of 85 metres. The life of the quarry would be extended by 35 years if this proposed extension was granted.

4. The Current Application and its Procedural History

4.1 While the case concerns an application made in 2017, the relevant chronology begins in 2012. On 22nd August of that year, Donegal County Council issued a s.261A notice to the Applicant. The authority decided that the quarry was a post-64 quarry, i.e. that it was not exempted development. The authority also determined that development had taken place that required an EIA and an AA respectively but that none had been undertaken. The authority determined that the quarry should cease its activities and so notified the Applicant. The Applicant sought a review of this notice, arguing *inter alia* that the authority ought not have considered the quarry as one entity.

4.2 This first s.261A notice was set aside by the Board in a decision dated 16th October 2013. The Board determined that, although the required assessments had not been undertaken, there was evidence that the quarry had commenced operation before 1964, therefore the decision to close the quarry was set aside as the Applicant could avail of the substitute consent process. The Inspector's report, prepared in 2013, considered the submission from the Applicant that the different sites within the quarry be treated separately. She noted that all parts of the quarry are owned and operated by the same entity, it was registered as a single site, it was given a registration number as one site and its operations are inextricably linked. The Inspector's report rejected the contention that the quarry be treated as different sites and the Board agreed in a decision dated 3rd October 2013. The Board expressly noted that it was "*appropriate to consider the entirety of the site as a single entity*." The Board required a new notice under s.216A to issue from the authority, directing an application under s.177B. Specifically, the notice required "*the owner and operator of the quarry to apply to An Bord Pleanála for substitute consent and the Board directed that the application shall contain…*" a remedial Natura Impact Statement ("rNIS") and a remedial Environmental Impact Assessment ("rEIA"). The Applicant was to be given 12 weeks to make this application.

4.3 On 22nd May 2014, Donegal County Council issued the required notice pursuant to s.261A(12) of the 2000 Act, as amended, ("the 216A Notice") directing the Applicant to make an application for substitute consent, pursuant to s.177B of that Act. This notice did not refer to a specific part of the quarry, in line with the decision and direction of

the Board. Later correspondence with the Board is set out below. No application to review this direction from the planning authority was made by the Applicant quarry.

4.4 In the 261A Notice, the planning authority gave the reference number of the quarry as a single entity. The quarry, after the word "location" in the notice, is described as the quarry at "*Ballymacgroarty & Glasbolie*" in Ballintra. This does not distinguish between Sites A, B, and C and refers to the townlands around the quarry generally and, more specifically, to Ballymacgroarty which, according to at least one Inspector's report, is the location of Site B with Site A described as being entirely in Glasbolie townland.

4.5 The authority set out in the 261A Notice that the Board had set aside the decision of the planning authority that the quarry was a post-1964 quarry but confirmed the decision of the planning authority that development had been carried out after the 1st day of February 1990, that would have required an EIA which was not carried out, and that development had been carried out after the 26th day of February 1997, which would have required an AA which was not carried out. As a consequence, the planning authority directed the Applicant to apply to the Respondent Board for substitute consent within 12 weeks, noting that the application "shall contain" a rNIS and a rEIA. As noted, there was no application to review this notice.

4.6 The Applicant submits that the direction of the Respondent must be understood as requiring that the application be made only in respect of the site in respect of which a determination was made by the planning authority. This is correct but it defeats the Applicant's claim. The site in respect of which the determination was made was the whole quarry, not Site A. Therefore, the Applicant's refusal to make its application in respect of the whole site was not made in accordance with the determination, or with the later direction and the Board was entitled to dismiss it.

4.7 The Applicant has referred to the quarry in its submissions as three "planning units". While this suits one argument that the company seeks to make, it is not an accurate description. The three sites at the quarry can be identified as different areas but at no time was it treated as three distinct planning units and, even if it could be raised at this stage, not having been raised by way of review of the terms of the planning authority notice, it is not appropriate or effective to refer to a quarry, which is operated as one entity, as three different sites when implementing environmental protection measures.

4.8 The 261A Notice directed the Applicant to make an application for substitute consent, pursuant to s.177B of that Act. Giving the notice its ordinary and natural meaning, the direction was to apply for substitute consent in respect of the entire quarry; the direction expressly included the relevant townlands beside the quarry in noting its location and this was in line with its planning history and current operations. As noted, no application to review this direction was made by the Applicant quarry.

4.9 The following month, in a letter dated 25th June 2014, the agent of the Applicant quarry requested an extension of time within which to prepare the relevant reports, referring to the scope of the work required and to various local habitats which would require a *robust* rNIS, to use the wording of the letter. There was no reference to sites or different planning units in the quarry and no review was sought. The extension was granted.

4.10 Subsequently, on 10th September, 2014, the agent of the Applicant quarry emailed Donegal County Council asking which part of the quarry was subject to the s.261A(12) Planning and Development Act Notice. I do not see this request in the papers, but it was relayed by the planning authority employee in the following terms:

> *"McCaffrey's are currently examining the possibility of submitting a new planning application under Sec. 34 of the Act to Donegal County Council to expand their operation. However, what has emerged during discussions pre planning on this matter is a lack of clarity as to what area McCaffrey's are applying for substitute consent on? … I have read through your Inspectors report … and in her conclusion she notes development of approximately 4.7 ha was carried out after 1st Feb, 1990 which would have required a determination as to whether an EIA was necessary, but this was not carried out...*
>
> *DCC just want to have it confirmed that in this conclusion the Board are referring to the* ***Northern Area of the Quarry****, (i.e. the most recently excavated area to the north of the County Road, exclusively within the townland of Glassbolie) the reason I'm requesting the clarification is that the Council only estimate this portion of ground to be approx.. 3.1 ha.*
>
> *It is not in doubt the pre 63 element of the development is within the townland of Ballymacgroarty, on the Southern side of the County Road."* [Capitals and bold type are reproduced from the original]

4.11 This request from the Applicant is worded, by an employee of the Council to a member of the Board's staff, in terms which seek confirmation of something that is not, in fact, correct. The Board was never referring only to the north quarry. The fact that this is noted in one report as being exclusively within Glasbolie townland highlights this as the location stated on the original determination and the subsequent directions refer in all cases to the townlands of Glasbolie and to Ballymacgroarty, where Site B is located. Notwithstanding this, on 23rd September an employee of the Respondent Board replied confirming that only the north quarry, Site A, was the subject of the 261A notice.

4.12 On the 4th of December, 2014 the Applicant submitted an application for substitute consent in respect of Site A only. On the 9th of January, 2015, the Board wrote to the Applicant and asked why it had confined its application to an area of only 4.4 hectares in its application for substitute consent, excluding an estimated 10.35 hectares of the extracted or working area of the quarry.

4.13 The Applicant's agent replied on the 13th of January, 2015. He noted that clarification had been sought from the planning authority regarding the area to be included, referring to the email exchange noted above. The writer told the Board that his understanding was that the area to be included consisted of the area to the north of the road located in the townland of Glasbolie, which is now fenced off and unused, namely, Site A. In line with this, according to the Applicant, "*an application was submitted consisting only of lands subject to quarrying activity to the north of the County Road in the townlands of Ballymcgroarty Irish and Glasbolie.*" The Applicant's survey of the lands confirmed that the area subject to quarrying activity consisted of 4.4 hectares and this was all that had been included as part of the application. The reference in the letter to the north quarry being in the townland of Ballymacgroarty is not consistent with one of the Inspectors' reports, although the map of the site appears to support an argument that Site A is also in Ballymacgroarty. However, given that this argument was specifically raised, and rejected, by both the planning Inspector in 2013 and by the Board in its decision of October 2013, it is clear that the references to the quarry throughout the correspondence in 2014 and 2015 were references to the entire quarry.

4.14 The Board replied to the Applicant's January letter on the 29th of June, 2015. The Board noted that it had considered the planning history of the site, including the registration of the quarry under s.261 and the earlier decision of the planning authority in respect of s.261A, the report of the Board's Inspector and the Board's determination in respect of the quarry. The Board expressly set out that it had regard also to the operational history of the site, which, notwithstanding commencement prior to 1964, involved significant subsequent intensification both laterally and vertically, and that the Board had considered the submissions on the file.

4.15 Taking all these matters into account, the Board expressly confirmed in this letter in June 2015 that it had determined that it would be appropriate to consider the entirety of the site as a single entity and therefore, it concluded, "*the information submitted with the application for substitute consent was inadequate for the purposes of carrying out an environmental impact assessment or an appropriate assessment for the entire project, including the assessment of cumulative impacts*." Consequently, the Board took the view that it was not possible to complete assessments in accordance with the relevant requirements. This letter concluded with a direction to submit "*the following information*:"

> "*A revised application, including a revised remedial Environmental Impact Statement and revised remedial Natura Impact Statement to incorporate sufficient information to enable the Board to complete an environmental impact assessment and appropriate assessment in relation to the overall quarry development (i.e. North Quarry, South Quarry and quarried lands to the east of the [public] road and west of the N15).*"

4.16 The first point to note about this letter of July 2015 is that it is in line with the planning authority's determination, which did not discriminate between different sites within the quarry but directed an application for substitute consent without distinguishing between one part of the quarry and another. This letter confirms, having considered the history of the application and the file in respect of this Applicant, that the whole quarry was always the intended subject matter of the application.

4.17 The Applicant submits that the request by the Board for a revised application was not a request for a revised application, but a request for information. Despite this

asserted belief on its part, the Applicant wrote again to the Board on 21st July 2015, seeking clarification of the request quoted above. In that letter, the Applicant set out its view that, what it referred to as "*any enlargement of the substitute consent application to Sites B and C*" would be *ultra vires* the powers of the Board. This reference to an enlargement of the application demonstrates clearly that the Applicant understood that the application was to refer to the whole quarry, not simply Site A. Still, there was no attempt to revisit the determination of the planning authority to that effect.

4.18 The Board responded in September confirming that it sought an application in respect of the whole site. In this letter, the Board expressly stated its view that "*the planning authority notice issued under Section 261A relates to the entire quarry. In completing the review under 261A, the Board considered the entirety of the information on file, including, inter alia, the integrated nature of operations on the quarry lands, and the scale of the ongoing activity on the lands. In consequence, the Board expressly required that the Substitute Consent Application encompass the entirety of the quarry lands*. The letter concluded: *Accordingly, the Board requires you to submit the documentation sought in its letter dated 29th June 2015*.

4.19 The terms of these letters in June, July and September make it clear that the relevant personnel in the Applicant entity knew, probably by July of 2015 and certainly by September of that year, what had been requested, namely, an application in respect of the entire quarry, including the areas that are here referred to as sites A, B and C. Again, no appeal was lodged, no review was sought. Instead, the agent of the Applicant, having made its objections in a letter in July, ignored the request for a revised application in respect of the whole quarry but proceeded as though the only request had been for an application confined to Site A, north of the quarry, but with rEIS and rNIS documents that referred to the remaining sites. This was the extent of the application submitted.

4.20 On 15th December 2015, the Applicant duly applied for substitute consent in respect of Site A, submitting an rEIS and rNIS in respect of the entire quarry which, in its submission, enabled a cumulative assessment to be conducted. On 19th January 2016, it applied also under s.37L for permission for further development of Site C.

4.21 The effect of the first application, as a matter of common sense, was that the Applicant applied only to obtain substitute consent in respect of Site A and not in

respect of the other areas of the same quarry. Expressed in these plain terms, this did not implement the terms of the notice itself, as clarified in the letter of June, 2015.

4.22 The Applicant relied in submissions on the views of the Inspector who described the site of the substitute consent application in his report prepared after a site visit on 20th May, 2015. He referred, at page 2 of his report to the application being confined to the north quarry, having referred to the same land as is referred to here as Site A. A report of 2013, by a different Inspector, refers to the areas differently and the site map also uses the earlier references. They will not be repeated in this judgment, to avoid confusion, but it should be noted again that the letters are not consistent.

4.23 The fact that an Inspector refers to a site as being the subject matter of an application does not bind the Board. While he may have considered this to be so, the decision is not one for him, nor can his view alter the position of the planning authority, in whose determination the correct description of the relevant site is set out.

4.24 On 28th November, 2016 the same Inspector prepared a second report on the substitute consent application in respect of Site A and on the s.37L application to develop at Site C. In respect of the first application, he recommended that substitute consent be refused. The report contains detailed analyses under various headings and concluded that the application should be refused given the pattern of development in the area, the nature and scale of the development at the site and the adverse impact of the existing works, in particular in terms of noise, dust and visual impact.

5. Limit of Original Determination, Illegitimate Expectations and Pleadings

5.1 The core of this case was that the Board had no jurisdiction to revisit the determination of the planning authority under s.261A(14). This argument relies on the false premise that the authority had never meant the direction to apply to the whole site, which has not been established. The direction speaks for itself and speaks clearly: the entire quarry was the subject matter of the Board's direction, the planning authority's determination and the subsequent notice. The previous dealings between the parties simply confirm the plain wording of that determination and the direction, including the description of the quarry location: The quarry has always been considered as a single entity, by the relevant planning authority and by the Board. Insofar as the

argument was made that the Board had treated other quarries as comprising different sites, this is irrelevant. The treatment of this quarry is the issue under consideration.

5.2 It was submitted that any application for substitute consent was required to be made in respect of the development which the planning authority had considered under s.261A(14), and that this was limited to Site A. It was submitted that the Board erroneously concluded that the *"determination affecting the subject quarry related to the entire quarry (planning authority ref no. EUQYOJ)."* But the Board's conclusion was not erroneous. Having considered the determination itself and all the material and submissions, for the reasons set out above, I am satisfied that the Board did not err; both the relevant determination and the original direction referred to the entire quarry.

5.3 There is nothing in the determination which could plausibly imply that the planning authority meant to refer to only one part or site in the quarry. Given the history of the quarry, as outlined above, this division of the quarry into areas would have to be expressly set out in the notice itself for the Applicant to have any grounds to make such an argument. There was no such express division of the quarry into different sites and the Respondent Board, correctly, issued a notice in line with the determination which was directed at the entire quarry.

5.4 While the Applicant is correct to suggest that the terms of s.261A confine the Board to directing an application in the terms of the planning authority's determination, that determination in this case did refer to the entire quarry. An email from an employee in the planning authority could not and did not change this reality. This argument is addressed also under the heading of legitimate expectations, below.

5.5 The Applicant sought to characterise the letters from the Board in 2015 as "revisiting" the site the subject of the application, but this is incorrect. Arguably, the Applicant itself introduced the confusion which ensued by specifically requiring confirmation from an employee of the Council that only one part of the quarry was to be the subject of the directed application, despite the planning history which confirmed that the quarry was a single site. While that employee confirmed what he was asked, two formal letters later disabused the Applicant of this mistaken notion, both confirming that the quarry was, as usual, to be treated as one entity.

5.6 In July of 2015, the agent of the Applicant outlined what amounts to an unstateable objection, based on an *ultra vires* argument which was never articulated further. The Applicant company clearly understood the implications of the clarification, even if the meaning of the original direction was not plain enough and, in my view, it was. There is no reasonable basis on which the request of the Respondent could be understood as a request for information only. While the word "*information*" was used, the "*information*" sought was a "*renewed application*" and the Applicant was repeatedly asked to make this application in respect of the entire quarry.

When Legitimate Expectations are not Pleaded

5.7 As set out in *A.P. v. the D.P.P* [2011] IESC 2, in judicial review proceedings parties must know, with specificity, what is claimed and what is said in defence of that claim, before the matter is argued in court. There is a mechanism whereby a party can amend pleadings to add new grounds. There was no application to amend the pleadings in this case. As the law on this point is well settled, it is a straightforward matter to dismiss this argument on the simple basis that the point was not pleaded.

5.8 The Respondent drew my attention to the decision of Barniville J., as he then was, in *Rushe v. An Bord Pleanála* [2020] IEHC 122. This was a windfarm case in which the applicants were refused leave to argue several grounds of review on the basis that they were not pleaded. There, however, the grounds were neither pleaded nor included in written submissions. Here, they have been reduced to writing but I do not consider this distinction to be a significant one. To hold otherwise would be to open the door to a potentially unlimited expansion of the grounds of review, just before the hearing date, and reduce the pleadings to a guide rather than the focused document envisaged by the Rules of the Superior Courts. To hold otherwise would frustrate the intentions of the Judge who granted leave to review on the basis of the grounds pleaded.

5.9 Having said that, the law on the unpleaded point is also straightforward. The legitimate expectations argument was based on the contention that an email of September 2014, from a Council employee, bound the Respondent Board to limit its decision to Site A, or the north quarry. The case relied upon in this regard was *Glencar Exploration v. Mayo County Council (No. 2)* [2001] IESC 64, [2002] 1 I.R. 84. Keane C.J.

dismissed the argument that there might be a legitimate expectation that a mining company would receive compensation in the event of a mining ban. His judgment concluded with the following line: "*Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected*."

5.10 As in *Fursey Maguire*, these facts provide a salutary reminder that "legitimate" is a key word in this context. The Applicant could have no legitimate expectation that the planning laws would not apply to their quarry, or might only apply to one area in it, such as the site no longer in use, and that submission is untenable in light of the facts of this case, including the communications between the parties. Further support for this conclusion is contained in *Dublin Corporation v. McGrath* [1978] ILRM 208, where a representation by an official of the corporation to a developer, to the effect that a building was exempted development, did not bind the planning authority.

5.11 It is clear from the wording of the 261A Notice in this case, the letter of clarification written and received in June, and from the replies to the Applicant dated July and September 2015, that what was sought was an application in respect of the whole site and that the Applicant understood this.

5.12 There was no enlargement of the site the subject of the application in this case. An agent writing that a proposal is *ultra vires* the powers of the Board does not make it so. On the facts of this case, it is clear that the Board was not "enlarging" the scope of the application but clarifying that the application directed had always applied to the whole site, despite what an employee represented in an email in 2014.

6. Quarries, Old and New

6.1 It was argued that, notwithstanding the terms of the direction and the subsequent clarification, substitute consent was only required in respect of Site A, the North Quarry, not only because of the reassurances given by email to that effect but because "*Sites B and C were exempted development because the remainder of the Quarry had been extracted pre-1964 and pre-1990 and did not require substitute consent.*"

6.2 There are significant problems for the Applicant in this regard. Firstly, the determination of the planning authority, directing an application in respect of the whole quarry, without distinguishing between different sites, was never challenged and the Applicant cannot now seek to review or revise the terms of that determination.

6.3 Secondly, to accept this proposition one must return to the argument that any pre-1964 development is somehow immune from planning legislation, which has been comprehensively rejected by the High Court in several cases. If a quarry has developed since 1964, according Ní Raifeartaigh J. in *J.J. Flood & Sons Ltd. v. An Bord Pleanála* [2020] IEHC 195, it must be in a manner proportionate to its historic user. A quarry with a pre-1964 user may still require an EIA, an AA or screening for an AA due to the ongoing activity and development, in other words. The whole purpose of a quarry is to extract material from the ground. The essence of continuing activity is that more material is extracted and the area of extraction inevitably grows larger as the works continue. On any logical reading of the *Flood* judgment, insofar as it affects the argument made here, the Applicant's argument is a misstatement of the relevant law. In considering this argument, the Applicant invited the Court to reconsider the law as set out in *Flood*, if necessary, and to reject its conclusions.

6.4 This is the argument that was rejected in *Flood*: Pre-1964 works on one site do not render any subsequent works on areas of the same quarry "exempted development" which does not require substitute consent. The history of the quarry in this case does not suggest that any revision of *Flood* is required. As noted, the Board has already determined and the material submitted in these proceedings confirms the conclusion that development on the site involved significant intensification after 1964, both laterally and vertically.

6.5 The High Court in *Flood* definitively rejected the contention that a quarry with pre-1964 status as a matter of national law has, as the Respondent put it, somehow acquired 'authorised' status which pre-dates the deadline for transposition of the EIA Directive and the Habitats Directive, and does not therefore require planning permission, and cannot, as a result, be subject to an EIA or AA. The Applicant asks me to accept a point rejected in *Flood* and in the cases of *Fursey Maguire* and in *McMonagle* [2023] IEHC 223, both of which followed *Flood*. The Applicant has not set out any basis,

as articulated in *Re Worldport Ireland Limited* [2005] IEHC 189, on which this Court can do so.

6.6 The Applicant has conceded that in *Flood*, the High Court has rejected the submission that pre-1964 quarries were equivalent to quarries which had planning permission prior to the operative dates of the EIA/Habitats Directive such that they were not required to apply for permission under the substitute consent process.

6.7 A number of submissions were made in an effort to persuade the Court to refuse to follow the reasoning of Ní Raifeartaigh J. in Flood. The first suggested reason to depart from *Flood* is on the basis that the High Court in *Flood* did not distinguish between pre-1964 development and development in accordance with planning authorisation. The Court was manifestly correct not to do so. As Ní Raifeartaigh J. held, it is not logical to extend greater protection (or greater freedom from regulation) to pre-1964 development with no permission than to development which has been carried out in accordance with a successful application for planning permission.

6.8 The second reason offered is that the High Court in *Flood* does not consider the retrospective application of the EIA/Habitats Directive as a matter of EU law. As the Respondent has pointed out, this is not correct. The Court in *Flood* conducted a detailed analysis of our provisions in the context of the applicable EU law. I am satisfied that there is no basis for this argument and again, not only is the logic of the analysis in *Flood* unassailable, but the principle of comity requires me to follow it unless I can articulate good reasons not to do so. There is no basis on which I can apply the principles outlined in *Worldport* to this case and decline to follow the *Flood* case.

6.9 It was argued that this Applicant quarry, unlike the applicant in *Liscannor Stone v. Clare County Council* [2020] IEHC 651, in which another High Court Judge, O'Regan J., followed *Flood*, has remained within its pre-1964/pre-1990 envelope in respect of sites B and C. This is an untenable argument. As set out in the planning reports and as argued before me, it was clear that the works at this quarry intensified over the years. Site B was in use before 1964 and became the main site of works in the 1990's. Site A, on which works began in the 80's, is no longer being developed and has been allowed to flood. The argument that the development of the quarry remains as it was pre-1964,

and has not intensified beyond that, does not accord with the facts of the case. This is the Applicant's submission and there is insufficient evidence to support it.

6.10 The history of development of this quarry suggests intensification of development, as the Board concluded. The case is analogous to the *Liscannor Stone* case and the same law, that in *Flood*, applies to both. The direction to apply for substitute consent was a legitimate, indeed a required direction under the 2000 Act.

6.11 The thrust of legal reforms in this area of law has been to ensure that operations such as those which are the subject matter of this application develop, if they are permitted to develop at all, in line with stricter regulation of onsite activities, with remediation of environmental damage where appropriate and with pre-development arrangements to address historic, existing and future environmental concerns.

6.12 Finally, it bears repeating that a primary basis for rejecting these arguments is that the determination of the planning authority, requiring the application in respect of the quarry, including all areas, was not reviewed by the Applicant and it cannot now seek to undermine or challenge its terms by dividing the quarry into three sites.

7. Retrospectivity and Practicality

7.1 The Applicant submitted that it would be impossible and impractical to apply the relevant directives retrospectively, suggesting that this means that the determination must relate only to Site A. The Applicant relies in part on the Inspector's comments in his report of 2015 to the effect that there is confusion about the scope of the determination and the exact extent of the land subject to the direction to apply for substitute consent. I have already set out the reasons to reject this contention that there was confusion or that the Applicant was in any way misled by the Respondent. Again, it must be noted that the views of an inspector cannot bind the Board.

7.2 In this context, the Applicant argues that identifying the entire quarry as the area to be considered has implications in that it becomes more difficult, if not impossible, to carry out an EIA, particularly in respect of development that occurred pre-1964 or indeed pre-1990. The Applicant relies for this proposition on *Stadt Papenburg v. Bundesrepublik Deutschland* (Case C-226/08, judgment of 14 January 2010, ECLI:EU:C:2010:10), where

the ECJ held that if dredging works were considered as a single operation, then the works could be considered to be one and the same project for the purposes of Article 6 of the Habitats Directive. There, the works had been authorised before the expiry of the time limit for transposition of the Habitats Directive and, therefore, the development was not subject to the requirement for an AA.

7.3 This is an entirely different factual scenario to that pertaining in *Stadt Papenburg*. There has been no authorisation of these quarrying works (registration of a quarry does not have the same effect as authorisation of works) and no AA under the Habitats Directive was ever conducted in respect of any part of the quarry. This also ignores the fact that the quarry is to be treated as a single entity and, as such, much of the development there has been conducted since the 1980's and even since the 1990's.

7.4 The whole purpose of the environmental protection measures required by the relevant EU directives would be undermined if a view was taken that it is impossible to apply them retrospectively. While the expectation is that they will, generally speaking, be applied prospectively, the purpose of the directives is not only to provide for future protection but, insofar as practicable, to remedy past damage. This pre-supposes a role for both prospective and retrospective analysis of the impact of development on the environment, whether in respect of flora, fauna or any other relevant factor, and how any damage, future or past, can be prevented or remedied.

7.5 Finally, again, I note that the direction of the Board in 2014 and the resulting 261A Notice seeking an application for substitute consent in respect of the entire quarry, was not challenged and the only clarification sought has already been reviewed, exhaustively, above. It is clear that the entire quarry was to be the subject matter of the application for substitute consent and thus any argument which is based on the premise that only part of the quarry is the subject of this application for substitute consent must fail. For these reasons, both the factual findings and the failure to challenge the original determination, this case is not an appropriate one in which to seek the assistance of the CJEU as to the retrospective nature of the Habitats Directive, as suggested. Looking at the history of the quarry, development onsite has intensified substantially since the 1990's, so the Directive applies to the quarry when considered, as it must be, in its entirety and not as three sites.

8. Separate Sites

8.1 The Applicant claims that each area of the quarry should be viewed as a separate planning unit. It was argued that this was not pleaded, specifically, but it appears to me to be a restatement of the earlier argument in respect of the extent of the planning authority's determination, which was not appealed. A point that has not been pleaded cannot be relied upon, for the reasons set out in paragraph 5.8, relying on *A.P. v. DPP* [2011] IESC 2.

8.2 If, for the sake of completeness, this is considered as a permissible rephrasing of the core argument, as set out above, the Applicant earlier contended that the Council should not have included the whole quarry in its initial s.261A assessment. That contention was rejected by the Board in a decision dated 3rd October 2013. The Board expressly noted that it was "*appropriate to consider the entirety of the site as a single entity*." The Inspector's Report dated 5th June 2013 makes similar comments. That Board decision was not challenged, the subsequent authority determination issued in respect of the entire quarry, as set out above, and the Applicant cannot seek to undermine that determination or launch a collateral challenge to that decision in these proceedings.

9. Jurisdiction to Dismiss the Application for Substitute Consent

12.1 The Applicant argues that the Planning Appeals Board did not have jurisdiction to dismiss the substitute consent application and that the legislation only allows for a refusal or a grant of substitute consent. The submission is made on the basis of the language in the relevant provision, which I am asked to read in context. Section 177(K) of the 2000 Act, as amended, reads:

> *"(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 may decide to grant the substitute consent, subject to or without conditions, or to refuse it."*

12.2 However, this argument overlooks s.177(P). This provides, in subsections 4 and 5, that s.132 and s.133 of the 2000 Act apply in relation to an application for substitute consent. This is a crucial provision, linking the language of s.132 and s.133 to the application for substitute consent. These sections provide:

"132.—(1) Where the Board is of opinion that any document, particulars or other information may be necessary for the purpose of enabling it to determine an appeal or referral, the Board may, in its absolute discretion, serve on any party, or on any person who has made submissions or observations to the Board in relation to the appeal or referral, as appropriate, a notice under this section—

(a) requiring that person, within a period specified in the notice (being a period of not less than 2 weeks beginning on the date of service of the notice) to submit to the Board such document, particulars or other information as is specified in the notice, and

(b) stating that, in default of compliance with the requirements of the notice, the Board will, after the expiration of the period so specified and without further notice to the person, pursuant to section 133, dismiss or otherwise determine the appeal or referral.

(2) Nothing in this section shall be construed as affecting any other power conferred on the Board under this Act to require the submission of further or additional information or documents.

133.—Where a notice has been served under section 131 or 132, the Board, at any time after the expiration of the period specified in the notice, may, having considered any submissions or observations or document, particulars or other information submitted by the person on whom the notice has been served, without further notice to that person determine or, in the case of a notice served under section 132, dismiss the appeal or referral."

12.3 Section 133 is the relevant section on the facts of this case and is the appropriate section to dismiss an application. One must read the references to an appeal or referral as including references to an application for substitute consent, in light of s.177(P). This application, despite a specific request that it cover the entirety of the quarry, was incomplete in that it was confined to Site A, albeit the rNIS referred to sites B and C.

12.4 The substitute consent application at issue did not relate to the entirety of the quarry as it was required to and, as a matter of law, to apply for substitute consent for part of the quarry was not what was directed. Given the deficiencies in the application, the failure to consider the whole of the quarry and to give information as specifically requested in the

form of a renewed application, and the clear provisions of s.177(P) and s.261A(14), it was appropriate and lawful for the Board to dismiss the application in accordance with s.133.

12.5 As set out in the notice served in this case, the Applicant was advised that, unless the relevant information was forthcoming, namely, a revised application in respect of the entire quarry and not just one part of it, the application would be dismissed without further notice to the quarry owner. The conditions of applying s.133 were fulfilled, therefore, and the section was validly relied upon to dismiss the case.

12.6 It was submitted that the Court must adopt a literal interpretation of s.177(K) and give effect to the ordinary and plain meaning of the words of s.177(K) that an application must either be granted or refused and, therefore, that there is no jurisdiction to dismiss an application. Leaving aside the obvious benefit to an applicant, in that an application that is dismissed may be renewed, this argument simply ignores s.177(P) and s.132 and s.133, which I cannot do. Section 177(K) must be read in context; the interpretation sought will contradict another section of the same Act and that, in itself, militates against selecting a literal interpretation, blind to co-existing provisions and creating a direct conflict which is easily avoided by reading the Act as a whole.

10 Identification of the Property

10.1 In written submissions, the Applicant argues that it was a matter for the Applicant to identify which property was the subject matter of its application for substitute consent. The Applicant relies on Articles 227 and 228 of the Planning and Development Regulations 2001 ("PDR") to make this argument.

10.2 Article 227(2)(b)(i) of the PDR provides that "*an application for substitute consent shall be accompanied... by 6 copies of a location map ... marked so as to identify clearly the land or structure to which the application relates and the boundaries thereof in red".* Article 228 PDR provides that the Board shall consider whether the applicant has complied with the requirements of Article 227 PDR on receipt of an application and shall invalidate the application if such non-compliance cannot be rectified by the submission of additional documentation.

10.3 The Applicant relies on *Beltan v. An Bord Pleanála* [2020] IEHC 133, where Barrett J. held that Articles 227-228 are mandatory in nature and granted an order of certiorari

where the Board refused an application for substitute consent based on defective maps. As the information before the Board was invalid, he found that the substitute consent application was invalid.

10.4 The Respondent, correctly, argues that the grounds upon which leave was granted do not include this argument. Accordingly, and as already noted in paragraph 5.8 above, this Court cannot consider them as no application was made to amend the statement of grounds. In any event, I am satisfied that *Beltan* is not authority for the proposition that this Respondent could not direct an application in respect of the whole quarry. As set out above, this application had always been directed in respect of the whole site. Despite the Applicant's argument to this effect, this application did not require amendments to the redline outline of the site on the relevant maps.

11. <u>Reasons for the Decision</u>

11.01 The Applicant contends that the Board has not given proper reasons for its decision to dismiss the application for substitute consent. In accordance with *Connelly v. An Bord Pleanála* [2018] 2 ILRM 453, the obligation is to provide the main reasons on the main issues raised. The reasons for the decision made here are, and were, readily apparent to the Applicant. Their application was dismissed as it was incomplete and did not comply with the notice served, directing the Applicant to make a renewed application to encompass the entire quarry. These were the main reasons for the decision made and they are apparent from the determination and made abundantly clear in correspondence between the parties even before the decision to dismiss the application was made.

11.02 The terms of the Applicant's own letters to the Respondent Board, predicting that the Board would seek to "enlarge" the application, make it clear that the Applicant was aware that this was the true extent of the application sought. The Applicant's contention that the direction was in respect of Site A have already been discussed.

11.03 The Respondent explained its decision to dismiss the application as it referred only to part of the quarry and, taken together with the planning history of the quarry and the relevant correspondence in 2015, the Applicant understood these reasons.

12. <u>Fair Procedures</u>

12.1 The Applicant submits that the Respondent Board did not notify the Applicant to the effect that it was dissatisfied with the rEIS and rNIS submitted and did not provide an opportunity to address its concerns. The premise of this argument is that the application was otherwise complete and as directed and, as set out above, this is not correct. The rEIS and rNIS were submitted as part of an application which related only to Site A, which is no longer in use and which was developed in the 1980's. While the two statements may well have referred to all three parts of the quarry, the application was only in respect of Site A and was therefore incomplete.

12.2 Quite apart from this point, the relevant legislative provisions make it clear that there was no legal obligation on the Board to set out its views on the rEIS or the rNIS. The Board has power to seek further information, as it did here in that it sought a renewed application, but there is no obligation on the Board to seek submissions if it has a concern about a statement that has been submitted. The Board was not required to afford the Applicant an opportunity to make further submissions. As Faherty J. held, in *Redrock Developments Ltd v. An Bord Pleanála* [2019] IEHC 792, it is open to the Board to decide, as it did here, that the information before it is deficient and to refuse permission; the Board is not obliged to revert to an applicant for more information. It is a matter for the applicant to satisfy the Board and not for the Board to advise the applicant on how best to phrase its application, or, indeed how to prepare its rEIS. Just as the Board may refuse permission without seeking more information, the Board may also, similarly, dismiss an application once the Applicant understands the reasons for the dismissal. As set out above, I am satisfied that the reasons here were clearly stated and were understood by this Applicant.

12.3 While the Applicant refers to Article 41 of the Charter of Fundamental Rights of the European Union under this heading, arguing that the case was not decided expeditiously. This point was not pleaded and again, as set out at paragraph 5.8, it cannot be considered.

12.4 The Applicant relied on *McMonagle* in this regard but quoted only from Ferriter J. at paragraph 74, omitting the following paragraph which continues to this effect:

> "[…] *The onus is on an applicant making an application under the relevant statutory processes to collate all relevant material and anticipate the issues which might reasonably arise from that material in light of the applicant's particular circumstances and the relevant criteria under the*

statutory scheme. A quarry owner or operator must be taken to be aware of the potentially very significant consequences for it of decisions under the statutory processes and it cannot present itself as some form of passive entity waiting to be informed as to what the decision-maker regards as weak points in its application so that it can then make submissions or further submissions on those points. Any assessment of a contention that there has been a failure to afford fair procedures under a s.261A or ss.177C/177D process needs to have appropriate regard to those matters of context.

12.5 I am satisfied that there was no want of fair procedures in this case.

13. <u>The Decision to refuse further Development, Section 37L</u>

13.1 The final matter under review is the decision of the Board to refuse an application under s.37L, to continue and extend development at Site C. This section allows for a consent application for prospective development to be adjudicated upon in parallel with an application for retrospective consent in form of substitute consent. The first ground pleaded was that the refusal was based on information about tonnage and that the Board should have sought further information before refusing the application. It is helpful to set out the reasons in full, as several challenges are made which depend on an interpretation of this passage containing the Board's decision:

> "*The Board considered that the Environmental Impact Statement submitted with the application is deficient on the grounds that the document failed to adequately quantify the volume of material to be extracted on site and the consequential impact that this would have on the processing and manufacturing of materials within the main quarrying area. As a result, the Board is unable to adequately identify and assess the impacts of the proposed extension in terms of traffic, noise and dust generation arising from the proposed extension in isolation and in combination with the existing processing and manufacturing activities on site. The Board is, therefore, not satisfied that the proposed development, as a consequence of such impacts, would not seriously injure the residential amenities of neighbouring and nearby properties and depreciate the value of such property. It is, therefore, considered that the proposed development would be contrary to the proper planning and sustainable development of the area*."

13.2 The pleaded ground is that insofar as the Board was unsatisfied with descriptions of tonnage it should have sought further information or imposed a relevant condition. As set out by Faherty J. in *Redrock Developments Ltd,* already cited above, this is not required. It is open to the Board to decide, as it did, that the information is deficient and to refuse permission and the Board is not obliged to revert to an applicant for more information. It is a matter for the Applicant to satisfy the Board and not for the Board to advise the Applicant on how best to phrase its application. The comments of Haughton J. in *Element Power Limited v. An Bord Pleanála* [2017] IEHC 550 apply here:

> "*… it is a matter for the Board to determine whether a particular issue warrants refusal of permission, or could be dealt with by a condition on a grant of permission. As submitted by the respondent, 'this is a question of fact and degree, and one eminently within the expert decision-making function of the Board…'… The Board's conclusion is not irrational, or 'unreasonable' in the O'Keeffe sense of that term*."

These comments apply here. The quantity of material to be extracted is a fundamental factor in assessing impact and there is no reason for this Court to revisit the Board's conclusions which cannot be said to be irrational.

13.3 The Applicant also pleaded that the decision made under s.37L was unreasonable or subject to predetermination. The rationale for the decision is clear, reasonable, and contains no suggestion of predetermination. The deficiencies of the EIS are set out plainly and, as is clear from the judgment of Barniville J. in *Cork Harbour Alliance For A Safe Environment v. An Bord Pleanála* [2021] IEHC 203, such matters are a matter for the Respondent to evaluate. This Court is obliged to treat such decisions with curial deference, as is the case with any expert decision-making body and as confirmed in numerous cases including that relied upon by the Respondent, *Coyne v. An Bord Pleanála* [2023] IEHC 412. In *Cork Harbour Alliance*, as Barniville J. made clear, in respect of adequacy of information, only irrationality or a lack of proportionality may be the basis for a successful review of a decision of the Respondent Board. The Applicant bears the burden of proof and cannot reach the threshold whereby a challenge to the merits of this conclusion can be successful.

13.4 The Applicant has also relied on *Behan v. An Bord Pleanála* [2020] IEHC 133. There, Barrett J. commented at paragraph 14(3) that one or more serious deficiencies in an EIS

would "*presumably*" lead to a refusal of the application. That is precisely what occurred here, and it is not clear how *Behan* can assist this Applicant.

13.5 The Applicant asserts that the s.37L decision-making process was "*tainted with prejudgment*" and pleads that, in the light of the reports of the Inspector, the Board was influenced by the determination on substitute consent. The decision is set out in full, above. The history of the case does not and could not create a reasonable apprehension in an informed bystander of bias, in the form of predetermination or prejudgment. The record of what was considered and decided in the relevant Decisions of the Board does not raise any concern in this regard but confirms a reasoned and objective analysis.

13.6 The Inspector recommended refusal of the s.37L application due to the absence of the benefit of planning permission or substitute consent. However, that was not a reason relied upon by the Board. The Board's reason for refusal was due to the deficiencies in the EIS and the Board's inability to carry out the requisite EIA as a result. This is unrelated to the dismissal of the substitute consent application under s.133 of the 2000 Act. The Respondent is correct to submit that it does not follow in law or logic that the s.37L decision must "consequently fall" if the substitute consent decision is quashed and that was not the effect of the dismissal of that application here. The refusal of the s.37L application was due to a clearly stated, reasonable and separate factor, namely the inadequacy of the information in the EIS.

14. Conclusions

14.1 The determination of the planning authority and the subsequent direction of the Respondent Board all related to the entire quarry and that constituted three different areas, sites A, B and C. The planning authority was entitled to, and did as a matter of fact, direct that an application for substitute consent be made in respect of the entire site. That determination was not reviewed. The Board was, therefore, required to direct an application in respect of the entire site. Equally, the Board was entitled to refuse the application to extend the operations at Site C. The Applicant has not established any ground on which certiorari should be granted. Even the grounds not pleaded were doomed to fail, had an application been made to amend the statement of grounds.

14.2 Certiorari is refused.

14.3 The issue of costs appears to be governed by the decision of the Supreme Court in *Heather Hill Management Company CLG & McGoldrick v. An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43.

14.4 This case will be listed for mention in order to allow the parties to address the issue of costs or any other matters arising from this judgment on Tuesday 18th June, 2024.