APPROVED

THE HIGH COURT

[2024] IEHC 336

Record No. 2023/94MCA

BETWEEN/

DAVID MALONE

APPLICANT

-AND-

GCHL LIMITED

FIRST NAMED RESPONDENT

-AND-

ENVIRONMENTAL PROTECTION AGENCY

SECOND NAMED RESPONDENT

-AND-

KILDARE COUNTY COUNCIL

FIRST NAMED NOTICE PARTY

AND

BALYNA ENVIRONMENTAL ACTION GROUP

SECOND NAMED NOTICE PARTY

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 16th day of May 2024

INTRODUCTION

Preliminary

1. Mr. Malone, who is a litigant in person, has issued proceedings pursuant to section 160 of the Planning and Development Act 2000, as amended ("the 2000 Act") and section 57 of the Waste Management Act 1996, as amended ("the 1996 Act") ("the substantive application").

2. The main focus of Mr. Malone's substantive application is the former Ballinderry quarry pit operated by the First Named Respondent, GCHL Ltd ("GCHL"). The site is a worked out sand and gravel pit and it is proposed to restore the quarry pit by the use of, *inter alia*, imported wastes. This in turn requires GCHL to apply, *inter alia*, for a Waste Licence from the Environmental Protection Agency ("the Agency"), which it did on 2nd June 2018, and this application (W0298-01) remains pending before the Agency at the time of the hearing of this motion in March 2024.

3. Whilst the issues in the substantive application are legally and factually complex, they involve similar type applications in the planning and waste management regulatory codes which are sometimes referred to as '*statutory injunctions*' and are part of the suite of '*enforcement*' actions available to address alleged planning or environmental irregularities. They share common features and are commenced, for example, by way of an originating notice of motion grounded on an affidavit. They seek to invoke the jurisdiction of the High Court (a similar jurisdiction exists in the Circuit Court insofar as

planning matters are concerned) to make orders directing certain activities to be stopped and regularised. Both codes have been the subject of extensive jurisprudence of the Superior Courts and have involved, for example, complex questions of EU law.

4. In his substantive application (brought by way of the originating Notice of Motion dated 30th March 2023), Mr. Malone seeks a number of reliefs under the 2000 Act and the 1996 Act, *i.e.*, the statutory injunctions, which are primarily directed against GCHL in relation to their operation of the former Ballinderry quarry pit, including *inter alia* the following orders:
    - directing GCHL to cease, what is alleged by Mr. Malone to be, unauthorised development comprising the excavation and processing of quarry materials together with the importation of waste at the quarry prior to GCHL having the alleged unauthorised development regularised by receiving a substituted consent from An Bord Pleanála in accordance with section 177C(1) of the 2000 Act;
    - prohibiting GCHL from carrying out what Mr. Malone alleges is the unauthorised disposal of waste at the former Ballinderry quarry pending GCHL receiving a Waste Licence from the Agency in accordance with section 40 of the 1996 Act;
    - directing GCHL to have the waste, which has allegedly been illegally disposed of at the former Ballinderry quarry, removed by an authorised contractor and taken to a waste facility authorised to accept such waste materials;

- compelling GCHL to return the former Ballinderry quarry to its previous condition prior to, what Mr. Malone alleges, is the unauthorised development taking place as a result of an alleged breach of Condition 4 of An Bord Pleanála's permission reference PL09.205039.

5. None of the above reliefs in the substantive application arise for consideration in this application now brought by the Agency.

6. In this regard, and in contrast to the four reliefs sought against GCHL (as set out above), Mr. Malone also seeks – as the fifth relief (at Paragraph 5 of the Notice of Motion dated 30th March 2023) in his substantive application - to prohibit or restrain *the Agency* from determining the application which was made by GCHL to it on 2nd June 2018 for a Waste Licence (W0298-01) in respect of the former Ballinderry quarry. It is this relief which the Agency, in this application, is seeking to strike out or dismiss as being improperly constituted and devoid of any jurisdictional basis having regard to the provisions of section 160 of the 2000 Act and section 57 of the 1996 Act.

7. After receiving Mr. Malone's substantive application (commenced by originating Notice of Motion dated 30th March 2023), the Agency's solicitors wrote to him *inter alia* stating its view that there was no jurisdiction in section 160 of the 2000 Act to restrain an administrative process – the Waste Licence application submitted by GCHL – which was pending before the Agency and which it was obliged to process in accordance with its statutory functions and obligations.

8. Consequent upon Mr. Malone's refusal to discontinue the relief sought as against the Agency, the Agency brought this application pursuant to a Notice of Motion dated 14th July 2023.[1]

9. By its Notice of Motion in this application, the Agency seeks *inter alia* an order pursuant to the High Court's inherent jurisdiction and/or Order 19, rule 28 of the Rules of the Superior Courts 1986 ("RSC 1986") striking out Paragraph 5 of the Notice of Motion dated 30th March 2023 (the substantive application), contending that it is improperly constituted and/or is bound to fail because neither section 160 of the 2000 Act nor section 57 of the 1996 Act provide any jurisdictional basis to prohibit the Agency from processing and determining the Waste Licence application, W0298-01, (which was submitted by GCHL on 2nd June 2018 in respect of the quarry at Ballinderry, Carbury, County Kildare) prior to GCHL submitting a *remedial* Environmental Impact Assessment Report ("rEIAR") and *remedial* Natura Impact Statement ("rNIS") to An Bord Pleanála and seeking substitute consent in accordance with section 177C of the 2000 Act, as contended for by Mr. Malone.

10. As mentioned earlier in this judgment, the application for the Waste Licence (W0298-01) was made by GCHL to the Agency on 2nd June 2018 and, at the time of the hearing of this application in March 2024, remained pending before the Agency.

[1] The Agency's Notice of Motion was initially returnable to 9th October 2023.

11. Notwithstanding the complex legal issues raised by Mr. Malone in the substantive application, which will be addressed at a future hearing, it is this sole issue, *i.e.*, whether Paragraph 5 of the Notice of Motion dated 30th March 2023 should be struck out, which requires to be determined in this application.

12. David Browne SC appeared for the Agency. Damien Keaney BL appeared for GCHL (albeit on a watching brief capacity). Both expressly reserved their positions in relation to the remaining parts of the Notice of Motion dated 30th March 2023. Mr. Malone is a litigant in person.

Notice of Motion dated 30th March 2023

13. Having summarised the reliefs sought in the Notice of Motion dated 30th March 2023, *i.e.*, the substantive application, the precise orders sought by Mr. Malone are as follows:

> "*(1) an order for the first named Respondent their successors and assigns to cease forthwith the unauthorised developments, consisting of the excavation and processing of quarry materials, together with the importation of waste at the Ballinderry Quarry, Carbury, County Kildare prior to the first named Respondent having the unauthorised development regularised by receiving substituted consent from An Bord Pleanála in accordance with section 177C. (1)* [of the Planning and Development Act 2000, as amended]*;*

(2) an order for the first named Respondent their successors and assigns to prohibit any further unauthorised disposal of waste at the Ballinderry quarry, Carbury, County Kildare pending the first named Respondent being in receipt of a waste licence from the second named Respondent in accordance with Section 40 of the Waste Management Act 1996 as amended;

(3) an order for the first named Respondent to have the waste illegally disposed at the Ballinderry quarry, Carbury, County Kildare removed by an authorised contractor and shall be taken to a waste facility authorised to accept such waste materials;

(4) an order compelling the first named Respondent to return the Ballinderry quarry, Carbury, County Kildare to its previous condition prior to the unauthorised developments taking place as a result of a breach of condition 4 of An Bord Pleanála permission Ref: PL09.205039;

(5) an order prohibiting the second named Respondent processing the waste licence application Ref: W0298-01 prior to the first named Respondent submitting a Remedial Environmental Impact Assessment Report and Remedial Natura Impact Statement to An Bord Pleanála seeking

substitute to consent in accordance with section 177C. (1) **[of the Planning and Development Act 2000, as amended]**;[2 3]

(6) Applicant costs;

(7) Any such further or other Order as this Honourable Court deems meet."

14. The gravamen of Mr. Malone's complaint in the substantive application is that, as a matter of law, he contends that the Agency cannot process GCHL's application for a Waste Licence until such time as it (GCHL) has applied for and received a planning consent. As stated, that issue, however, is not for determination in this application. This application deals solely with whether the relief sought at Paragraph 5 is appropriate in an application pursuant to section 160 of the 2000 Act and section 57 of the 1996 Act.

SUMMARY OF THE POSITION ON BEHALF OF THE AGENCY

15. In summary, the Agency argues that the relief sought at Paragraph 5 of the Notice of Motion dated 30th March 2023 (set out above) is procedurally irregular and constitutes a collateral challenge of the decision-making process which remains pending before the Agency. Mr. Browne SC submits that any decisions made by the Agency on the Waste Licence application submitted by

[2] Correction added.

[3] Emphasis and underlining added.

GCHL may only be challenged by way of judicial review within the statutory framework of section 43(5) of the 1996 Act and, therefore, the relief sought at Paragraph 5 of the Notice of Motion dated 30th March 2023 should be struck out on the basis that it lacks any jurisdictional foundation and/or is an abuse of process and bound to fail.

SUMMARY OF MR. MALONE'S POSITION

16. Mr. Malone's arguments in his substantive application are multi-faceted and are summarised in a series of correspondence which he sent to the Agency on behalf of Environmental Action Alliance–Ireland.

17. In response to the Agency's application, Mr. Malone delivered comprehensive written and oral submissions. These submissions, however, sought to canvass wider issues which Mr. Malone contends relate to the processing of GCHL's Waste Licence Application before the Agency, *i.e.*, the relief sought in Paragraph 5 of the Notice of Motion dated 30th March 2023.

18. In the context of GCHL's application for a Waste Licence (W0298-01), Mr. Malone, for example, has made a number of detailed submissions to the Agency including on 6th November 2019, 12th December 2019, 4th February 2020, 19th February 2020, 13th May 2020, 22nd December 2020, 7th September 2021, 26th October 2021 and 22nd January 2022. Mr. Malone raises a large number of legal matters by way of Affidavit sworn on 29th September 2023 (which is described on its face as the "*Legal Affidavit of David Malone*", and

which was treated by the Agency as a Legal Submission made by Mr. Malone), and a replying Affidavit sworn on 17th January 2024.

19. In relation to the reliefs sought at Paragraph 5 of the Notice of Motion dated 30th March 2023, Mr. Malone at paragraph 44 of the Affidavit sworn on 29th September 2023, states as follows:

> "*(44) I say that the jurisdiction to prohibit the second named Respondent from processing the waste licence application is its failure to implement the following legislation:*
>
> - *The CJEU judgments in C-50/09, C-215/06 and C-494/01;*
> - *Statutes enacted by the Oireachtas, pursuant to Article 15.2.1° of the Constitution of Ireland to give effect* [to] [sic.] *the CJEU judgments in Cases-50/09, 215/06, C-494/01 and Article 6 of the Aarhus Convention;*
> - *S.87(1B) of the EPA Act 1992, as amended, s.42(1B) of the Waste Management Act 1996, as amended and Part XA, s. 177 and s. 261A in the 2000 Act;*
> - *The EIA and AA screening in compliance with Chapter 2 of Part 2 of the Planning and Development (Housing) and Residential Tenancies Act 2016;*
> - *The European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018;*

- *The Irish Supreme Court judgements in An Taisce v McTigue Quarries Ltd & Ors [2018] IESC 54, which upheld the CJEU judgement in Case C-215/06;*
- *The High Court case Heart* [sic.] *Peat Ltd v Environmental Protection Agency [2022] IEHC 148, which has ruled on many of the issues raised by Mr. Rory Ferguson in his grounding Affidavit.*"

20. Mr. Malone describes that he has been involved in environmental consultancy for over 30 years, including the preparation and registration of a number of complaints with the European Commission and the Aarhus Convention Compliance Committee. The initial part of Mr. Malone's written submissions also details his involvement in several complaints brought by the Commission against Ireland.

21. In addition, Mr. Malone also refers to examples of judgments involving Ireland before the CJEU, including, *inter alia*, *Commission v Ireland* (Case C-50/09, EU:C:2012:834), *Commission v Ireland* (Case C-215/06, EU:C:2019:955) and *Commission v Ireland* (Case C-494/01, EU:C:2005:250).

22. The following is a summary of both his written and oral presentation in response to the Agency's application to strike out Paragraph 5 of the Notice of Motion dated 30th March 2023.[4]

[4] The following references to caselaw and legislation are those contained in Mr. Malone's submissions.

23. Mr. Malone submits that the Planning and Development Act 2010 amended section 87(1C) of the Environmental Protection Agency Act 1992, as amended, ("the EPA Act 1992") and provides that in the circumstances which he contends apply here and where an application for a Waste Licence is made to the Agency by GCHL and it has not complied with section 87(1B) of the EPA Act 1992, the Agency is required to refuse to consider the application and must inform GCHL accordingly.

24. He submits that on 9th August 2023, the Agency informed GCHL that it had not carried out a screening to ensure compliance with section 87(1B) of the EPA Act 1992, as amended and section 42(1B) of the Waste Management Act 1996, as amended. Mr. Malone further submits that the amendments effected by, *inter alia*, the European (Environmental Impact Assessment) (Waste) Regulations 2012 amended the Public Participation Directive, the codified EIA Directive 2011/92/EU and Article 6 of the Aarhus Convention, and gave further effect to Article 2 of the Treaty on European Union ("TEU") in relation to democracy, human rights, and the rule of law, and that accordingly his case is of exceptional public interest derived from EU law.

25. A fundamental aspect of Mr. Malone's submission, therefore, is his contention that a planning application must precede an application for a licence to the Agency.

26. Mr. Malone refers to the decision of the Supreme Court in *An Taisce-The National Trust for Ireland v McTigue Quarries Ltd & Ors* [2018] IESC 54 and

the decision of the CJEU judgment in *Commission v Ireland* (Case C-215/06, EU:C:2008:380).

27. Mr. Malone's central submission is that the following consequences arise from the principle of '*consistent ('conforming') interpretation*' in EU caselaw for his application in this set of proceedings (Record Number 2023/94 MCA): (i) the Agency is processing a Waste Licence application prior to carrying out a screening in compliance with section 87(1B) of the EPA Act 1992, as amended and/or section 42(1B) of the Waste Management Act 1996, as amended; the Agency is processing the Waste Licence application prior to GCHL submitting a *remedial* Environmental Impact Assessment Report and *remedial* Natura Impact Statement to An Bord Pleanála seeking substitute consent in accordance with section 177C (1) of the 2000 Act; (iii) this court, in giving effect to the principle of consistent interpretation, must establish a general duty to interpret the national law in conformity with the entire body of EU law, relevant to the proposed project.

Mr. Malone's response to the Agency's motion to strike out

28. In response to paragraph 4 of the Agency's Legal Submissions, Mr. Malone states in his written submissions that his case relates to implementing EU law and that he is seeking remedies under Article 19(1) of the TEU which provides that Member States are responsible for providing remedies sufficient to ensure effective legal protection in the fields covered by EU law. Therefore, Mr. Malone submits that the issue before me is to establish whether the Agency is processing the Waste Licence application furnished by GCHL in a way which

is compatible with EU law. He submits that the Agency must use the rule of '*consistent interpretation*' to show that it is processing the Waste Licence application in conformity with national law in a way which is compatible with EU law.

29. Mr. Malone submits that the Agency has made a jurisdictional error in seeking to strike out the relief sought in Paragraph 5 of the Notice of Motion dated 30th March 2023 under the High Court's inherent jurisdiction. In this regard, he submits that the court's inherent jurisdiction relates to domestic law and is invoked when there is no specific statutory jurisdiction available and that his proceedings relate to implementing legislation that has been transposed into Irish law by the Oireachtas. Mr. Malone submits that the source of inherent jurisdiction in Ireland is the Irish Constitution, in which Article 15.2.1˚ confers "*sole and exclusive power of making laws for the State in the Oireachtas*" and that no other legislative authority has power to make laws for the State. He submits that to facilitate the implementation of Directives, the European Communities Act 1972 ("the 1972 Act") was enacted and that section 2 of the 1972 Act provides that existing and future acts adopted by the EU institutions are binding in domestic law.

30. Mr. Malone submits that the substantive issue in his case is that the Agency and GCHL have failed to implement the legislation transposed into Irish law by the Oireachtas and that I cannot strike out Paragraph 5 of the Notice of Motion dated 30th March 2023 pursuant to my inherent jurisdiction, as it would involve disregarding the legislation that was transposed into Irish law

by the Oireachtas to give effect to the CJEU judgments in *Commission v Ireland* (Case C-50/09, EU:C:2011:109), *Commission v Ireland* (Case C-215/06, EU:C:2008:380) and *Commission v Ireland* (Case C-494/01, EU:C:2005:250).

31. He contends that the Agency's application to strike out the relief sought in Paragraph 5 of the Notice of Motion dated 30th March 2023 is self-contradictory and involves a deliberate material omission of the CJEU judgments in *Commission v Ireland* (Case C-50/09, EU:C:2011:109), *Commission v Ireland* (Case C-215/06, EU:C:2008:380), the Supreme Court judgment in *An Taisce-The National Trust for Ireland v McTigue Quarries Ltd & Ors* [2018] IESC 54 which upheld the CJEU judgment in Case C-215/06 and the High Court judgment (Phelan J.) in *Harte Peat Ltd v The Environmental Protection Agency & Ors* [2022] IEHC 148, which upheld the CJEU judgment in Case C-50/09.[5]

32. Mr. Malone submits that the proceedings in *Harte Peat Ltd v The EPA* pointed to legislative changes, and that clarity was achieved through litigation and the requirement to interpret domestic legislation in conformity with the requirements of EU law and in this regard, he references paragraph 186 of the

[5] The Court of Appeal in *Harte Peat Limited v The Environmental Protection Agency & Ors/The Environmental Protection Agency v Harte Peat Limited* [2022] IECA 276 refused Harte Peat's application for a stay on the injunction granted by the High Court and at a point where the hearing of the substantive appeal before the Court of Appeal had not concluded. The Court of Appeal comprised Faherty, Power and Collins JJ. and the court delivered judgment.

judgment of Phelan J. in *Harte Peat Ltd v The EPA* [2022] IEHC 148, where the court observed that:

> "*The Agency point to legislative changes, clarity achieved through litigation and the requirement to interpret our domestic legislation inconformity with the requirements of EU law to contend that Irish law now requires that HP seek planning permission even in respect of pre'64 user. In particular, they rely on the requirement of EU law that peat extraction which is likely to have significant effects on the environment by virtue of its nature, size or location be subject to a requirement to obtain "development consent" within the meaning of the Directives. They maintain that s. 87(1C) of the EPA Act was correctly invoked because the activity the subject of the licence required an EIA and therefore development consent which in Ireland includes both planning permission and a licence where peat extraction at this scale is involved.*"

33. Mr. Malone refers to the following extract at paragraph 177 of the judgment of Phelan J. in *Harte Peat Ltd v The EPA* [2022] IEHC 148, and he submits that the court found that the Agency in that case was correct in its conclusion that it could not consider the application under section 87(1 C) of the EPA Act 1992 in the absence of evidence of planning permission:

> "*177. The memorandum advised the Board of the Agency that s. 87(1C) obliged the Agency to refuse to consider an application that does not comply with s. 87(1B) stating further:*

"Licence applications which are not accompanied by:

Details of the relevant grant of planning permission or

Confirmation from the planning authority that an application for permission has been made or

A section 5 declaration under the Planning and Development Act, 2000 as amended

Should be refused to be considered by the Agency pursuant to section 87(1C) of the EPA Act, 1992 (as amended).""

34. Mr. Malone submits that the Agency's application is self-contradictory as he contends that it used the rule of consistent interpretation in *Harte Peat Ltd v The EPA* [2022] IEHC 148, but he says the Agency is now submitting, in this application, that Mr. Malone's proceedings (Record No. 2023/94/MCA) are improperly constituted and/or are bound to fail. He contends that the court ruled in *Harte Peat Ltd v The EPA* [2022] IEHC 148 that the Agency cannot process a Waste Licence application prior to a planning application being submitted to the relevant planning authority but that the Agency, in this application, is now submitting that Mr. Malone's proceedings (Record No. 2023/94 MCA) are moot because the Waste Licence application has not yet been determined by the Agency.

35. Mr. Malone contends that the Agency's application is further self-contradictory in claiming that there is no jurisdictional basis in section 160 of the 2000 Act for the relief sought in Paragraph 5 of the Notice of Motion dated 30th March 2023, whereas *An Taisce-The National Trust for Ireland v McTigue Quarries Ltd & Ors* [2018] IESC 54 concerned an application brought pursuant to section 160 of the 2000 Act in relation to an unauthorised development in Galway.

36. He also submits that in *Harte Peat Ltd v The EPA* [2022] IEHC 148, the Agency relied upon the decision of the High Court (Baker J.) in *McCoy v Shillelagh Quarries Ltd* [2015] IEHC 838 and refers to the following extract at paragraphs 84-85 of that judgment (which extract is also referred to by Phelan J. in *Harte Peat Ltd v The EPA* [2022] IEHC 148 at paragraph 236), and submits that the court held that the exercise of its discretion under section 160 of the 2000 Act should be informed by reference to EU environmental law:

> "*(84) I consider myself constrained further by the requirements of European Community law, and especially the EIA Directive and the Habitats Directive as each of these mandates that an Environmental Impact Statement is required in respect of the operation of this quarry.*
>
> *(85) Accordingly, were I to refuse injunctive relief or grant injunctive relief with respect to some of only of the operation, I consider that my decision would be one which could be characterised as a failure to respect the integrity of the*

environmental legislation, and allow the development to continue when it is unauthorised under Irish and when Irish law arises as a result of the obligations of Ireland and Community law."

37. By reference to paragraph 237 of the judgment of Phelan J. in *Harte Peat Ltd v The EPA* [2022] IEHC 148, Mr. Malone submits that the court stated that it is now well-established that there is an onus on the courts to ensure conformity with EU environmental law in exercising a discretion under section 160 of the 2000 Act. Consistent with his fundamental submission, Mr. Malone argues that the CJEU judgment in Case C-50/09, the legislation transposed into Irish law by the Oireachtas, and the High Court judgment in *Harte Peat Ltd v The EPA* [2022] IEHC 148, all concluded that a planning application must precede an application for a licence to the Agency.

38. Mr. Malone argues that the application in this case contains sufficient evidence to show that the Agency is not processing the Waste Licence application in conformity with national law in a way which is compatible with EU law.

39. He submits that the within application by the Agency has created a conflict between domestic law and EU law, which has resulted in his proceedings in Record Number 2023/94 MCA (*i.e.*, the substantive application) being effectively delayed for approximately one year.

40. In summary, Mr. Malone submits that I should refuse the Agency's motion to strike out (which he refers to as '*domestic proceedings*') as it is incompatible with both national and EU law and that I should grant him the remedies he has sought in Paragraph 5 of the Notice of Motion as a matter of EU law.

41. Finally, Mr. Malone submits that in the interests of justice and in conformity with Article 2 of the TEU, he seeks the costs of this application.

ASSESSMENT AND DECISION

42. For the following reasons, I find that the relief sought against the Agency in Paragraph 5 of the Notice of Motion dated 30th March 2023 is improperly constituted and has no jurisdictional basis having regard to section 160 of the 2000 Act and sections 43(5) and section 57 of the 1996 Act. Further, and if necessary, I find that this relief, seeking as it does, to prohibit the Agency from determining the application which was made by GCHL to it on 2nd June 2018 for a Waste Licence (W0298-01) in respect of the former Ballinderry quarry, is bound to fail and represents an abuse of process.

43. First, as mentioned at the beginning of this judgment, Mr. Malone is seeking, in the substantive application, to invoke the *statutory jurisdiction* of the High Court in similar processes prescribed by section 160 of the 2000 Act and

section 57 of the 1996 Act[6] for the purposes of seeking '*enforcement orders*', commonly referred to as '*statutory injunctions*'.

44. The exercise of *these* statutory jurisdictions, whether pursuant to section 160 of the 2000 Act or section 57 of the 1996 Act, however, do *not* provide a mechanism which would allow Mr. Malone to achieve the fifth relief set out in the Originating Notice of Motion dated 30th March 2023.

45. The objection brought by the Agency in this application is essentially a *preliminary objection*, brought by way of Notice of Motion, where it is submitted that the relief claimed in Paragraph 5 of the Notice of Motion cannot be obtained within the four corners of these statutory provisions because that relief is improperly constituted and has no jurisdictional basis.

46. This is borne out when each of these provisions are examined.

47. Section 160 of the 2000 Act, for example, provides as follows:

> "*(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or*

[6] The application, for example, is entitled "[i]*n the matter of an application pursuant to section 160 of the Planning and Development Act, 2000, as amended and section 57 of the Waste Management Act, 2000*".

to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

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

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

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

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

(ii) in the case of a certificate issued by the Dublin Docklands Development Authority under section 25(7)(a)(ii) of the Dublin Docklands Development Authority Act 1997 or by the Custom House Docks Development Authority under section 12(6)(b) of the Urban Renewal Act 1986, the planning scheme made under those Acts to which the certificate relates and any conditions to which the certificate is subject.

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

(3) (a) An application to the High Court or the Circuit Court for an order under this section shall be by motion and the Court when considering the matter may make such interim or interlocutory order (if any) as it considers appropriate.

(b) Subject to section 161, the order by which an application under this section is determined may contain such terms and conditions (if any) as to the payment of costs as the Court considers appropriate.

(4) (a) Rules of court may provide for an order under this section to be made against a person whose identity is unknown.

(b) Any relevant rules of Court made in respect of section 27 (inserted by section 19 of the Act of 1992) of the Act of 1976 shall apply to this section and shall be construed to that effect.

(5) (a) An application under this section to the Circuit Court shall be made to the judge of the Circuit Court for the circuit in which the land which is the subject of the application is situated."

48. In summary, section 160 of the 2000 Act provides the High Court (and the Circuit Court) with a statutory jurisdiction to grant orders where the court is satisfied that "*unauthorised development*" has occurred within the meaning of the 2000 Act.

49. In this regard, in *Meath County Council v Murray & Anor* [2017] IESC 25; [2018] 1 I.R. 189, McKechnie J. *inter alia* observed at paragraph 71 that "*where successfully invoked, that provision now empowers inter alia the High Court … to make any order which it deems is necessary so that what "has been, is being or is likely" to be done is not only planning compliant, but also that the affected land is restored to the condition it was in prior to the unauthorised development being commenced, insofar as that can feasibly be done. Furthermore, for the avoidance of doubt, the section makes it clear that "restoration, reconstruction, removal, demolition, or alteration of any structure or other feature" is within the competence of the Court to so order*."

50. These are powers of "*regulatory enforcement*" and have simply no application to the fifth relief (Paragraph 5) sought in the Notice of Motion dated 30th March 2023 which, in contrast to a jurisdiction based on a finding of '*unauthorised development*', seeks to prohibit or restrain *the Agency* from determining the application which was made by GCHL to it on 2nd June 2018 for a Waste Licence (W0298-01) in respect of the former Ballinderry quarry.

51. Turning to section 57 of the 1996 Act, it provides for the power of the High Court in relation to "*the holding, recovery or disposal of waste*" and has a similar structure to section 160 of the 2000 Act, providing *inter alia* as follows:

> "*Where, on application by any person to the High Court, that Court is satisfied that waste is being held, recovered or disposed of in a manner that causes or is likely to cause*

environmental pollution or section 34 or 39(1) to be contravened, it may by order—

(a) require the person holding, recovering or disposing of such waste to carry out specified measures to prevent or limit, or prevent a recurrence of, such pollution or contravention, within a specified period,

(b) require the person holding, recovering or disposing of such waste to do, refrain from or cease doing any specified act, or to refrain from or cease making any specified omission,

(c) make such other provision, including provision in relation to the payment of costs, including costs incurred by the Agency in relation to the carrying out of relevant inspections or surveys and the taking of relevant samples and the analysis of the results of any such activities, as the Court considers appropriate.

(2) An application for an order under this section shall be by motion, and the High Court when considering the matter may make such interim or interlocutory order as it considers appropriate.

(3) An application for an order under this section may be made whether or not there has been a prosecution for an offence under this Act in relation to the activity concerned and shall not prejudice the initiation of a prosecution for an offence under this Act in relation to the activity concerned.

(4) Without prejudice to the powers of the High Court to enforce an order under this section, a person who fails to comply with an order under this section shall be guilty of an offence."

52. Again, these provisions have no application to the fifth relief (Paragraph 5) sought in Mr. Malone's Notice of Motion dated 30th March 2023 which, to recap, seeks to prohibit or restrain *the Agency* from determining the application which was made by GCHL to it on 2nd June 2018 for a Waste Licence (W0298-01) in respect of the former Ballinderry quarry.

53. The seeking of the relief at Paragraph 5 of the Notice of Motion dated 30th March 2023, purportedly relying on section 160 of the 2000 Act and section 57 of the 2000 Act, is entirely misconceived.

54. Further, I am satisfied that, independent of any question in relation to the applicability of O. 19, r. 28 RSC 1986, the High Court has a free-standing jurisdiction and also an inherent jurisdiction to assess and determine, as a *jurisdictional pre-requisite* or *preliminary question* in a Notice of Motion brought by the Agency, whether or not any of the reliefs claimed in the substantive application are improperly constituted as having no jurisdictional basis in either section 160 of the 2000 Act or section 57 of the 1996 Act or, in the alternative, are bound to fail and therefore amount to an abuse of process.[7] For example, in discussing *inter alia* the question of the availability of section

[7] *Barry v Buckley* [1981] IR 306; *Keohane v Hynes* [2014] IEHC 66.

160 of the 2000 Act being addressed by way of plenary hearing, the Supreme Court (McKechnie J.) in *Meath County Council v Murray & Anor* [2017] IESC 25; [2018] 1 I.R. 189 observed as follows:

> "*(35) … Indeed, if necessary, as the court has a constitutional obligation to ensure fairness and fair procedures, and as the Superior Courts have an inherent right to regulate their own procedures, they can be asked at any point to put in place a regime by which those objectives can best be served (see O. 103, r. 6(a) of the Rules of the Superior Courts, and O. 56, r. 3(7)(a) of the Circuit Court Rules) …*
>
> *(38) Where serious complexity arises, it seems to me that whether section 160 is triggered by the issue of a motion and the procedure then suitably adapted so that the full ventilation of all issues can take place, or if a plenary summons should issue in the first instance, is purely a technical matter of procedural significance only. Accordingly, I believe that there is jurisdiction in all courts vested with authority to deal with section 160 applications to regulate their own procedures – in the case of the Circuit Court within the relevant statutory provisions and the rules of court – so as to render that procedure compliant with constitutional norms.*
>
> *(39) In addition, it is difficult to see, in such circumstances, how any issue of law, no matter how complex, far reaching or significant it might be, cannot be adequately dealt with by way of submissions, written and oral, and determined by the judge.*

Whether the commencement process is summary in nature or plenary in nature should have no bearing on how issues of law are presented, argued, addressed and adjudicated upon".

55. I will, therefore, leave over the specific question of the applicability of O. 19, r. 28 RSC 1986 to proceedings brought pursuant to section 160 of the 2000[8] Act and section 57 of the 1996 Act to another case where that matter has been fully argued by the parties.[9]

56. Equally, in the context of section 57 of the 1996 Act, the making of an application to the Agency for a Waste Licence does not mean that *the Agency* is holding, recovering or disposing of waste, and therefore section 57 of the 1996 Act has no application.

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[8] Although the point does not appear to have been argued in *South Dublin County Council v Fallowvale Limited and Weston Limited* [2005] IEHC 408, this case concerned an application brought pursuant to section 160 of the 2000 Act in the context of the operation of Weston Aerodrome in Lucan where the respondents issued a separate Notice of Motion (within the substantive application) seeking an order striking out averments contained in an affidavit being relied upon by the Council which it argued were *inter alia* scandalous, unnecessary, invidious and prejudicial. Ultimately, it was agreed between the parties that the court could deal with the substantive issues without reference to the affidavit in question.

[9] See, for example the questions raised by Collins J. in the decision of the Court of Appeal in *North Westmeath Turbine Action Group & Ors v An Bord Pleanála &* Ors [2022] IECA 126, paragraph 10, fn. 5, and the discussion of similar issues by Holland J. in *Mount Salus Residents' Owners Management Company Limited By Guarantee v An Bord Pleanála & Others* [2023] IEHC 691 at paragraphs 49 to 57. By way of observation, as the Agency's Notice of Motion was dated 14th July 2023, it therefore predated the new O. 19, r. 28 RSC 1986 which came into force on 22nd September 2023 pursuant to the Rules of the Superior Courts (O. 19) 2023 (S.I. No. 456 of 2023).

57. For example, in *Kildare County Council v Merlehan t/a Ark Recycling* [2022] IEHC 107, this court (Barr J.) stated at paragraph 64 that "[t]*he test which must be applied by the court when considering whether to grant relief pursuant to s.57 of the Act, was set down in Cork County Council v. O'Regan* [[2009] 3 I.R. 39]. *In that case, Clarke J. stated that there were three criteria: firstly, there must be waste within the meaning of the Act; secondly, it must be established that the waste was being held, recovered or disposed of and thirdly, the holding and disposal of the waste must be likely to cause environmental pollution, or was likely to contravene s.34 or s.39(1) of the Act (as amended).*" These provisions have no application to the relief sought by Mr. Malone at Paragraph 5 of the Notice of Motion dated 30th March 2023.

58. I am therefore of the view that Paragraph 5 of the Notice of Motion dated 30th March 2023 should be struck out or dismissed as against the Agency. This finding has no bearing on the other reliefs set out at paragraphs 1 to 4 of the Notice of Motion dated 30th March 2023 and it is, of course, a matter for Mr. Malone as to whether he challenges any decision the Agency has made or will make in the context of the application by GCHL for a Waste Licence.

59. Second, in summary, Paragraph 5 of the Notice of Motion dated 30th March 2023 seeks an order of *prohibition* against the Agency from processing the application made by GCHL for a Waste Licence application (reference W0298-01) prior to GCHL seeking a substituted consent before An Bord Pleanála.

60. Ordinarily, the seeking of an order of prohibition in the context of challenging a public law decision is achieved by way of an application for judicial review, the process of which is prescribed by O. 84 RSC 1986 and/or statutory provisions – such as section 43(5) of the 1996 Act – which incorporate O. 84 RSC 1986. I, of course, make no comment whatsoever on the prospects of such an application being successful or not. That is not the question before me. Rather, the question is whether or not the seeking of such an order of prohibition is more properly found in a judicial review application or in an application brought pursuant to section 160 of the 2000 Act and section 57 of the 1996 Act.

61. Before examining the process prescribed in section 43(5) of the 1996 Act for initiating an application for judicial review in the context of a Waste Licence application, it is apposite, as a matter of general principle, to examine briefly how orders of prohibition and related reliefs such as stays, interim and interlocutory injunctions are sought, especially having regard to what Mr. Malone is seeking in Paragraph 5 of the Notice of Motion dated 30th March 2023.

62. O. 84, r. 18(1) RSC 1986, for example, provides that "[a]*n application for an order of certiorari, mandamus, prohibition or quo warranto shall be made by way of an application for judicial review in accordance with the provisions of this Order.*"

63. O. 84, r. 20(8) RSC 1986 provides that "[w]*here leave to apply for judicial review is granted then the Court, should it consider it just and convenient to do so, may, on such terms as it thinks fit: (a) grant such interim relief as could be granted in an action begun by plenary summons; (b) where the relief sought is an order of prohibition or certiorari, make an order staying the proceedings, order or decision to which the application relates until the determination of the application for judicial review or until the Court otherwise orders.*"

64. In the citation of numerous authorities, Mr. Malone misconstrues the nature of what I have described as the "*statutory injunction*" applications in section 160 of the 2000 Act and section 57 of the 1996 Act as providing a basis for seeking to prohibit or restrain the "*statutory process*" of seeking a Waste Licence. As with any other putative applicant, the procedure for seeking to obtain such a remedy is by way of an application for judicial review, subject to complying with any statutory requirements (for example, section 43(5) of the 1996 Act) and O. 84 RSC 1986.

65. Contrary to the position here, the case of *Harte Peat* concerned an application for judicial review where the applicant in that case sought orders seeking *inter alia* to quash the Agency's decision to refuse to consider an application for an IPC licence having regard to section 87(1C) of the EPA 1992 and an application by the Agency for injunctive relief pursuant to section 99H of the 1992 Act.

66. Further, in its recent decision in *MD v Board of Management of a Secondary School* [2024] IESC 11, whilst the judgment of O'Donnell CJ. makes clear that it was not argued that the approach of the High Court was mandated by the provisions of O. 84 RSC 1986, and, therefore, no argument was addressed to the limits of the rules-making function, the Supreme Court (in the judgments of Hogan J. and Collins J.) re-emphasised its earlier decision in *Okunade v Minister for Justice* [2012] IESC 49; [2012] 3 I.R. 152 that the potential suspension of a presumptively valid public law measure engages considerations of the public interest (that generally do not arise in private law injunction proceedings) and that the entitlement of those conferred with statutory authority to make legally binding decisions is an important part of the structure of any legal order based on the rule of law. The court found that it follows that significant weight must be given to permitting measures that are *prima facie* valid to be "*carried out in a regular and orderly way*" and that appropriate weight needed to be accorded to "*allowing the systems and processes by which lawful power is to be exercised to operate in an orderly fashion*."

67. The Supreme Court in *MD v Board of Management of a Secondary School* held that the High Court was not empowered by O. 84, r. 20(8) RSC 1986 to grant interlocutory injunctions *ex parte* following the grant of leave to apply for judicial review. The Court held that only interim relief which is time limited may be granted in this manner, and that the moving party must apply for an interlocutory injunction, on notice to the respondent, where the moving party bears the onus of proof that the injunction should be granted.

68. In his judgment in *MD v Board of Management of a Secondary School* [2024] IESC 11, Hogan J. observed as follows in paragraph 29:

> "*(29) Apart from anything else, the Superior Court Rules Committee would not have had the jurisdiction so to alter the substantive law in respect of the granting of injunctive relief. As Keane C.J. observed in McDonnell v. Brady [2001] 3 IR 588 at 598: "There is nothing in the wording of* [what is now Ord. 84, r. 20(8)(a)] *to suggest that, when an applicant seeks an order of prohibition or certiorari, he is further entitled ex debito justitiae, to a direction that the proceedings should be stayed. There seems no reason in logic why the applicant, where the grant of the stay is subsequently challenged, should not be under an onus to satisfy the court that it is an appropriate case in which to grant a stay*".

69. The correct procedure, therefore, is to invoke the process prescribed for judicial review under the 1996 Act (*i.e.*, section 43(5)) and O. 84 RSC 1986 (which, as set out above, includes a bespoke procedure for the seeking of a stay or an injunction) as there is no jurisdictional basis in section 160 of the 2000 Act or section 57 of the 1996 Act for the relief sought in Paragraph 5 of the Notice of Motion dated 30th March 2023, which seeks to prohibit the Agency from carrying out its statutory duties.

70. It is, of course, not a matter for me to assess whether the seeking of such an order of prohibition or injunction (or any interim or interlocutory relief which may be sought) as captured by the intent of Paragraph 5 of Mr. Malone's Notice of Motion dated 30th March 2023 in any hypothetical legal challenge by way of judicial review would, or would not be, likely to succeed or is, or is not, premature.

71. Issues of timing were, for example, canvassed in the judgment of the High Court (Humphreys J.) in *North East Pylon Pressure Campaign Limited and Maura Sheehy v An Bord Pleanála* [2016] IEHC 300 and to a certain extent also arose in the decision of the Supreme Court (Clarke CJ.) in *Callaghan v An Bord Pleanála and Ors* [2018] IESC 39.

72. This matter is also addressed in Practice Direction HC 124, dealing with Planning and Environment cases, under subheading *(13) Statement of Grounds and Grounding Affidavits*, at paragraph 68 which states as follows:

> "*Parties considering challenging any preliminary decision prior to a final substantive decision should in cases of doubt seek consent from the proposed respondents and notice parties to the effect that no point would be taken against the applicants if the challenge is postponed to the final decision and that any extension of time for that purpose, if required, would be consented to. If such consent is not forthcoming and an application is brought, the court may award costs of that challenge, irrespective of which result, against any party who*

caused unnecessary costs to be incurred by declining to furnish such consent."

73. Again, these are not matters which I have to consider in this application by the Agency.

74. Third, whilst in *non-statutory judicial review applications*, the Superior Courts in Ireland had not adopted the rigidity of the approach in the UK post *O'Reilly v Mackman & Ors* [1983] UKHL 1; [1983] 2 A.C. 237 (see the observations of O'Donnell J. (as he then was) in *O'Connell & Lambe v The Turf Club* [2015] IESC 57; [2017] 2 I.R. 43 at paragraph 39), the notion of *procedural exclusivity* has been incorporated in a suite of statutorily prescribed measures[10] which also incorporate the judicial review process in O. 84 RSC 1986. Section 43(5) of the 1996 Act is one such example. (In the context of section 50(2) of the 2000 Act, see also the observations of the Supreme Court in *Krikke & Ors v Barranafaddock Sustainable Electricity Ltd* [2022] IESC 41 per Hogan J. at paragraph 22 and per Woulfe J. at paragraphs 65 to 86; the Court of Appeal in *Narconon Trust v An Bord Pleanála* [2021] IECA 307 per Costello J. at paragraphs 41 to 51 and 67 to 68 and Collins J. at paragraphs 1-8).[11]

75. Section 43(5) of the 1996 Act provides as follows:

[10] For example, section 50(2) of the 2000 Act; section 87(10) of the Environmental Protection Agency Act 1992 (as amended); section 5 of the Illegal Immigrants (Trafficking) Act 2000 (as amended).

[11] The Court of Appeal comprised Woulfe, Costello and Collins JJ. Woulfe J. agreed with the judgments delivered by Costello J. and Collins J., who agreed with each other's judgments.

"*(5) (a) A person shall not question the validity of the decision of the Agency on an application made to it for the grant of a waste licence, or in consequence of a review conducted by it of such a licence, otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (hereafter in this subsection referred to as "the Order").*

(b) an application for leave to apply for judicial review under the Order in respect of a decision referred to in paragraph (a) shall-

(i) be made within the period of 2 months commencing on the date on which the decision is given,

(ii) be made by motion on notice (grounded in the manner specified in the Order in respect of an ex parte motion for leave) to-

(I) the Agency,

(II) where the applicant for leave is not the applicant for, or the holder of, the waste licence concerned, and the applicant for or holder of that licence,

(III) any person who has made an objection in accordance with section 42(3) to the Agency in relation to the matter concerned,

(IV) Any other person specified for that purpose by order of the High Court, and such leave shall

> *not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed.*"

76. Accordingly, section 43(5) of the 1996 Act *inter alia* provides that a person shall not question the validity of a decision of the Agency on an application made to it for the grant of a waste licence, or in consequence of a review conducted by it of such a licence, *otherwise than by way of an application for judicial review* under O. 84 RSC 1986. The relief sought in Paragraph 5 of the Notice of Motion dated 30th March 2023 would have the effect of circumventing this requirement. Any challenge to the decision-making process before the Agency in respect of an application for a waste licence should be brought by judicial review proceedings pursuant to section 43(5) of the 1996 Act.

77. Fourth, and leaving aside any questions of timing, delay and prematurity (as referred to earlier), the relief sought in Paragraph 5 of the Notice of Motion also amounts to a pre-emptive and intended *collateral challenge* to the Waste Licence process (which remained extant at the hearing of this motion in March 2024) and is contrary to the decisions of the Supreme Court in *Sweetman v An Bord Pleanála* [2018] IESC 1; [2018] 2 I.R. 250, *Nawaz v Minister for Justice* [2012] IESC 58; [2013] 1 I.R. 142 and the High Court in *Goonery v Meath County Council* [1999] IEHC 15.

78. Accordingly, I find that Paragraph 5 of the Notice of Motion dated 30th March 2023 which *inter alia* seeks to prohibit the Agency from determining the application which was made by GCHL to it on 2nd June 2018 for a Waste Licence (W0298-01) in respect of the former Ballinderry quarry, is improperly constituted as there is no jurisdictional basis for it in section 160 of the 2000 Act or section 57 of the 1996 Act.

79. Further, and if necessary, and for the reasons set out herein, and assuming for the purpose of this exercise that the facts are as asserted by Mr. Malone, the relief claimed at Paragraph 5 of the Notice of Motion dated 30th March 2023 is bound to fail and therefore represents an abuse of process as it lacks a jurisdictional basis pursuant to section 160 of the 2000 Act or section 57 of the 1996 Act.

80. Ultimately, Paragraph 5 of the Notice of Motion dated 30th March 2023 is improperly constituted. Without expressing any view about the merits of any application seeking to prohibit the Agency from processing the Waste Licence application (W0298-001) prior to GCHL submitting a *remedial* Environmental Impact Assessment Report and a *remedial* Nature Impact Statement to An Bord Pleanála seeking substitute to consent in accordance with the 2000 Act, this *cannot be achieved in an application pursuant to section 160 of the 2000 Act or section 57 of the 1996 Act* (*i.e.*, within the substantive application) and allowing this application for relief against the Agency to proceed, in circumstances where it is bound to fail, is an abuse of process which the court has an inherent entitlement to prevent: see the decision of the Supreme Court

in *Keohane v Hynes* [2014] IESC 66 at paragraphs 6.5, 6.6. and 6.10. In addition, no decision had been made by the Agency during the hearing of this application and section 57 of the 1996 Act is directed towards a person "*holding, recovering or disposing of*" waste, which has no application to the Agency.

81. By way of analogy, in *Morris v Ireland & Ors* [2022] IEHC 472 the High Court (Barr J.) struck out proceedings on the basis that they were bound to fail, were frivolous and vexatious and accordingly constituted an abuse of the process of the court. The proceedings in that case had commenced by way of Plenary Summons and were held by Barr J., at paragraph 90 of the judgment, to be a *collateral challenge* in relation to two earlier administrative decisions by An Bord Pleanála which the court held came within the *procedural exclusivity* of section 50(2)(a) of the 2000 Act (*i.e.*, the statutory judicial review process in the planning code).

82. In the circumstances, for the reasons which I have set out in this judgment, I find that Paragraph 5 of the Notice of Motion dated 30th March 2023, which seeks an order of prohibition against the Agency processing a Waste Licence application, is improperly constituted as there is no jurisdictional basis for such relief in an application which is issued under the provisions of section 160 of the 2000 Act and section 57 of the 1996 Act and, if necessary, is also bound to fail and constitutes an abuse of process. I, therefore, direct that Paragraph 5 of the Notice of Motion dated 30th March 2023 be struck out and dismissed as against the Agency.

PROPOSED ORDER

83. I shall, in the circumstances, make an Order striking out the following paragraph from the Notice of Motion dated 30th March 2023 and dismissing this relief sought in the substantive application as against the Agency:

> "*(5) an order prohibiting the second named Respondent processing the waste licence application Ref: W0298-01 prior to the first named Respondent submitting a Remedial Environmental Impact Assessment Report and Remedial Nature Impact Statement to An Bord Pleanála seeking substitute consent in accordance with Section 177C. (1)* [of the Planning and Development Act 2000, as amended]."

84. I shall put the matter in before me on Friday 31st May 2024 at 10:30 to deal with any ancillary and consequential matters arising.