THE HIGH COURT

[2024] IEHC 552

[2013 No. 783 JR]

IN THE MATTER OF SECTION 50 OF THE
PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

THOMAS GRALL

APPLICANT

– AND –

MEATH COUNTY COUNCIL

– AND –

AN BORD PLEANÁLA

– AND –

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

<u>JUDGMENT of Mr Justice Max Barrett delivered on 31st July 2024.</u>

SUMMARY

In this judgment I explain why I will not grant any of the reliefs sought in respect of and/or consequent upon an impugned s.261A PADA process.

Background

1. Mr Grall owns lands at Milltown, Co Meath. Those lands are operated partly as a quarry for the extraction of sand and gravel. This quarrying, Mr Grall claims, commenced on or before 1.10.1964.

2. Pursuant to s.261 of the Planning and Development Act 2000 (PADA), Mr Grall registered his quarry with Meath County Council. As part of that process, Meath County Council imposed 22 conditions as regards the continued operation of the quarry. Mr Grall was not happy with the requirement that he pay a €30k financial contribution and successfully appealed this requirement to An Bord Pleanála.

3. Pursuant to s.261A PADA, Meath County Council came to consider the status of the quarry afresh. On the basis of the evidence before it Meath County Council (including a submission from Mr Grall) the Council determined pursuant to s.261A(4) PADA that the proposed development was not in fact a pre-1.10.1964 development. That evidence included an aerial photograph which appears to show the present quarry site as unworked, though I am given to understand from the hearings before me that it is typical for a quarry such as that operated by Mr Grall to go through periods in which it is unworked, during which period the site becomes overgrown (and hence would seem to be like any other piece of land in an aerial photograph).

4. In reaching its decision, the Council did not have before it a letter from Mr Grall's late uncle indicating that he remembered withdrawing material from the quarry in the 1940s. Nor did the Council have before it a journal that Mr Grall has since found in which he recorded quarry orders from 1966 – so post-1964 but I suspect that it would have been construed (had it been presented) as bolstering his case that the quarry was a site of activity in the 1960s, not least as Mr Grall hardly started out with a full book of orders immediately in 1966.

5. Mr Grall makes a number of criticisms of how matters proceeded against him in the s.261A proceedings. He maintains that:

– it was not open to Meath County Council to reach the decision it reached in the s.261A proceedings following the decision it reached in the s.261 proceedings.

- he expended considerable resources to comply with the conditions imposed upon him pursuant to s.261 and considers that he had a legitimate expectation that the Council would reach the same decision in the s.261A context that it reached in the s.261 context.
- the s.261 authorisation constitutes a development consent for the purposes of the EIA directive and having permitted a development thereunder the Council cannot now decide that what presents is unauthorised development.
- Meath County Council had no additional evidence before it in the s.261A context that was not before it in the s.261 context which would justify it in reaching the decision it reached in the s.261A context.
- it is not clear why the Council decided as it did in the s.261A context; and, on a related note, inadequate reasons were provided.
- (i) it was not open to the Council to reach a decision that the quarry would have a likely particular effect on the environment when such an effect would already have occurred and been identified, (ii) he has not had the opportunity to address the Council in this regard. (iii) the Council made no such decision as to likely effect in the s.261 context.
- the decision as to whether or not an EIA was merited ought to have been made in the s.261 context.
- the belated determination by Meath County Council as to there not having been pre-1.10.1964 user has significantly prejudiced Mr Grall's ability to demonstrate that there was pre-1.10.1964 user (in circumstances where (i) a number of the operators and users of the quarry had died or were infirm or otherwise unavailable, (ii) pertinent evidence had been lost or destroyed).
- he has in effect been denied the ability to apply for planning permission (including retention permission) and is now likely to be served with the prospects of an enforcement notice and prosecution.

6. One would almost imagine from the just-recited series of complaints that the gravamen of Mr Grall's complaints lies against the Council. However, the decision that stands properly impugned in these proceedings is not a decision of the Council but a decision that subsequently issued from An Bord Pleanála after Mr Grall brought a review of the County Council's decision to An Bord Pleanála. (That later decision is the correct target of the within proceedings is clear

from *Fursey Maguire t/a Frank Pratt & Sons v. Meath County Council* [2022] IEHC 707 and *McMonagle Stone v. An Bord Pleanála* [2023] IEHC 223).

7. In the statement grounding the judicial review application the following points are made regarding the review undertaken by An Bord Pleanála and as regards certain constitutional infirmities that Mr Grall perceives to present in the process/es to which he has been subjected and the situation in which he now finds himself placed:

> '(24) The Board appointed an Inspector...to report on the review. The said Inspector considered an aerial photograph of the site [from]...1973. Upon inspecting this photograph, the Inspector formed the view that the 1973 aerial photograph shows no quarrying activity being undertaken at that time. The Applicant had submitted a sworn statement of Mr Bernard Grall, an uncle of the Applicant which stated that he recalled extraction having been carried out on the site pre-1964.
>
> (25) The within quarry development is a sand and gravel quarry and during the periods of inactivity or low activity, the quarry quickly grows over with grass and shrubs. This can clearly be seen on the aerial photographs of the site before An Bord Pleanála which show areas that had been quarried appearing and disappearing under vegetation over time. Accordingly, aerial orthography is not conclusive of user.
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> [I do not recall anyone contending at the hearings before me that aerial orthography is conclusive of user. Rather An Bord Pleanála looked at the photographic evidence in the course of its considerations and never proffered any view as to its being conclusive evidence as to user, though it is clearly a form of evidence.]
>
> (26). Having regard to this evidence and the uncontroverted Affidavit evidence filed on behalf of the Applicant...there was no information before the Board or the planning authority that would entitle them to form the view that no quarrying occurred on the site prior to 1964. The fact that the Board on review was unable to see quarrying activity on the lands was not and could not have been conclusive in this relation. It

was incumbent on An Bord Pleanála if it was concerned in relation to the aerial orthography to seek further submissions or observations in respect of same.

(27) The Applicant herein was never informed of the consideration of this photographic evidence. The Applicant was never asked to make submissions in respect of the photography and had no opportunity to address this issue, this is contrary to fair procedures and natural justice.

(28) The Board's inspector considered the issue of EIA at para.9.2 of his report. This section considers the development carried out as of 4th February 2013. The Inspector estimates that the site has been expanded to approximately 4.5 ha and remarks that this is approaching the mandatory EIA threshold. The Inspector also considers recent development on the site. The Inspector concludes in the last statement in this section that the decision of the Council that EIA was required ought to be upheld. No specific rationale or reasoning is advanced in this regard. This is again contrary to the duty to give reasons and to properly inform the Applicant of matters considered. However, all of the matters mentioned in this section of the report refer to development that was carried out after the decision of the Council [in the s.261 proceedings]....

(29) The Board itself in its determination of 5th September 2013 also fails to give any proper reasons or considerations in respect of its determination. This is again contrary to law. The Board does not give any reasons for its determination that the site was not a pre-1964 development. This is particularly unsatisfactory having regard to its earlier determination...to the contrary.

(30) The Board in the section of its decision that deals with the matters it considered also fails to account for how it reached the determination that the development required an EIA. No or no proper reasons or considerations are given in this relation. Insofar as any indication of the reasons are given, it appears same relate to the expansion of the quarry and the impacts on the water table. Again, these are recent occurrences that occurred after the authorisation granted under section 261 of the Act.

(31) As a result of the determinations of Meath Council and An Bord Pleanála, there is no means now open to the Applicant...whereby the Applicant can regularise the planning status of the site. The Applicant having been permitted to carry out the development of his lands is now told that the said development was in fact unauthorised and, also required an EIA. This determination now means the Applicant cannot now apply for planning permission on the site.

(32) The service of an enforcement notice as required by the above determination is also contrary to natural and constitutional justice. The development of the site, the subject matter of the within proceedings commenced prior to 1st October 1964. While this is disputed by the first and second named Respondents in their decisions, it is accepted by all [the] parties that development occurred on the said lands from the mid-1990s onwards. Accordingly, the development has been carried out for in excess of seven years. Furthermore, the development had been carried out for a period of seven years when section157(4)(aa) and (ab) were inserted into the Planning Act 2000 by Section25 of the Environment Miscellaneous Provisions Act 2011.

(33) Accordingly, when an Enforcement Notice is served on foot of the above determination, [Meath County Council]...will be purporting to enlarge the 7 year period within which prosecution or enforcement action could be commenced in respect of an alleged unauthorised development.

(34) Further or in the alternative, the third named Respondent [Ireland] has enacted legislation that purports to enlarge the period within which enforcement proceedings may be brought against quarrying operations such as the within quarrying operation thereby retrospectively criminalising and enabling enforcement of or against acts on the site that were undertaken in the belief that not only were they legal, but certain of which were required pursuant to the earlier section261 registration. Retrospectively penalising the Applicant in this manner is contrary to [Article 15]...of the Constitution and to natural and constitutional justice.'

Reliefs Sought

8. Arising from his perception of how matters have proceeded to this time and how he now finds himself placed, Mr Grall has come to court seeking the following reliefs at this time:

(1) An order of *certiorari* quashing the decision of Meath County Council purportedly made pursuant to s.261A PADA, which decision was made pursuant to s.261A(4(a)) PADA on 26th July 2012.

(2) An order of *certiorari* quashing the decision of An Bord Pleanála to confirm the decision of Meath County Council, which decision was made on 5th September 2013.

(3) A stay on the said determination and/or an order of prohibition preventing the service of an enforcement notice pursuant to s.154 PADA.

(4) A declaration that the provisions of s.261A(4(a)) PADA are unconstitutional.

(5) A declaration that s.157(aa) and (ab) PADA as inserted by the Environment (Miscellaneous Provisions) Act 2011 are unconstitutional,

(6) Certain further reliefs.

Some Evidence Considered

9. I have read and considered all of the affidavit evidence that was placed before me, which evidence was of a notably high quality. Mr Grall's affidavit evidence essentially covers the matters and criticisms touched upon in the preceding pages and I will return to some of his observations later below. I found the principal replying affidavit of Mr Farrell, an executive engineer with Meath County Council, to be helpful in terms of his description of the s.261 and s.261A processes both in general and as they operated here. Rather than 're-invent the wheel', I quote at some length from his affidavit evidence hereafter. Thus, in his initial replying affidavit of 25th November 2022, Mr Farrell avers, among other matters, as follows:

'4. The Applicant has issued these proceedings with a view to quashing the decision made by the Council on the 26th July 2012 pursuant to Section 261A(4)(a) of the Planning and Development Act 2000 (as amended)

notifying the Applicant of the Council's intention to issue an Enforcement Notice in relation to the quarry under section 154 of the Planning and Development Act 2000, as amended (hereinafter referred to as the 'Act') requiring the cessation of the operation of the quarry and the taking of such steps as the authority considers appropriate. The Applicant applied to the Second Named Respondent for a review of this decision, who confirmed the decision of the Council on the 5th September 2013. The Applicant is further seeking to quash this decision. Accordingly, the Applicant is seeking to quash two separate decisions namely -

a) the decision of Meath County Council, the First Named Respondent made on the 27th of July 2012; and
b) the decision of An Bord Pleanala, the Second Named Respondent made on the 5th of September 2013.

In addition, the Applicant seeks to make the case that the provisions of section 261A of the Planning and Development Act 2000, as amended (hereinafter referred to as the 'Act'), and Section 157(aa) and (ab) of the Act, as inserted by the Environmental (Miscellaneous Provisions) Act, 2011 are unconstitutional. For the reasons set out below I do not believe there is any basis for the Orders sought.

5. I say and am advised that the core of the Applicant's challenge is based on a misinterpretation of the effects of registration of the quarry pursuant to Section 261 of the Act 2000. I am concerned that the Applicant has misunderstand the system by which quarries are registered with planning authorities and subsequently assessed by planning authorities and I set out hereunder the relevant sections that applied and the procedure followed by the First Named Respondent in respect of the registration and examination of the Applicant's quarry.

6. Section 261 of the Act was commenced on the 28th April 2004. The Section imposed an obligation on all owners or operators of quarries to provide specified information regarding their quarry to the planning authority in whose functional area the quarry is located within one year of the coming into force of the Section. The Planning Authority was obliged pursuant to Section 261(l) and Section 7(2)(y) of the Act, on receipt of such information, to enter the information relating to the operation of a quarry provided in accordance with

the Section in the Planning Register. The requirement to provide information to a Planning Authority applied to all quarries, regardless of whether a quarry operated with the benefit of planning permission or had been operating pre or post the 1st October 1964. A Planning Authority has no discretion as to what information to enter in the Register; it is obliged to enter the information as provided. The entry of information in the Register is not a determination by the Planning Authority in any regard. There is no provision for a Planning Authority to investigate the probity of the information provided, it had no discretion in this regard. Section 261(12) of the Act permits the Minister to issue guidelines to planning authorities regarding their functions under the Section. Such guidelines were published in April 2004 by the Minister for the Environment, Heritage and Local Government…

PLANNING HISTORY

7. By application dated the 26th April 2005 the Applicant, applied to register the quarry with the Council as it was legally obliged to do pursuant to the said Section 261. The application was allocated Registration Number QY46. The information prescribed under Section 261(2) of the Act was provided to the Council and placed on the Planning Register on the 5th July, 2005…..

8. Pursuant to the provisions of Section 261(4) of the Act, within six months of the entry of the information provided in the register, the planning authority was obliged to publish a notice in a local newspaper stating, *inter alia,* that a quarry has been registered and detailing whether or not planning permission has been granted to the quarry and whether it is intended to impose conditions on the operation of the quarry. Notice of registration of the Applicants' quarry was advertised in the *Meath Chronicle* on the 22nd October, 2005 as required by Section 261(4)(a) of the Act. The notice advised that no planning permission had been granted for the quarry and that the Council, as the relevant planning authority, proposed imposing conditions on its operation pursuant to Section 262(6)(a)(i). The notice invited submissions or observations regarding the continued operation of the quarry within four weeks from the date of publication of the notice….

9. On the 7th of October 2005 Mr. George Mulvey, a Senior Executive Technician of the Council's Planning Enforcement Section inspected the quarry. Given the nature, scale and location of the quarry Mr. Mulvey recommended that the Council consider imposing conditions, on the future operation of the quarry to ensure that best management practices are in place….

10. I say that by letter dated the 14lh December 2006 the Council wrote to the Applicant to notify him that the Council proposed to impose certain conditions on the operation of the quarry. A draft schedule of conditions and the reasons for their proposed imposition was enclosed with this letter. A letter from HMN Environmental Consultants Ltd was received by the Council on the 12th February 2007 purporting to confirm acceptance of the draft conditions proposed in respect of the Applicant's quarry, but requesting an extension of the time period for completion of the works referred to in some of the proposed conditions. The Council duly acknowledged receipt of this correspondence by letter dated 15th February 2007. The said draft Conditions were subsequently confirmed by way of formal notification of the 20th of April 2007. In that Notification the Applicant was advised that it had the right to appeal the decision to impose conditions to An Bord Pleanala within four weeks from the date of receipt of the letter and conditions. The Applicant chose to appeal condition 22 imposed by the Council, which said condition related to a payment of a Special Development Contribution under section 48(2)(c) of the Act. The second named Respondent by decision dated 15th November 2007 determined to remove condition 22….

11. I say that the conditions imposed were in the interest of orderly and sustainable development as well as in the interests of environmental protection and were based on the information provided in the registration process and the visual inspections that took place at the quarry.

PLANNING HISTORY PURSUANT TO SECTION 261

12. I say and I am advised that no planning permission has ever been granted for

the extraction of sand and gravel at the quarry site. I say the effect of registration of the quarry is simply to give the Council and members of the public sufficient information to consider whether renewed controls, if any, should be imposed. Registration of the quarry does not confer the benefit of planning permission on development. The controls imposed by the Council following registration of the quarry pursuant to Section 261 are in addition to, and not a substitute for, the normal planning process. It is clear from the foregoing that the conditions imposed on the Applicant's operation of the quarry was not equivalent to the granting of planning permission to the Applicant for the operation of the quarry.

13. I further say, contrary to the averments at paragraph 8 of the Applicant's grounding affidavit, the Council did not, when applying the provisions of Section 261, make a determination that the quarry was a pre-1963 development nor did the Council make any determination in respect of the planning status of the quarry. The Section 261 registration process simply registered the quarry as having commenced operations prior to the 1st October 1964 based on information submitted by the Applicants. Such registration does not confer the status of a "pre-1964 development authorisation" for all time on the operation of the quarry, nor could anything arising from the S261 process influence the subsequent S261A outcome.

OVERVIEW OF SECTION 261A OF THE PLANNING AND DEVELOPMENT ACT 2000-2013 AND ITS IMPLEMENTATION BY THE FIRST NAMED RESPONDENT

14. Section 261A of the Act was inserted by Section 75 of the Planning and Development (Amendment) Act 2010. It was commenced on the 15th November 2011 and the section is intended to require planning authorities to determine whether quarries should have been subject to an Environmental Impact Assessment pursuant to the Environmental Impact Assessment Directive or an Appropriate Assessment pursuant to the Habitats Directive but did not carry out such assessments. Section 261A was subsequently amended by European Union (Environmental Impact Assessment and Habitats) Regulations 2011 (SI 473/2011). Section 261A made provision for quarries

operating, without having carried out the required assessments, to apply for substitute consent in order to regularise their status and in addition section 177C of the Act provides for an additional gateway for quarries to seek to regularise their status to apply for leave to apply for substitute consent in exceptional circumstances. Guidelines in respect of the implementation of section 261A of the Act were published in January 2012 and supplemental guidelines were published in July 2012 by the Minister for the Environment, Community and Local Government pursuant to section 28 of the Act of 2000 and l beg to refer to a copy of both sets of the guidelines upon which pinned together and marked with the letters and number “MF6” have signed my name prior to the swearing hereof.

15. Section 261A(1) of the Act required every planning authority to publish a newspaper notice, within four weeks of the coming into operation of the section, stating, *inter alia,* that it intended to examine every quarry in its administrative area to determine, in relation to that quarry, whether having regard to the Environmental Impact Assessment Directive and the Habitats Directive, one or more of the following was required but was not carried out: (i) an environmental impact assessment; (ii) a determination as to whether an environmental impact assessment is required; or (iii) an appropriate assessment. Pursuant to this section, I published such a notice on behalf of the Council in the *Irish Independent* newspaper on 6th day of December 2011…

16. The said notice informed owners and operators of quarries as well as members of the public, in particular pursuant to section 261A(l)(b), that where the planning authority examines a quarry and determines that one of the matters referred to in paragraph 14 above was required but was not carried out, that the quarry commenced operations prior to the 1st October 1964 and that the registration requirements of section 261 of the Act were fulfilled, the planning authority will issue a notice to the owner or operator of the quarry requiring him/her/it to submit an application for substitute consent, such application to be accompanied by a Remedial Environmental Impact Statement or a remedial Natura Impact Statement or both of those statements, as appropriate. The notice invited submissions or observations pursuant to section 261A(1)(e) of the Act to be received by the Council on or before the 25th January 2012. I say that notably pursuant to the notice the Applicant was warned of the possible consequences

for the quarry of the Council's examination. The Applicant, through its agent Messrs Patrick J Cusack Solicitors, by letter dated the 11th January, 2012 submitted a submission…

17. I say that an inspection of the Applicants' quarry was carried out by David Caffrey, Executive Planner with the Council, on the 11th April 2012, pursuant to the provisions of Section 261A(2) of the Act. As part of the section 261A process, the Council was obliged to determine if the quarry commenced operations prior to the 1st October l964.

18. Following the site inspection and following a consideration of aerial photography taken in 1973/74, demonstrating no quarrying works or excavation on the lands and mapping dating back to the 1960s which failed to corroborate the…Applicant['s] claim on the section 261 process that the quarry had commenced operation pre 1964, Mr. Caffrey considered that the quarry did not commence pre 1964, and furthermore found that the quarry had not obtained any subsequent planning permissions. Mr. Caffrey also found that the extraction area of the quarry was quite substantial and was well in excess of the 1.4 hectares referenced on the section 261 application and by Mr. Caffrey calculations was approximately 4 hectares. In making a determination as to whether an EIA was required or an assessment as to whether an EIA was required for the purposes of the EIA Directive Mr. Caffrey referred to the areas of extraction that were undertaken since 1990, as well as the cumulative impacts arising from the remainder of the quarry and the quarry adjacent. Therefore Mr Caffrey having appraised the information available, considered that having regard to the nature of the proposal, the method and rate of extraction post 1990, the traffic volumes associated with this type of activity and to the cumulative impacts, the requirement for a sub threshold EIA could not have been screened out. In considering whether an Appropriate Assessment was required, Mr Caffrey found that the elements of the project alone or in combination were considered unlikely to result in significant adverse impacts on the Lough Sheelin Special Protection Area (SPA) located downstream, which was based mainly on the scale of the quarry works, distance from the Natura 2000 site and qualifying interest of the SPA….I therefore say and I am advised that the Applicant is incorrect when he avers at paragraphs 16-18 that the Council failed to provide reasons for its determination that the quarry did not

commence operation prior to 1st October 1964 and failed to provide reasons as to why the requirement of a sub threshold EIA could not have been ruled out. I say that the Council's determinations were clear and understandable.

19. In preparing his report, Mr. Caffery also had regard to the report prepared for Meath County Council by Scott Cawley Environmental Consultancy and Environmental Management Services on the 25th July 2012. The report was prepared in order to determine whether the quarry required an Appropriate Assessment under Section 261(A)(2) of the Act and it concluded that the likelihood of significant impacts on Lough Sheelin SPA arising from the operations could be ruled out on the basis of the distance from the SPA and the sensitivity of the qualifying interests and therefore the need for Appropriate Assessment did not arise….

20. As it had been found that the provisions of Section 261A(2)(a)(i) of the Act apply to the quarry and having regard to the matters set out at Section 261 A(2)(b) and in circumstances where the Council had also determined that the quarry commenced operation on or after 1 October 1964, the Council, was obliged to issue a notice to the owner of the quarry pursuant to section 261A(4)(a) of the Act. By letter dated the 26th July 2012 the said notice was issued to the Applicant. Pursuant to the provisions of Section 261A(4)(c) of the Act the notice set out the determinations made by the Council under Sub-Section 2(a) and the reasons therefore and informing the Applicant that the Council intended to issue an enforcement notice in relation to the quarry under section 154 requiring the cessation of the quarry and the taking of such steps as the authority considers appropriate. The Applicant was further advised that they may apply to An Bord Pleanala not later than 21 days after the date of the notice, for a review of the determination under Sub-Section 261A(2)(a) or the decision of the Planning Authority under paragraph 261A(4)(a)….

21. An Application from HMN Environmental Consultation Ltd…on behalf of the Applicant, was submitted and received by the Bord on the 14th August 2012, for a review of the Council's determination under section 261A(2) and Section 26 l A(4). The Review Application focussed on whether the quarry commenced operations prior to 1st October 1964 and that the operations of the quarry do not warrant an Environmental Impact Assessment. I say and I am so advised that the quarry did not commence operation prior to 1st October 1964. The Council

was given the opportunity to respond to the application for review. By letter dated the 17th of September 2012 the Council indicated that it had no further comment to make in relation to the review…

22. The second Named Respondent appointed an Inspector who considered the Council's determinations and direction made pursuant to Sections 261A(2)(a) and 261A(4)(a) of the Act. The Inspector visited the site of the quarry on the 4th February, 2013. ln assessing the quarry, the inspector found, inter alia, that Historical OS maps did not give any indication of quarrying within the quarry site and the earliest aerial photography from 1973/1974 did not give any indication of quarrying on this site, while aerial photography of 1994/1995 indicated quarrying on the lands extending across field 2.49ha. The Inspector considered on the basis of the evidence before the Bord, that quarry did not commence on the site prior to October 1964 and that the determination of the Council under Section 261A(2)(a)(i) should be affirmed…

23. The Second Named Respondent in exercise of its powers conferred on it under Section 261A of the Act decided to confirm the determinations and decision of the Council on the 5th September, 2013. The reasons for its decision were detailed in its decision bearing reference number I7.QV.0040 dated the 5th September, 2013…

24. I say contrary to the averments made at paragraph 15 of the Applicants' grounding Affidavit, a significant amount of additional information was before the Council during the Section 261A process compared to the section 261 registration process. As detailed above, the Section 261 process involved a registration of the quarry based on information supplied by the Applicant, while the Section 261A process involved an examination of the history and development of the quarry requiring a number of determinations to be made which the Council duly did in accordance with its statutory obligations and the evidence available.

25. I say that there is no basis in fact or in law for the Applicant's averments in paragraph 12 of the grounding affidavit that the Council's determination pursuant to Section 261A(4) of the Act was expressly contrary to the Council's earlier determination reached in the context of the section 261 registration. As previously averred, registration as a pre-1964 quarry does not equate to the acknowledgement of a "pre-1964 development authorisation".

The Council never considered the planning status of the quarry prior to the Section 261A process and therefore there was no view on its part that the quarry was not operating under a pre- 1964 authorisation until the determinations made pursuant to the Section 261A process. For the purposes of the Section 261 registration the Council acted on the information as furnished to it by the Applicant to the effect that quarrying was carried out on the lands prior to 1964.

26. In relation to the question of ownership, while it is accepted that the lands the subject matter of the within proceedings may have been within the ownership of the extended Grall family, it is not accepted that the fact that the said lands may have been in the ownership of the extended Grall family since 1800s has any significance. Nor is it accepted that the lands have been used for quarrying since the 18th Century. No evidence has been provided to the Council on behalf of the Applicant to support such an assertion.'

10. I note that Mr Caffrey's report, the aerial photography evidence, the report of Ms Anderson, the Ordnance Survey map, and the notice served pursuant to s.261A(4)(a) were all placed on the Council's planning file and thereafter were at all material times available for inspection by the applicant and any member of the public.

Some Law Considered and Applied

11. I turn now to consider various elements of the applicable law and case law and to apply that law and caselaw to the facts at hand. I do not propose to engage in yet another detailed history of the background to s.261A. The interested reader is referred in this regard to the recent judgments of Hyland and Ferriter JJ., respectively in *Fursey Maguire t/a Frank Pratt & Sons v. Meath County Council* [2022] IEHC 707, paras.22-29 and *McMonagle Stone v. An Bord Pleanála* [2023] IEHC 223, paras.9-25, to which I have nothing to add.

12. Before proceeding further I note that the written submissions furnished by counsel for Mr Grall make points that are not pleaded. It is clear from, *e.g.*, *Save Roscam* [2024] IEHC 335, para.49 that points cannot be so pursued.

13. As mentioned above the Board confirmed the decision of the Council that the quarry did not commence operations prior to 1st October 1964. It is clear from *Fursey* (para.18) and

McMonagle (paras.96-102) that the decision that is correctly the target of these proceedings is the decision of An Bord Pleanála.

14. I do not see anything in the procedure observed in this case which raises any concerns. It is useful to summarise that procedure. First, as part of the s.261A process the Council was obliged to and did notify the public by way of newspaper advertisement about the s.261 process and what it entailed. This means that Mr Grall knew what was involved, knew that an enforcement notice could ultimately issue, and knew that he could make submissions. Second, Mr Grall made a submission on 11th January 2012; staggeringly given all that was potentially at stake for him at this point his only submission was, in effect, that his quarry had previously gone through a s.261 process. Third, as required by law, the Council made various determinations; these were made on 26th July 2012 and included the conclusion that there had been development within the meaning of s.261A and that the quarry was not a pre-1963 venture. Absent a contrary decision by the Board an enforcement notice was required to issue. That such a consequence could ensue was clear. Fourth, a review of the Council decision was sought by Mr Grall; the Board proceeded with that review having heard, amongst others, from Mr Grall (who this time made a better hand at his submissions, furnishing the recollection of his uncle described previously above). The Board appointed an Inspector who made the impugned decision, a decision that he was entitled to make and could properly make on the evidence before him. There is nothing wrong with that process or with the decision that has ensued therefrom.

15. One key point made by and for Mr Grall is that having concluded in the s.261 process that the quarry was a pre-1963 quarry the Council was precluded from reaching a contrary conclusion in the s.261A process. A largely identical point was rejected in *McGrath Limestone Works Ltd v. An Bord Pleanála* [2014] IEHC 382, *JJ Flood & Sons Ltd v. An Bord Pleanála* [2020] IEHC 195 and latterly in *Fursey Maguire*. Mr Grall considers that all of these decisions were wrongly decided, though he has at no point articulated any good reason why this is so; he just considers it to be so. Respectfully I do not agree. I consider that I am bound by these decisions and that the just-described point must, as a consequence, fail.

16. Mr Grall complains that he was never informed that photographic evidence would be relied upon and never given an opportunity to comment on same. This point cannot stand. Mr Grall in seeking a review by An Bord Pleanála sought to rely on aerial photography in support of his

case. So to turn around now and claim that he did not know that An Bord Pleanála would have regard to aerial photography is a point that, to use a colloquialism, just does not 'stack up'. Moreover, the County Council had proceeded by reference to aerial photography and Mr Grall sought a review of the Council's decision by the Board; I do not see how such a review could have proceeded without the Board having regard to the aerial photography (and I do not see how Mr Grall could have believed otherwise).

17. Mr Grall complains that if the Board had a concern then it should have sought further information or given an opportunity to Mr Grall to make more submissions. This is the point that gave me the greatest cause for pause in these proceedings. The consequences of the finding that the Board has reached in the s.261A process are so profound for Mr Grall that had I been the first judge to come to this issue I might have decided that natural justice and fair procedures required that he should be given one last chance to mend his hand, *i.e.* that he should have been told 'We are minded to decide against you because of Reason A, Reason B, and Reason C. Is there anything you would like to say before we proceed to a decision?' I might have concluded that this is not a process that needs to be followed in all administrative processes but that here the consequences for Mr Grall are so profound that he is entitled to such a degree of protection. And I would have been (as I am here) mindful of the peculiarly tight timeframe which applied to Mr Grall in terms of assembling the necessary evidence to put before the Board. However, on looking at the applicable caselaw I see that a like position to that canvassed before me by Mr Grall was rejected in *Fursey Maguire*, *McMonagle*, *McGrath Limestone*, and *JJ Flood*. The binding nature of precedent is a bedrock of order in our court-administered system of law and I believe that I am required by precedent to hold as the judges in those cases held in this regard.

18. Mr Grall contends that the reasoning of the Board is not adequate and could be better reasoned. The Board's decision (read with the Inspector's Report and the material on file) seems clear and comprehensible and in conformity with the type of reasoning to which the Supreme Court gave its approval in *Connelly v. An Bord Pleanála* [2021] 2 I.R. 75.

19. Mr Grall contends that there was no evidence before the Board on which it could conclude that his quarry did not commence before 1 October 1964. I am myself a little surprised that the Board concluded as it did in the face of the evidence from Mr Grall's uncle. However, it is not for me to substitute my view for that of the Board: it proceeded procedurally correctly in reaching the decision that it did; and it offered clear reasons for concluding as it did. What

leaves a sour taste in Mr Grall's mouth as I understand matters is that he has, since the decision was made, come across evidence that would seem to buttress his case (the 1966 journal; post-1964 but perhaps still of note). However, it is not open to Mr Grall to impugn the Board's decision by reference to material that never went before the Board. (See, *e.g.*, *Hennessy v. An Bord Pleanála* [2018] IEHC 678, para.38, *Halpin v. An Bord Pleanála* [2019] IEHC 352, para.114, and *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2021] IEHC 648, para.15).

20. Mr Grall contends that the issuance of an enforcement notice is contrary to natural justice which, in effect, is an argument as to constitutionality. The enforcement notice issues pursuant to the operation of s.261A. In *McGrath Limestone Works Ltd v. An Bord Pleanála* [2014] IEHC 382, para.10.8, Charleton J. indicates that the enactment of s.261A was necessitated by Ireland's membership of the European Union. If one accepts that point (and I respectfully do) then the protection of Article 29.4.6° of Bunreacht na hÉireann extends to s.261A and Mr Grall's contention must fail.

The Constitutional Case

21. In his statement of grounds, at para.34, Mr Grall states:

> '34. Further, or in the alternative, the third named Respondent [Ireland] has enacted legislation that purports to enlarge the period within which enforcement proceedings may be brought against quarrying operations such as the within quarrying operation thereby retrospectively criminalising and enabling enforcement of or against acts on the site that were undertaken in the belief that not only were they legal, but certain of which were required pursuant to the earlier section 261 registration. Retrospectively penalising the Applicant in this manner is contrary to Article...[15] of the Constitution and to natural and constitutional justice.'

22. A like averment appears in Mr Grall's affidavit. The written submissions of counsel for Mr Grall amplify on this pleading in the following terms:

> '48. The service of an enforcement notice as required by the above determination is also contrary to natural and constitutional justice. The development of the

site, the subject matter of the within proceedings commenced prior to 1st October 1964. While this is disputed by the first and second named respondents in their decisions, [it] is accepted by all parties that development occurred on the lands from the mid-1990s onwards. Accordingly, the development has been carried out for in excess of seven years. Furthermore, the development had been carried out for a period in excess of seven years when s.157(4)(aa) and (bb) were inserted into the Planning Acts.

49. Accordingly, when an enforcement notice is served on...[foot] of the above documentation, the First Named Respondent will be purporting to enlarge the seven-year [period]...[w]ithin which prosecution or enforcement action could be commenced in respect of an alleged unauthorised development. Further or in the alternative, [the] third named respondent has enacted legislation that purports to enlarge the period within which enforcement proceedings may be brought against...[quarrying] operations such as the within...[quarrying] operation thereby retrospectively criminalizing and enabling enforcement of or against acts on the site that were...[undertaken] in the belief that not only were they legal...[but] certain of which were required pursuant to the earlier section 261 registration.'

23. The foregoing is all that the State had to proceed upon in terms of defending these proceedings. The State, I note, is as much entitled to fairness in the prosecution of proceedings against it as any other respondent; just because it is 'the State' does not mean that it falls somehow to be treated differently. Respectfully, I do not see that the manner in which the constitutional issues have been pleaded accords with O.84, r.20(3) RSC. It also flies in the face of the specificity and particularity that McDonald J. canvasses for in *Sweetman v. An Bord Pleanála* [2020] IEHC 39, para.93.

24. Further to the foregoing I would make a number of related points concerning how this aspect of matters was pleaded. First, it is not open to Mr Grall (or anyone else for that matter) to impugn the constitutionality of a statute that enjoys the presumption of constitutionality in the vague and general manner in which Mr Grall has proceeded. Second, the pleadings offer no factual or legal basis on which I could grant the relief sought. Third, there is a complete failure on the part of Mr Grall to identify in his pleadings how s.261A(4)(a) or s.157(4)(aa) (or (ab)) infringe his constitutional rights. Fourth, there is no legal or factual basis offered in the

pleadings for the assertion that Mr Grall has been retrospectively penalised. Instead, the State is presented with a profoundly serious contention – that the State has proceeded in a manner that is contrary to the Constitution and to natural and constitutional justice (and those are *very* serious claims to make) – without those claims being particularised, without any specificity being offered, without due observation of Art.84(20)(3) RSC, and without anything being offered in Mr Grall's affidavit evidence or the advance written submissions of his counsel that duly amplifies on the substance of the case as to unconstitutionality.

25. In the just-described circumstances, I see no choice but to dismiss the case as to unconstitutionality for the complete failure in this regard to comply with the applicable rules as to pleading. Had I not decided to dismiss the case as to unconstitutionality for the reasons just stated I would in any event have concluded that Mr Grall has no *locus standi* to pursue his constitutional challenge absent proof that the quarrying activities would have been lawful but for the provisions of s.261A(4) and s/157(aa) and (ab) PADA. It is trite law that property rights under the Constitution are not absolute and can be subject to regulation of development (see, *e.g.*, *Central Dublin Development Association Ltd v. Attorney General* (1975) 109 I.L.T.R. 169). Mr Grall has not established that his quarrying activities did not require planning permission and were lawful. He cannot come to court and challenge the constitutionality of the just-mentioned provisions without demonstrating that those provisions unlawfully interfered with what in this case would be a pre-existing right to quarry without planning permission – and of course that could not be proven as no such right exists.

Conclusion

26. For all of the reasons aforesaid all of the reliefs sought by Mr Grall are respectfully refused. I know that this places him in a difficult position and I am genuinely sorry that this should be so. However, I consider that I am bound by law and binding precedent to reach the conclusions that I have reached.