[2023] IEHC 610

THE HIGH COURT

[2023 No. 326 MCA]

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF SECTION 10 OF THE LOCAL GOVERNMENT (WATER POLLUTION) ACTS 1977 TO1990

BETWEEN

CORRIB COMMUNITY ASSOCIATION COMPANY LIMITED BY GUARANTEE

APPLICANT

AND

KILLOLA QUARRIES LTD, MICHAEL POWER AND NOEL WELBY

RESPONDENTS

AND

GALWAY COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Thursday the 9th day of November, 2023

1. This matter primarily concerns an injunction application by a community association in relation to ongoing blasting and other works at a quarry in Co. Galway that has never had the benefit of a normal planning permission.

2. The second and third respondents ("the relevant respondents") say that the lands were previously owned by the second named respondent's father, John Power, who purchased them in the late 1950s or early 1960s. The relevant respondents say that the lands were used for quarrying activity prior to 1st October, 1964, being the coming into effect of the Local Government (Planning and Development) Act 1963.

3. Galway County Council brought planning enforcement proceedings against the second respondent in 2004. It appears from records obtained under Access to Information on the Environment (AIE) regulations by the applicant's solicitors that Galway County Council failed to produce evidence to the court contradicting oral evidence of the mother of the second respondent that there was a pre-1964 use of the site for quarrying. Consequently, the prosecution failed to establish their case for unauthorised development and the case was dismissed.

4. An application under s. 261 of the Planning and Development Act 2000 was made to Galway County Council on 23rd May, 2005 by the second respondent.

5. From 15th August, 2006 onwards, the first respondent operated the quarry by agreement with the owner, the second respondent.

6. Galway County Council registered the quarry under s. 261 on 25th April, 2007 under reference no. QY80. The registration included the imposition of 17 conditions on the operation of the quarry. The total quarry area at the time of the s. 261 application and registration was given as 22ha, with an extraction area of 5ha.

7. Registration of quarries under s. 261 is not equivalent to planning permission, but it does allow the imposition of conditions pending substitute consent. Non-compliance with such conditions renders the quarry an unauthorised development (s. 261(6)(aa)).

8. Mr Doyle, a director of the applicant, comments as follows on the s. 261 conditions:

> "23. ... [in July 2022] I emailed the Council for some information about the mitigation measures I had seen in the paperwork. I got an email back saying it was forwarded to the relevant person for 'their direct attention'. I did not hear anything back.
>
> 24. Eventually I learned that this was typical of the Council's responses and between the inevitable toing and froing, and my use of the Freedom of Information Act I did get a response on 28th July via email with a copy of the conditions as laid out in a letter to the second Respondent on the 25th April 2007. I now know that these are the conditions of what is called a 'quarry registration' under Section 261 of the Planning and Development Act. The email also stated I could look up these documents online via their Planning Documents Repository. When I read through to them it was obvious that they were not being complied with, in particular the conditions of operating times, dust, noise or vibrations. I knew this because I could hear work underway at the Quarry from approximately 6am in the morning to very late in the night-time, often up to 11pm."

9. On 3rd August, 2012, Galway County Council issued a notice under Section 261A(3)(c) of the Planning and Development Act 2000, as amended, directing the first and second respondents to apply to An Bord Pleanála for substitute consent with a remedial EIS and remedial NIS.

10. On 13th September, 2013, an application was made for substitute consent to the board. The application included a remedial EIS and a remedial NIS (ABP reference SU07.SU0060).

11. The board has jurisdiction to grant substitute consent under s. 177K of the 2000 Act but that is only on fairly stringent conditions.

12. The inspector's report makes clear that the substitute consent is purely historic, and defines the development to which the consent relates as development from 1990 to 2012.

"Description of Development

3.2 The application site forms part of a wider landholding (c.22ha) on which quarrying has been carried out on an occasional, small scale but continual basis between the early 1960s and the early 1990s. More intensive and mechanised methods of extraction commenced in the early 1990s.

3.3 The development comprises the quarry development carried out on site since the inception of the EIA legislation in Ireland (1st February 1990) to the date of the planning authority's determination (3rd August 2012). The site area referred to by the applicant is the quarry area that informed the planning authority's determination under section 261A(3)(c) i.e. the extraction area at the quarry in August 2012 of 3.015ha (Figure 1-3 in EIS, p4). All ancillary structures including the quarry weighbridge, office, garage, canteen, wheel wash etc. are outside of this area, lying directly south of it.

3.4 In 1995 limestone was extracted from an area of 0.067ha (see Drawing Quarry Progression 1995-2013, Appendix 3.1, rEIS). Since this time the area of extraction has increased progressively to a current extraction area of 3.015ha. Limestone was traditionally extracted from the quarry by mechanical means (early 1990's to c.2000) with subsequent rock breaking, crushing and screening for the production of aggregates. In 2000 blasting was introduced with 1-2 blasts each year rising to 2-4 blasts each year by 2006 and falling to 2-3 times a year since 2010."

13. As regards possible future operation of the quarry, the inspector said the following:

"11.2 In the course of the application for substitute consent the planning authority recommended conditions to be attached to any grant. Some of these refer to the future operation of the quarry (signage, wheelwash, refuelling, waste material) and do not apply as the application for substitute consent only refers to works carried out. The proposed conditions in respect of a development contribution (roads) and restoration seem reasonable in particular given the volume of traffic emanating from the quarry over the period of substitute consent application and the impact of the development on the ecology of the site."

14. Could the inspector have been clearer that future operations were not being consented? I don't think so.

15. In an order dated 28th January, 2015 the board granted substitute consent. The conditions are phrased in terms of restoration and are clearly formulated as relating to historic matters only. The total absence of conditions that would be essential if ongoing operations were covered is consistent with this.

16. The conditions were as follows:

"CONDITIONS

1. This grant of substitute consent shall be in accordance with the plans and particulars submitted to An Bord Pleanála with the application on the 13th day of September 2013. The grant of substitute consent relates only to development undertaken, as described in the application, and does not authorise any future development on the said site.

Reason: In the interest of clarity.

2. A detailed restoration scheme for the site in accordance with the broad principles indicated on drawing number 6.14 'Landscape Restoration Strategy' submitted to the Board on the 13th day of September 2013, shall be submitted to the planning authority for written agreement within three months of the date of this order. The restoration scheme shall extend to the lands surrounding the quarry which fall within the operator's ownership and shall include a timeframe for implementation.

Reason: In the interest of the visual amenities of the area, to ensure public safety and to ensure that the quarry restoration protects and enhances ecology.

3. Within three months of the date of this order, a summary of all existing and proposed mitigation measures shall be submitted to, and agreed in writing with, the planning authority, including where relevant, a timescale for implementation.

Reason: In the interest of clarity.

4. Within three months of the date of this order, proposals for a surface water drainage system and water quality management system, to include a timeframe for implementation and mitigation measures set out in the remedial Environmental Impact Statement, to manage surface water flows within the site and to protect groundwater shall be submitted to, and agreed in writing with, the planning authority.

Reason: To ensure protection of groundwater quality and to provide for the satisfactory disposal of surface water.

5. Within three months of the date of this order, the developer shall lodge with the planning authority a cash deposit, a bond of an insurance company, or other security acceptable to the authority to secure the provision and satisfactory restoration of the site, coupled with an agreement empowering the planning authority to apply such security or part thereof to the satisfactory restoration of any part of the site. The form and amount of the security shall be as agreed between the planning authority and the developer or, in default of agreement, shall be referred to An Bord Pleanála for determination.

Reason: To ensure the satisfactory restoration of the site."

17. On 1st March, 2019, the first respondent surrendered its operating rights at the quarry. Such rights were then conferred on the proposed fourth respondent, Noel Welby Plant Hire Ltd.

18. Matters started to come to a head following the combination of the Covid-19 emergency combined with alleged increased activity due to the council's reliance on the quarry for material for the Moycullen by-pass. Mr Doyle avers:

"17. As can be seen from the various affidavits of the local residents, up until recent years there was not much community concern about the Quarry. This was due to the relatively low levels of activity there. Many if not most members of the community would not have been aware of the planning status of the quarry. However, a combination of the significant increase in the intensity of operations at the quarry, predominantly associated with supplying aggregate to the Moycullen Bypass as well as the increasing number of local community members working from home and therefore experiencing the blasting operations at the Quarry resulted in a situation where the Quarry and its impacts is a dominant concern of the local residents.

18. My position as a Director of the Applicant arises from my own personal experience of the Quarry. After we moved into our house, for a time we did have not had a major issue with the quarry as I would not have been present in the house during the day, as I was working in Galway City. I remember the first time I heard a blast from the quarry, it came as a shock to me as the whole house tremored. However, I did not concern myself further on this incident as I assumed it was a legitimate enterprise with appropriate mitigation measures and controls.

19. By the beginning of 2022, my work circumstances had changed and I now spent a lot of time working from home. I noticed that blasts seemed to be more intense. On one occasion I recall, possibly in March, I was changing some of my socks downstairs when a blast went off and I had to stop myself from falling over by catching the dresser.

20. By April 2022 I had experienced another blast that I could only describe as horrendous. I was genuinely frightened that blasts like this were physically dangerous to my family.

21. At this stage I wasn't the only one to notice these events and a number of my neighbours were genuinely concerned and in May 2022 a local gathering was organised by my neighbour to see if anyone else had concerns about the Quarry and what we could do about it.

22. Following that meeting the local residents, including myself, began to investigate the planning status of the Quarry. This was not an easy thing to do. I started out making a few phone calls to the planning department in Galway County Council, and when no one answered the phone I'd leave a message asking that they call me back. No one ever rang me back. Eventually I did get through to someone and they informed me I could look at the quarry file on their website. I did so and downloaded the documentation. ..."

19. Matters moved on into September, 2022 as follows, according to Mr Doyle:

"25. During this more recent period, I experienced very disturbing house shaking as a result of the vibrations from the blasting as the quarry significantly intensified its operations to meet the demand from Galway County Council's contractor on the Moycullen Bypass. The constant rock breaking was like Chinese torture. I even had to relocate to a back room to do my work and even then I could still couldn't get away from it. I witnessed vast dust plumes arising from the quarry and drifting across people's property. I had even used my smartphone as a vibration monitor to gauge the level of vibration and I knew it was above where it should be. On one occasion I was working from home and my youngest daughter was home when a blast went off. She ran to me in tears as she thought the house was going to fall down. I assured her that it wouldn't and that things would be ok.

26. On the 1st September 2022, I asked members of the community to fill out a survey via WhatsApp which I had drafted to try and understand what people felt and experienced about the Quarry. It transpired that many of the residents attributed cracking in their houses to the Quarry blasting. I beg to refer to a visual representation showing the questions and summary responses to that survey, including a 'Word Cloud' located at TAB 3 to the Booklet of Exhibits. On the 6th September 2022 my neighbours and I called a public meeting with

members of the community and local politicians (Cllr Tom Welby, Cllr Noel Thomas, Cllr Eileen Mannion and Eamonn O' Cuiv TD) to let everyone know what I had learned so far. The second and third Respondents were invited to this meeting but did not attend. My presentation included the conditions of how the quarry was supposed to operate and the results of the survey I had conducted.

27. The meeting was attended by approximately 80 to 100 hundred people. From that meeting I sensed a real feeling of anger amongst the community. One Councillor (Tom Welby) said that the enforcement section in the Council was 'broken' and that there was nothing the Councillors could do. After some frank exchange of views from the community to their representatives it was suggested by Eamonn O' Cuiv TD that we set up a committee to look into this further. This was agreed and it was open to anyone who wanted to join. The initial members were myself, Hillary Sharpe, James Kelly, Muriel McGuaran and Anne Marie Joyce. It was agreed a meeting with the Quarry was in order."

20. An Enforcement Notice dated 28th September, 2022 was served on the Second and Third named respondents alleging unauthorised quarrying activity at Killola, Rosscahill.

21. The second respondent brought judicial review proceedings in relation to this notice on 21st November, 2022 which ultimately resulted in an order of *certiorari* on 25th July, 2023.

22. The applicant wrote threatening its own proceedings in or about May, 2023 and spent some time engaging with the council, which (as follows from the above) wasn't in a position to advance its enforcement notice as of July, 2023.

23. Mr Doyle brings matters up to the issue of the proceedings:

"38. ... On 2nd February 2023 blasting resumed at the Quarry. Blasting has continued since, including this morning 4th October 2023. I received a Blast Notice from the Quarry in my letterbox yesterday evening. Every evening before a Blast at approximately 6pm there is a Notice distributed to the houses of local residents. ...

39. The Quarry are even working past midnight, and this is affecting some people's ability to sleep. Many text messages have been sent to the third respondent without any response. ..."

Procedural history

24. The proceedings were issued on 4th October, 2023. The original papers were served on or about 6th October, 2023.

25. The matter first appeared in the Commercial Planning and Environmental List on 9th October, 2023.

26. On 16th October, 2023 I directed that a motion for an interlocutory injunction and a motion by the second and third respondents to remit the matter to the Circuit Court could be brought. Contrary to what was envisaged, the second and third named respondents issued a motion returnable to the Master's Court in January, 2024 rather than to the Commercial Planning & Environmental List in November, 2023. That was certainly not the correct procedure especially where the court was already seized of the matter. By contrast, the applicant *did* issue the papers for the injunction in accordance with what was directed, those papers being dated 16th October, 2023.

27. I also directed timescales for written submissions with the applicant to file written submissions, which it did, and the respondents filing replying written legal submission by 3rd November, 2023. Contrary to that direction, the respondents did not file such written legal submissions, or any written legal submissions, by the appointed date, or at all.

28. Alongside these directions I ordered that the matter would be listed for hearing on Monday 6th November, 2023 at the end of the list. That was not objected to by anybody. The time to make one's pitch as to how long a hearing should last and on what date it should take place is when the hearing date is being fixed. The court will listen to and have due regard to any submission or any application made in any such context, and will either accept it, reject it if that is warranted, or split the difference in some way that tries to accommodate any point that is sufficiently compelling. No such contrary submission was made. No legal system, let alone a list dedicated to case-managed commercial proceedings, could function on the basis that parties reserve the right to try to upend arrangements by seeking adjournments of dates fixed without objection, by intervening on the day of the hearing with no prior notice.

29. The first named respondent put in an affidavit on 6th November, 2023 disclaiming ongoing responsibility for the quarry. On that basis the applicant agreed to let the first named respondent out of the injunction application.

30. The second and third named respondents sought to piggy-back on that development by seeking time to "reply" to that affidavit. But that misunderstood the process involved. I didn't have any particular regard to that affidavit for the purposes of the merits of the injunction against those respondents, but only as regards whether the first named respondent should be involved in the application.

31. Just minutes before the matter formally started its hearing, in accordance with normal practice, I asked the parties how long the matter would take (that is, in circumstances where it was being taken at the end of the list, starting in the mid-afternoon). That is something that the court tends to ask all parties at the outset of any hearing to confirm that everyone is on the same page. That question is not an open invitation to derail the hearing – it is a query framed in the implied context of the envelope of time that has already been directed for that hearing. Such directions are maxima rather than minima so the court always welcomes news that parties can be more economical than originally envisaged. In response to that routine and fairly innocent question, the second and third named respondents intervened, without any prior warning to the court, to demand that a full day be made available for the hearing of the injunction application and made reference to putting in affidavits and written submissions. Unfortunately that isn't the way case-managed proceedings are meant to work and nor could any court function under such anarchic rules of engagement.

32. The date for hearing of the matter was fixed weeks beforehand on the basis of being heard at the end of the Monday list, on Monday 6th November, 2023. The matter began at approximately 14:40 that afternoon and ended at approximately 16:50 after an about 2 hour and 10 minute hearing which complied with the arrangement already fixed and fell within a reasonable albeit generous interpretation of the time envelope already directed. Indeed (especially since the list began at 09:30 with a break from 13:00 to 14:00) one might have been justified in only allowing until 16:00 for the matter to be heard, but I didn't limit the parties in that way. Not content with the initial attempt to derail matters, or the further attempt to opportunistically piggy-back on the first named applicant's affidavit by seeking an alternative basis for an adjournment, during the hearing the relevant respondents sought yet a third adjournment on a different but equally unpersuasive basis as set out below when the applicant sought to add an additional respondent.

33. A further development was that during the hearing it came to light that the second and third named respondents' motion to remit the matter to the Circuit Court had been listed before the Master on 18th January, 2024 rather than the court. It was agreed that I would vacate that date and treat the motion as before the court at the hearing of the present application.

34. The second and third respondents at the hearing claimed among other things a lack of instructions and claimed it was "grossly unfair" that an injunction was being sought in such circumstances by the applicant. This is a misunderstanding. The respondents have had a lot of notice of concerns about the alleged unauthorised development, have had about a month's notice of the proceedings, and have had three weeks' notice of the injunction and of the hearing date. All that is happening is that the court is dealing with the interlocutory situation. Any such order will be revisited in the context of the substantive hearing.

35. It is not the case that a party can create a fair procedures issue out of nothing by asking (or asking repeatedly) for adjournments having already had an opportunity to prepare for the hearing, and then crying foul if these are refused. No fair and rational legal system can function on that basis; doubly so when no objection was made at the time the hearing date was fixed.

36. Nor is it the law that the fact that new leading counsel, however eloquent, might come into a case has the effect of nullifying procedural developments prior to his or her arrival, such as case-management directions or the fixing of hearing dates, especially where this process was conducted with the consent or acquiescence of the very party subsequently objecting. Talk about not taking ownership.

37. In case anyone is interested in the court's point of view on this, if the relevant respondents had sought a full day or further time when the date was being fixed, I would absolutely not have dismissed that but would have weighed it seriously as a proposition for debate. I would have checked in with the applicant and considered how the various competing considerations could be balanced, for example by adjusting the timescale either in a minor way or more significantly but hypothetically on certain undertakings. If the only issue was duration of the hearing rather than additional time as such, we could have gone through a diary comparison exercise to see what other options might suit. But I was deprived of all of those instruments and simply confronted with multiple, repeated, adamant, demands on the day of the hearing for the adjournment of the matter, on rapidly fluctuating grounds. The effect of acceding to any of these demands would have been to set the clock back to zero with time then starting to run for the further hypothetical affidavits and written submissions, and replies to those. That would be both nihilistically destructive of the directions already given (including directions for written submissions, which weren't complied with), and also improperly far more advantageous to the relevant respondents than the situation that would have arisen had they made that point at an earlier stage (because then there would be no question of re-setting the clock but merely adjusting the original directions as they were being made).

38. It would be one thing if a party seeking additional time offered undertakings regarding development being paused in the meantime or even accepted a liability to pay the wasted costs of a hearing abruptly adjourned with no prior notice. But the relevant respondents here envisaged no such thing. They asserted both an entitlement to significant additional time, without consequence,

in response to the alleged gross unfairness of having to answer the motion on the assigned hearing date, and an entitlement for the quarry to continue to operate at full speed in the unspecified meantime. A recent British Prime Minister declared that when it comes to cake, he was "pro having it and pro eating it too" (Gideon Rachman, "Boris Johnson, 'cakeism' and the Blitz spirit", *Financial Times*, 15th July, 2019). The second and third respondents are kindred spirits to the limited extent that that they seek an order of adjournment that is both indefinitely non-dispositive and wholly unconditional.

39. Things would also be different if a last-minute adjournment wouldn't cause prejudice. But that isn't the situation, not that one would have seen any acknowledgment of that from the relevant respondents. I am as anxious as anybody that there isn't unfairness to the parties, obviously including the second and third respondents, but the procedure of holding the hearing in accordance with previous case-management directions and on the appointed date, a date fixed without objection, following an opportunity to file affidavits in reply, which was availed of, and an opportunity (indeed a direction) to file submissions, which was not availed of, did not create such unfairness. If the matter could have been adjourned without disadvantage to anybody I would have had due regard to that, but that wasn't the case. The interests represented by the applicant and the objective environmental concerns they wished to press upon the court were such that those interests and concerns could be prejudiced materially by delay. That was the primary consideration in maintaining the date that had been fixed. Other considerations included the fact that the relevant respondents had already had adequate opportunity to make their case on the injunction and will have even more ample opportunity to make their case on the substantive s. 160 and s. 11 order when the matter comes back to the court for the main hearing. I also have regard to the reasonable prospect of providing an early hearing date next term.

40. I appreciate that the relevant respondents were trying to advance their position rather than to inconvenience the court or the applicant or both just for the sake of it. And nor would I take from their right to do so robustly. But advancing one's position has to be done in an orderly manner and within tramlines of appropriate procedure including where relevant the orders and directions of the court and one's own previous engagement with the litigation. In all of the circumstances, and adopting an approach that duly balanced the demands for adjournments with the interests of the applicant, the argument for proceeding with the matter on the assigned date was overwhelming.

41. There were in effect three primary applications before the court, an application to admit the case to the List, an application to remit it to the Circuit Court, and an application for an injunction. There were some ancillary issues particularly an application to add a further respondent. I will address these in turn.

Admission to the List

42. The application clearly meets the criteria in PD HC119 for admission to the List. Such an order of admission is appropriate in the interests of justice and expedition.

43. Insofar as that is objected to because of the combination of reliefs under the 1977 and 2000 Acts in the one motion, that is misconceived for reasons set out below. Insofar as the application to admit is based on various objections to the merits, they can be dealt with following admission. Insofar as the objection impliedly involves the complaint that the matter should be remitted to the Circuit Court, that lacks merit and is addressed further below.

Motion to remit

44. The Applicant has invoked s. 11 of the Local Government (Water Pollution) Act 1977 which is exclusively confined to the High Court. This cannot be remitted and it would make no sense to remit the 2000 Act claim only.

45. Even if s. 160 was the only claim, there is no requirement that this has to be heard in the lowest court. The Court of Appeal has confirmed in *Morgan v. Slaneygio* [2019] IECA 155, [2020] 3 I.R. 353, [2019] 6 JIC 0503 (Costello J., Whelan and McGovern JJ. concurring) that both the High Court and the Circuit Court have concurrent jurisdiction in relation to planning injunctions under s. 160 of the Planning and Development Act 2000 and that High Court costs could be awarded even though the Circuit Court would have had jurisdiction, upholding Baker J. in the High Court to that effect.

46. The court has a discretion regarding remittal. There are multiple reasons why that should not be exercised in favour of remittal here:

(i) the fact that the 1977 Act claim cannot be remitted;
(ii) the serious nature of the allegations set out on affidavit by the applicant (which are of course contested);
(iii) the significant legal issues, particularly in relation to the relevant respondents' EU law defences, which are more appropriate, all things being equal, for consideration in the High Court;
(iv) the case management procedures available in the Commercial Planning and Environmental List; and

(v) the likelihood that remittal would cause delay – this isn't a case which will just slot into the next available date because it is going to require some further management, as the slightly intricate order set out at the end of the judgment might perhaps demonstrate (if a current snapshot of the need for ongoing management of the proceedings be required).

The injunction application

47. What the court is dealing with is merely what is to happen pending a full hearing of the injunction as a substantive relief. It makes sense to deal first with the relief sought and the legislation under which it is sought, then to address the main technical objections to that, then to deal with whether the injunction should be granted as a matter of principle, followed by the question of against whom the injunction should be granted, before specifying the terms of the order.

Relief sought

48. The terms of the relief sought in the motion regarding the injunction are as follows:

1. An Order for an interim and/or interlocutory injunction pending the determination of these proceedings, pursuant to Section 160(1)(a) of the Planning and Development Act 2000 (as amended), the inherent jurisdiction of this Court or otherwise, requiring the Respondents, their respective servants, agents, licensees, or any person acting in connection with them or on their instruction, or anyone acting in concert with them and all persons having the knowledge of the making of any Order herein, forthwith to cease and/or refrain from carrying out unauthorised development at Killola Quarry, Rosscahill, Oughterard, Co. Galway comprising unauthorised quarrying and associated activities including the blasting, extraction, processing, production, storage, distribution of any quarried and/or associated materials.
2. An Order for an interim and/or interlocutory injunction pursuant to Section 11 of the Local Government (Water Pollution) Act 1977 as amended, and/or pursuant to the inherent jurisdiction of this Honourable Court, until the determination of the within proceedings:
(a) Prohibiting the Respondents, their servants and/or agents, or anyone acting in concert with them and all persons having the knowledge of the making of any Order herein, from causing or permitting or continuing to cause or permit the entry and/or discharge of polluting matter and/or trade effluent into drains, watercourses and/or waters on and/or in the vicinity of the lands at Killola Quarry, Roscahill, Moycullen, Co. Galway other than under and in accordance with a licence granted pursuant to Section 4 of the 1977 Act, and/or;
(b) Requiring the Respondents, their servants and/or agents, or anyone acting in concert with them and all persons having the knowledge of the making of any Order herein, to do, refrain from or cease doing any specified act or to refrain from or cease making any specified omission, as this Honourable Court deems appropriate, for the purpose of preventing, or preventing the continuance or recurrence of, such an entry or discharge as aforesaid.
3. If necessary, an Order that the Protective Costs provisions under s.3 and s.4 of the Environment (Miscellaneous Provisions) Act 2011 and/or Article 9 of the Aarhus Convention apply to the within application and/or proceedings.
4. Such further and other relief as this Honourable Court shall deem meet.
5. An Order providing for the costs of the proceedings.

Terms of s. 160 of the 2000 Act

49. Section 160(1) and (2) are as follows:

"160.—(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 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) 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."

Terms of s. 11 of the 1977 Act

50. Section 11(1) of the 1977 Act provides as follows:

(1) Where, on application by any person to the High Court, whether or not that person has an interest in the waters concerned, that Court is satisfied that—

(a) polluting matter is being, has been or is likely to be caused or permitted to enter waters and the entry is not one to which section 3 (5) applies or would apply and is not under and in accordance with a licence under section 171 of the Act of 1959,

(b) trade effluent or sewage effluent is being, has been or is likely to be discharged or caused or permitted to be discharged to waters and the discharge is not one to which subsection (2) of section 4 applies or would apply and is not under and in accordance with a licence under that section or the said section 171, or

(c) polluting matter has escaped, is escaping or is likely to escape accidentally from premises to waters,

the High Court may by order—

(i) prohibit any person from causing or permitting or continuing to cause or permit the entry of polluting matter to the waters or the discharge aforesaid of trade effluent or sewage effluent to the waters,

(ii) require the carrying out of specified measures by any person having the custody or control of polluting matter or trade effluent or sewage effluent to prevent an entry or discharge referred to in subparagraph (i) or the continuance or recurrence of such an entry or discharge,

(iii) for the purpose of preventing, or preventing the continuance or recurrence of, such an entry or discharge as aforesaid, or of avoiding any risk that a person having custody or control of polluting matter or trade effluent or sewage effluent may cause or permit such an entry or discharge as aforesaid, require the person to do, refrain from or cease doing any specified act or to refrain from or cease making any specified omission,

(iv) for the purpose of preventing the escape aforesaid or the continuance or recurrence of such an escape, require the carrying out of specified measures by the occupier of the premises aforesaid and for the purpose of avoiding any risk of such an escape, require the occupier to do, refrain from or cease doing any specified act or to refrain from or cease making any specified omission, and

(v) make such other provision as that Court considers appropriate.

Objection regarding the status of the applicant

51. A point was made in submissions as to the entitlement of the applicant as a company limited by guarantee to represent the concerns of local residents affected by the development. That issue can be revisited at the substantive hearing but is not so clearly a factor against an injunction as to outweigh factors in favour of such an order at this stage.

Objection that the applicant was confined to motion papers

52. The relevant respondents objected that the applicant should not be allowed to open to the court any evidence relating to the "merits" of the case to which the respondents hadn't replied, and could only open evidence related to the interlocutory injunction. That is a misconception. All such evidence is before the court, and in addition the affidavits in the interlocutory application do make reference to the evidence overall. The respondents have had an opportunity to put in whatever evidence they want for present purposes – they weren't confined to the applicant's latest papers. There is no unfairness to them in having regard to all of the evidence and indeed they can put in further evidence in advance of the substantive hearing. But a court can't be prevented from hearing an injunction application on the basis of the full suite of evidence available merely because a party that has had a reasonable opportunity to take instructions and put in evidence has only put in limited replies and may want to put in further evidence at some future point.

53. For good measure my note of the mention date of 9th October, 2023 was that the existing papers could be relied on for the interlocutory stay. Any point so noted down by the court is normally communicated to the parties during the mention in some shape or form, but even if I am wrong in thinking that it was, at least my note confirms that allowing reference to the totality of the papers was what had previously been envisaged by the court. However this is not a decisive factor – the more significant factor is that it is illogical to say that regard cannot be had to the affidavits overall.

Objection that the applicant has brought a single motion

54. There is no rule that claims under different statutes have to be brought by different originating proceedings or motions. Indeed it makes sense and saves costs to combine all relevant reliefs into the one motion or set of proceedings. That is a general principle of pragmatism that applies to legal proceedings of whatever kind.

55. The application of such an approach in the environmental context particularly is supported by *Wicklow County Council v. Fenton* [2002], 2 I.R. 583, 2 I.L.R.M. 469, 2002 WJSC-HC 7312, [2002] 3 JIC 1104 (Kelly J.) where an application was brought under both ss. 57 and 58 of the Waste Management Act 1996 which relate to applications normally brought by notice of motion and summary summons respectively. Kelly J. upheld the procedure adopted of combining reliefs into a single originating document. He said:

> "S. 57 confers jurisdiction on this court alone and is worded in the present tense. If s. 57 is invoked, proceedings must be commenced by way of originating notice of motion. That is provided for in s. 57(2).
>
> S. 58 confers concurrent jurisdiction on the District Court, the Circuit Court and this court. It is worded in a different tense to s. 57 in that it is phrased in the present tense.
>
> Why is different language used in these two sections? It is sometimes difficult to read the entrails of parliament but it may in part be explicable by the concurrent jurisdiction given to three different courts to deal with applications under s. 58 in a summary manner.
>
> The applicant issued a notice of motion against all entities which it believes to have been involved in the dumping of waste on the first named respondent's lands. As a matter of convenience and expediency and, because of the overlap of ss. 57 and 58, the applicant felt that the sensible thing to do was to join all parties to the one motion. Counsel for the applicant says that the objection raised by the three respondents currently before me is purely technical and submits that the court should not exercise the jurisdiction conferred upon it by Order 124 of the Rules of the Superior Courts.
>
> It seems to me that, in the context of this particular set of proceedings and the conferring of jurisdiction in circumstances where one section of the Waste Management Act confers jurisdiction on this court and the other section on three courts, the applicant ought not to be confined to the issue of a special summons in order to ventilate its complaints. When there is an overlap on the facts and between ss. 57 and 58, it is unreal and academic to regard these proceedings as offensive to s. 58(2) or to contend that proceedings commenced by any manner other than special summons offend against that section. In any event there may well be an argument that proceedings commenced by a notice of motion are in themselves somewhat summary in nature.
>
> If I were satisfied that any real prejudice would be suffered by the respondents, different considerations might apply. However, in my opinion, no prejudice arises to the respondents arising from the procedure which the applicant has adopted in these proceedings."

56. To argue that there should have been separate documents was "unreal and academic" and there was no prejudice involved – exactly the same considerations apply here. That was an even stronger case from a defendant's point of view because there were two separate potential procedures there whereas here both applications would be by notice of motion.

57. This is also consistent with McDonald J.'s view in *S.G.B. Finance S.A. v. the Owners and All Persons Claiming An Interest In the M.V. "Connoisseur"* [2018] IEHC 699, [2018] 12 JIC 0703, albeit in a different context at para. 22:

> "The next issue which is sought to be ventilated by the plaintiff is that CCL is not entitled to raise issues as to the validity of the arrest until after the jurisdiction issue is disposed of. I do not agree with that proposition. In my view, it makes sense that if a party has a number of grounds in which to challenge steps taken in proceedings, it makes sense that they should be addressed in the same notice of motion. This leads to the more efficient disposal of the issue. Moreover, it is a fairly commonplace approach for a defendant to take."

58. The applicant's submission is convincing on this issue (para. 5):

> "There is no basis for that objection and none is identified other than bald statement to that effect. Neither section 160 of the 2000 Act nor section 11 of the 1977 Act impose an obligation of procedural exclusivity and there is no statutory basis for that objection. The approach adopted by the Applicant is consistent with the respective statutory schema, has the virtue of allowing all matters to be ventilated in a single set of proceedings and imposes the least burden in terms of costs and implications for scarce judicial resources."

Objection regarding alternative jurisdictional bases

59. There was an objection in submissions that the motion combined a claim for general equitable relief (what the motion calls the court's inherent jurisdiction) with statutory injunctive relief, in that it specified alternative bases for the order being applied for. It was asserted that this could not be done. But no rational basis for that assertion was offered. Combining alternative sources of jurisdiction to grant an order is fairly standard in the industry and doesn't offend against any principle of logic or indeed fairness.

The test for an injunction

60. Overall I have had regard to all of the circumstances including those for and against granting an injunction. In the light of the test for an injunction as set out in *American Cyanamid v. Ethicon*

Ltd [1975] A.C. 396, [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504, [1975] LS Law Pat 1, [1975] FSR 101, [1975] RPC 513, [1975] UKHL J0205-1, *Campus Oil Ltd v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88, [1984] I.L.R.M. 47, [1983] 5 JIC 1703 (O'Higgins C.J.), and *Okunade v. Minister for Justice & Ors* [2012] IESC 49, [2012] 3 I.R. 152, [2013] 1 I.L.R.M. 1, [2012] 10 JIC 1602 (Clarke J.), the basic position, subject to consideration of the defences outlined below, is that:

(i) the applicant has clearly established a fair question to be tried or (alternatively phrased) a sufficiently strong case to warrant an interlocutory order;
(ii) damages are not generally an adequate remedy for environmental damage and are not so here; and
(iii) the balance of convenience favours an order, particularly having regard to the risk of environmental damage, reinforced by the precautionary principle in the EU law context that applies here.

61. The fact that the test is effectively a fair question rather than balance of probabilities does also raise a procedural point which is that cross-examination is not generally essential at the interlocutory injunction stage. What a moving party normally has to show is a fair question to be tried, not that they will probably succeed. Hence merely because some of their averments are contradicted doesn't mean that they can't get an interlocutory injunction. In fact here, the contradictions were somewhat on the vague side and generally did not engage in the granular detail of refutation, so even without cross-examination those denials could have been held to be an insufficient basis to refuse the order. Ultimately though an applicant only has to show that the tests are satisfied, for example by reference to sufficient risk rather than established probability of harm warranting an injunction. Therefore a conflict of evidence is not automatically fatal although the opposing evidence obviously has to be borne in mind, and has been here. I don't need to go through that evidence in detail but it suffices to say that it has been carefully considered. Even insofar as it amounts to a clear contest, it does not seem to be such as to allow one to conclude that the applicant has not demonstrated a fair question to be tried.

62. The factors of particular note are:

(i) evidence of unauthorised development;
(ii) evidence of impacts on the applicant's members, and their family members including children, which have been averred to by such residents including Mr Doyle as referred to above;
(iii) evidence of impacts on European sites – this was a concern of the Department of Arts, Heritage and the Gaeltacht at the substitute consent stage;
(iv) evidence of impact on habitats including Annex I habitats and strictly protected species; and
(v) evidence of impact on an ecclesiastical enclosure and children's burial ground.

Evidence regarding unauthorised status of the development

63. Mr Peter Thomson is a Planning Consultant with 44 years' experience of town and country planning. He has been a qualified professional planning consultant for 33 of those years.

64. He is a member of the Irish Planning Institute and holds a Master's Degree in Urban and Regional Planning from Strathclyde University and an Advanced Diploma in Planning and Environmental Law.

65. As regards whether unauthorised development is being carried out, Mr Thomson avers:

"47. ... in my professional opinion, having regard to the following:

i. the absence of any planning application being applied for or permission being granted for quarrying or quarrying activity since the granting of Substitute Consent by An Bord Pleanala on 28th January 2015;

ii. condition 1 of Substitute Consent ref: ABP ref: SU07.SU0060 13th September 2013 which clarified that the grant of Substitute Consent related only to development undertaken as described in the application and did not authorise any future development on this site,

iii. the unauthorised quarrying observed by the Galway County Council officer at his site inspection on 19 July 2018 (Tab 16 of the Booklet of Exhibits refers)

iv. all the quarrying activities identified by the planning authority and documented in Galway County Council enforcement records ENF19/042 (Tab 17 of the Booklet of Exhibits refers)

v. the unauthorised development witnessed by the Tomás Doyle, Director of the Applicant for this Section 160 injunction seeking to stop all quarrying and quarrying activity, the quarrying and quarrying activity that has been ongoing and continues, is unauthorised development.

vi. the evidence of quarrying, and discharge to surface waters witnessed by me during my site visit on 25th September 2023 and from drone footage taken by the applicant, noted in paragraphs 14 to 19 above.

vii. The felling of trees which is evident from the drone footage and the aerial photographs in Tab 27 the preservation of which was the mitigation measure agreed by the quarry owner to prevent further impact on bat species which are protected under the Habitats Directive in the rNIS submitted with the application for substitute consent (Tab 11 of the Booklet of Exhibits refers).

viii. the acknowledgement of the quarrying on site since the granting of Substitute Consent in 2015 by the Respondents' agent in correspondence responding to the Enforcement Notice dated 28 September 2022 is unauthorised (Tab 24 of the Booklet of Exhibits refers).

the Quarry is an unauthorised development within the meaning of the Planning and Development Act 2000 (as amended)."

66. I repeat that at this juncture the applicant only has to show a fair question as to there being unauthorised development, whereas to get the substantive s. 160 order such unauthorised development must be demonstrated. However I think that the applicant has shown unauthorised development at the *prima facie* level and this had not been rebutted sufficiently as of the present order. But that will of course be fully up for debate and reconsideration at the substantive hearing.

Evidence regarding impact on European sites

67. As regards the impact on a European site, Mr Thomson avers:

"14. On 25 September 2023 I viewed the quarry from the public road outside and within the quarry site as far as the customer reception area. From the public road I was able to witness trucks entering the quarry site and exiting the quarry site. I was also able to see from the public road edge, water discharging from the quarry void into drainage channels excavated on the landholding which discharged into the roadside drainage network and onwards into Lough Naneevin. Lough Naneevin is hydrologically linked to Ross Lake and Wood, which is a Special Protection Area (SPA). I was able to follow the flow of water from the site as far as the inlet of the water course into Lough Naneevin. ..."

68. Mr Owen Twomey is a Senior Ecologist with APEM Ireland. He has over seven years' experience working as an ecological consultant. He holds a BSc (Hons) Environmental Science with a major in Zoology and a Postgraduate Diploma (PgDip) in Ecological Assessment from University College Cork.

69. As regards the receiving environment, Mr Twomey avers as follows:

"16. The quarry boundary, as permitted by Substitute Consent granted by An Bord Pleanála (ABP ref SU07.SU0060) and based on the application submitted in 2013, covers a total area of ca. 3 ha. The extent covered by quarrying activity in 2022, including excavation, soil stripping, internal roads and stockpiling, was determined using satellite imagery from 2022 in comparison to imagery from 2013. The extent of quarrying activity in 2022 has been measured as covering ca. 15.5 ha. Quarrying activity has extended beyond the 2013 permitted boundary in all directions, the majority of which are to the west and east.

17. The Site is set within a karst landscape with areas of recorded exposed limestone pavement in close proximity to the quarry (Wilson & Fernández 2013). The Geological Society of Ireland (GSI) define karst as follows:

'Karst is a landscape with distinctive hydrology and landforms that arise when the underlying rock is soluble. Although karst can develop on evaporate rocks such as gypsum and siliceous rocks such as quartzite, the vast majority of karst landforms are found on carbonate rocks, such as limestones. Karst landscapes may have sinkholes, caves, enclosed depressions, disappearing streams, springs and sinkholes.'

18. The karst landscape surrounding Killola Quarry is formed of limestone and the rock and associated aggregates extracted from the quarry are limestone. The GSI has classified the aquifer at Killola Quarry and the surrounding area as 'Regionally Important Aquifer – Karstified (conduit)'. The vulnerability of the aquifer has been assessed as 'E - Extreme' and 'X – Rock at or near Surface or Karst' meaning that groundwater is extremely vulnerable to contamination by human activities.

19. The closest watercourse to the quarry is Killola stream ca. 20 m south of the current quarry extent. This watercourse is present in the field to which untreated water is discharged from the quarry floor. The discharging of untreated waters from the quarry floor to the field to the south of the quarry is specified in the documentation submitted to support the application for substitute consent. This was specified again in the planning inspectors report as part of that application (An Bord Pleanála Ref. 07 SU.0060) and shown in the surface water treatment plan prepared by Michael Power in 2021.

20. The Killola stream for part of WFD water quality monitoring. The most recent round of monitoring recorded a status of 'moderate' for Ballycuirke_010 which the Killola stream forms part of. This watercourse was also recorded as 'at risk' Killola stream flows ca. 3 km

downstream to Ross Lake which is a Special Area of Conservation (SAC) and proposed Natural Heritage Area (pNHA). There are several other areas designated for nature conservation in the zone of influence. In addition to these designated sites there are also numerous habitats recorded within the surrounding area that are protected under Annex I of The Habitats Directive, these include Limestone pavement (8240), Dry Heath (4030) and Wet Heath (4010), the closest being an area of recorded limestone pavement ca. 15 m from the northern boundary of the quarry."

70. In terms of the Lough Corrib SAC [000297], Mr Twomey avers:

"Lough Corrib SAC is ca. 500 m west of the Site at the closest point. Lough Corrib SAC is designated for a variety of qualifying interests. The qualifying interests are as follows:

- Oligotrophic waters containing very few minerals of sandy plains (Littorelletalia uniflorae) [3110]
- Oligotrophic to mesotrophic standing waters with vegetation of the Littorelletea uniflorae and/or Isoeto-Nanojuncetea [3130]
- Hard oligo-mesotrophic waters with benthic vegetation of Chara spp. [3140]
- Water courses of plain to montane levels with the Ranunculion fluitantis and Callitricho-Batrachion vegetation [3260]
- Petrifying springs with tufa formation (Cratoneurion) [7220]
- Alkaline fens [7230]
- Limestone pavements [8240]
- Old sessile oak woods with Ilex and Blechnum in the British Isles [91A0]
- Bog woodland [91D0]
- Margaritifera (Freshwater Pearl Mussel) [1029]
- Austropotamobius pallipes (White-clawed Crayfish) [1092]
- Semi-natural dry grasslands and scrubland facies on calcareous substrates (Festuco-Brometalia) (* important orchid sites) [6210]
- Molinia meadows on calcareous, peaty or clayey-silt-laden soils (Molinion caeruleae) [6410]
- Active raised bogs [7110]
- Degraded raised bogs still capable of natural regeneration [7120]
- Depressions on peat substrates of the Rhynchosporion [7150]
- Calcareous fens with Cladium mariscus and species of the Caricion davallianae [7210]
- Petromyzon marinus (Sea Lamprey) [1095]
- Lampetra planeri (Brook Lamprey) [1096]
- Salmo salar (Salmon) [1106]
- Rhinolophus hipposideros (Lesser Horseshoe Bat) [1303]
- Lutra lutra (Otter) [1355]
- Najas flexilis (Slender Naiad) [1833]
- Hamatocaulis vernicosus (Slender Green Feather-moss) [6216]

32. The Water Framework Directive (WFD) (2000/60/EC) requires the assessment of terrestrial ecosystems that depend directly on groundwater as part of the classification of groundwater bodies (Annex V). If chemical or quantitative pressures on a groundwater body result in 'significant damage' to a Groundwater Dependent Terrestrial Ecosystems (GWDTE), the groundwater body will be classified as being at 'poor status' and require mitigation measures (Kilroy et al. 2008). The following qualifying interests of Lough Corrib SAC are all also classified as GWDTE:

- Calcareous fens with Cladium mariscus and species of the Caricion davallianae [7210]
- Petrifying springs with tufa formation (Cratoneurion) [7220]
- Alkaline fens [7230]

33. These GWDTE are identified in Kilroy et al. (2008) as having High Sensitivity to changes in groundwater level, groundwater chemistry, relative groundwater contribution and groundwater nutrient concentration. Killola Quarry and Lough Corrib SAC are within the same Groundwater Body: Ross Lake (EU code IE_WE_G_0010). It is therefore possible that there is a groundwater connection between the quarry and the GWTDE listed as qualifying interest of the SAC.

34. A section of the Site has been shown to regularly hold a large amount of ponded water in the northwest portion of the quarry where excavation has deepened in comparison to 2013. The unauthorised works at Killola Quarry also have the potential to impact the Groundwater Body through pollution as a result of the release of pollutants; such as those previously trapped in the rock and/or from oils, fuels from the ongoing operations. The drawdown and / or pollution of groundwater has the potential to affect the three GWDTE

that are listed as qualifying interests of Lough Corrib SAC through reduction in groundwater levels and alteration of the groundwater chemistry.

35. Furthermore, it is apparent that there are significant blasting operations at the quarry involving the use of explosives. Chemical residues from such explosives have the potential to enter pathways to groundwater. Such residues are potentially harmful to groundwaters. The developer accepted the possibility of such runoff in its Remedial Environmental Impact Assessment Report (page 134).

36. The developer again in the Remedial Environmental Impact Assessment accepted that there would be recharge of surface water run-off to groundwater. There is likely to be explosive residues in such run-off, as well as silt and hydrocarbons. Again, if this is the case such a recharge is required to be authorised under the 1977 Act."

71. As regards Ross Lake and Woods SAC [001312], Mr Twomey avers as follows:

"39. Ross Lake and Woods SAC is ca. 2.1 km southeast of the Site at the closest point. The Qualifying Interests of Ross Lake and Woods SAC are as follows:

- Hard oligo-mesotrophic waters with benthic vegetation of Chara spp. [3140]
- Rhinolophus hipposideros (Lesser Horseshoe Bat) [1303]

40. Killola Quarry discharges untreated water from the quarry floor to a field to the south. Water from the quarry floor will include suspended solids and are likely to include pollutants, such as fuels, oils and explosive residues used in the extraction of quarried material. The field to the south also contains Killola stream that flows 3 km downstream to Ross Lake and Woods SAC. This surface water hydrological connection, between the Site and Ross Lake, provides an impact pathway to affect the water quality of Ross Lake SAC. Hard oligo-mesotrophic waters with benthic vegetation of Chara spp. [3140] is a habitat that is associated with high water quality with very clear water (NPWS 2019a). There is, therefore, potential for the unauthorised works at Killola Quarry to affect this Qualifying Interest of Ross Lake and Woods through a deterioration of water quality.

41. Killola Quarry and Ross Lake and Woods SAC are within the same Groundwater Body: Ross Lake (EU code IE_WE_G_0010). As noted in O'Connor (2015):

> 'The high alkalinity and calcium and magnesium concentrations of the hard-water lake habitat are the result of the significant groundwater contribution to these lakes. The catchments of many hardwater lakes are dominated by groundwater pathways, rather than surface run-off and rivers. This distinguishes the hard-water lake habitat from other lake habitats but is a common feature with the priority habitat turloughs (3180) and, indeed, habitats 3140 and 3180 co-occur at a number of sites.
>
> Habitat 3140 is under significant pressure from eutrophication, the primary sources of pollutants being agriculture and municipal and industrial wastewaters. Pollutant pathways through groundwater are a significant concern, in particular the high phosphate concentration recorded in karst aquifers (Craig et al., 2010).' ...

42. The GSI website provides information on groundwater pollution. The GSI identifies Mining and Quarrying as a source of pollutants as these activities '……..can release pollutants previously trapped in the rock into surrounding underground water sources. Chemicals such as iron, aluminium and sulphates can seep into the groundwater and make it dangerous for consumption.' There is potential for the unauthorised works at Killola Quarry to affect the Annex 1 habitat 'Hard oligo-mesotrophic waters with benthic vegetation of Chara spp. [3140]' through pollution of groundwater from the release of pollutants previously trapped in the quarried rock.

43. Killola Quarry is on the edge of the recorded foraging range of the known lesser horseshoe bat roost at Ross Lake and Woods SAC (NPWS 2018). The unauthorised works resulted in the clearing of sections of woodland outside of the permitted quarry boundary. As part of the application for Substitute Consent the woodland removed had been recorded as oak-ash-hazel woodland (WN2) with suitability to support foraging and roosting bats (NEO 2013a). The retention of this woodland was included in the Natura Impact Statement for that same application (NEO 2013b) as a mitigation measure to prevent further impacts on the lesser horseshoe population at Ross Lake and Woodland SAC. There is potential for the unauthorised works at Killola Quarry to affect the lesser horseshoe population at Ross Lake and Woodland SAC through the removal of foraging and commuting habitat."

Evidence regarding impact on habitats including Annex I habitats and strictly protected species

72. As regards habitats and strictly protected species, Mr Thomson avers:

"19. In other locations there is evidence from drone footage of significant areas of trees on the site having been felled."

73. Mr Twomey avers:

"46. The woodland recorded at the Site as part of the 2013 application for Substitute Consent (NEO 2013a) was classified as Oak-Ash-Hazel woodland (WN2) and assessed as having County level importance. The unauthorised works at Killola Quarry has resulted in the loss of a large proportion of this habitat."

74. As regards Annex I habitats Mr Twomey continues:

"Limestone Pavement [8240]

47. Limestone Pavement is a priority Annex I habitat. Several areas of this habitat were recorded within 3 km of the Site as part of the national limestone pavement survey (Wilson & Fernández 2013), the closest being ca. 15 m from the northern boundary of the quarry. The presence of confirmed Limestone Pavement within close proximity to the Site increase the likelihood of this habitat being present within the area of unauthorised works. Quarrying was identified as one of the most threatening activities affecting Limestone Pavement and associated habitats (Wilson & Fernández 2013).

48. The Article 17 reporting on Annex I habitats (NPWS 2019a) describes Limestone Pavement in Ireland as;

Limestone pavement habitat typically consists of blocks of rock, known as clints, separated by fissures or grikes Sometimes due to weathering this structure is less defined, especially in the 'shattered' variant of pavement. Limestone pavement can occur as areas of exposed rock with very little vegetation or in association with grassland, heath, scrub, or woodland communities.

The main vascular plant species associated with the 8240 habitat include scattered low-growing woody species, such as Corylus avellana, Hedera helix, Ilex aquifolium, Rosa spinosissima and Rubus fruticosus, and herbaceous species such as Sesleria caerulea, Teucrium scorodonia, Mycelis muralis, Geranium robertianum, Senecio jacobaea, Carlina vulgaris and Carex flacca. A suite of calcicole ferns are also usually found, including Asplenium ruta muraria, Ceterach officinarum and, in the deeper grikes, the shade loving Phyllitis scolopendrium. Characteristic bryophytes are Ctenidium molluscum, Tortella tortuosa and Neckera crispa.

The wooded variant of 8240 Limestone pavement has been recorded in areas of hazel woodland with a low canopy of at least 3m and minimal soil depth. Under canopy the surface of the limestone pavement is sometimes completely covered by bryophytes such as Eurhynchium striatum, Neckera crispa and Thamnobryum alopecurum.

49. The woodland recorded outside of the then quarry extents as part of the 2013 application for Substitute Consent (NEO 2013a) was classified as Oak-Ash-Hazel woodland (WN2) with 'rocky' ground. Oak-Ash-Hazel woodland has a strong association with wooded variant of Limestone. As a result, clearing of this woodland, as part of the unauthorised works, potentially resulted in the loss of this priority Annex I habitat.

50. The intensification, including blasting, and expansion of the quarry, arising from the unauthorised works, will also have resulted in increased dust emissions. Emission of dust due to quarrying activity can affect habitats and vegetation in the surrounding area by suppressing plant growth. Dust impacts will occur mainly within 400 m of the operation with the greatest impacts being within 100 m of the source (IAQM 2016). There are three areas of recorded Limestone Pavement Habitat within 400 m of the quarry, two of these are within 100 m, with the closest being ca. 15 m from the northern boundary. The recorded Limestone Pavement habitat outside of the Site is, therefore, also likely to have been affected by the unauthorised works at Killola quarry."

75. As regards protected species Mr Thomson continues:

"51. There is evidence of unauthorised tree felling contrary to the quarry owners commitments and in conflict with the mitigation measures in the rNIS submitted with the application for substitute consent to prevent further impact on bat species which are protected under the Habitats Directive."

Evidence regarding impact on ecclesiastical enclosure and children's burial ground

76. The board's inspector noted at para. 9.36 that:

"An ecclesiastical enclosure (GA054-039:001) and a Children's burial ground (GA054-039:002) lie c.60m to the west of the site".

77. Mr Thomson avers:

"18. G[r]ound in the quarry owner's ownership, but outside the original registered quarry, has been cleared and appears to be used for storage and sorting of waste and manoeuvring and parking of vehicles and machinery. In the case of land to the west of the quarry site, this is within the notification zone of a recorded Monument afforded protection under the National Monuments (Amendment) Act 1994 (Children's burial ground ref: GA054-039002). ... From my observations on 25 September 2023, it appeared that material and machinery were very close to the edge of the burial ground."

78. Mr Liam Ó Connor is an Information Officer with the Heritage Services Division of the Office of Public Works and submits his affidavit in a voluntary personal capacity. He is a local historian of the Oughterard area of County Galway and holds a Batchelor of Arts in Heritage Studies from Atlantic Technological University (ATU), Galway. He has worked in the heritage field for two years. He avers as follows:

> "4. I make this affidavit to put before the Court relevant information in relation to the Killola Cemetery/Early Christian Site which is in the immediate vicinity of the Killola Quarry. I beg to refer to an extract from the First Edition Ordnance Survey map, illustrating what was described as "Infants Burial Gd" thereon ... As one can see from this map, the area of the site encompasses a circular enclosure marked with a dashed line illustrating the extent of the site. This is important for the reasons which will be further addressed below. More information on this class of enclosure may be found (Early Ecclesiastical Sites in Ireland Author(s): Muiris O'Sullivan and Liam Downey, Archaeology Ireland, Summer 2020, Vol. 34, No.2 Summer 2020, PP. 43-46). Further information on settlements similar may be found in (Early Medieval Ireland, AD 400-1100 by Aidan O'Sullivan, Finbar McCormick, Thomas Kerr, and Lorcan Harney. Published by the Royal Irish [Academy] 2014, ISBN: 9781904890607).
> 5. I am conscious of my duty to the Court to present facts within my area of expertise relating to local cultural history, and that this duty overrides any sense of obligation to the local residents or any sympathy which I may have for the reliefs sought within the Notice of Motion herein.
> 6. Killola Cemetery is listed as GA054-39 in the Record of Monuments and Places (RMP) for County Galway. It is listed on the RMP as an ecclesiastical site. It is subject to the requirement for the protection of National Monuments contained in the National Monuments Act 1994.
> 7. Killola Cemetery / Early Christian Site is perhaps one of the most intriguing early medieval sites of West Galway, a region historically known as Iar-Connacht. Killola Cemetery is one of many early Christian sites following a linear pattern on the southern shore of Lough Corrib between Moycullen and Oughterard. It was probably built soon after the arrival of Christianity to the area.
> 8. What is unusual about Killola Cemetery is that its name is an outlier in relation to other such sites in the area. Nearly all the other sites in the locality are dedicated to missionaries or close associates of Patrick, such as Odhrán, Ainnín, and Cuanna to name a few. All of these saints are of Gaelic Irish origin; however Killola, or rather in its Gaelic origin Cill Óla is unusual. Its name may be a corruption of the church of Saint Olaf, a Norwegian / Scandinavian saint, and suggests there may have been Norse influence in this place name.
> 9. References to Saint Olaf appear in parts of Dublin and other places where there is a Norse influence. In the townlands surrounding Killola there are other locally held names, such as Garraí Na Danes which suggest there may have been Norse presence in the immediate area. The Annals of the Four Masters (M927. 13) tell us in the 10th Century the Danes of Limerick invaded Lough Corrib (Loch nOirsbean as appears in the annals) and plundered many of its islands. After this period it would suggest there was settlement inland that was short-lived as the Annals of Clonmacnoise (M925.149) tells and suggests that sometime later the Connacht men attacked the Vikings and slaughtered them on Lough Corrib returning the area to Gaelic Irish control.
> 10. It is uncertain when the Early Christian Monastic site went out of use, but it was definitely a substantial site in it day. This is reflected by the circular ring ditch which surrounds it - a classic tell-tail sign of an early monastic site. Burials within the enclosure probably began in the early medieval period onward as is common in many other sites in the area. The need to bury people in a sacred place continued through to famine times, when folklore tells of many burials within the enclosure evidence is listed in the Folklore Commission U.C.D (Cill Ainbhthin Roll Number: 14591. Teacher: Aoife Bean Mhic Dhonnchadha. Pages: 361-363).The site was held in high regard in penal times and evidence of this may also be found in the Folklore Commission archive of U.C.D Dublin (Úachtar Árd Roll Number: 4786. Teacher: An tSr M. S. Iognáid. Collector: Kathleen Joyce. Pages: 197-198) After this period and following Catholic emancipation Killola became a place of burial for children and the unbaptised. It was used as such until around the 1960s. Records from this period are minimal as most children during those times were born at home and died before having their births registered.
> 11. This site is under extreme threat. As Killola Quarry has expanded, it has done so without due regard to the site, which is a protected structure listed with the National Monuments Service with a legal 50 metre exclusion zone around it, as is standard for all monuments on the RPS. As the site is located on karst limestone ridges much archaeology is on or near the surface, and as such the site is extremely vulnerable to any interference.

Like many such sites its associated features may well extend into and beyond the 50 metre exclusion zone. Many earlier burials may lie outside the modern grave plots but within the circular ring ditch enclosures marked on the OSI maps. Archaeological excavations conducted at a similar site in Killederdadrum in Lackenavorna in Co. Tipperary in 1984 by Conleth Manning of the Office of Public Works show the deep complexities and nature of these sites. They consist of shallow irregularly places burials, agrarian implements and tools associated with the farming of early Christian sites as well as domestic areas. Deposits were found in most trenches dug on site. Within this site also eighty burials were uncovered. Some burials for example, were merely 0.35-0.40m below the surface. Earlier burials were lesser well preserved however in some graves shroud pins were uncovered despite fragmentary skeletal remains. Small finds associated with early ecclesiastical sites were also uncovered, such as knives, nails, awls, axe, flint, along with many others including spindle whorls hones and quernstones. This very much shows the contents of an Early Christian site of which Killola is one. This report was published by the Royal Irish Academy as (The Excavation of the Early Christian Enclosure of Killederdadrum in Lacenavorna, Co Tipperary. Authors(s) Conleth Manning, Finbar McCormick and Michael Monk. Proceeding of the Royal Irish Academy: Archaeology, Culture, History, Literature, 1984, Vol. 84C (1984), pp. 237-268)."

79. He refers to condition No. 30 of the quarry registration:

"No quarry activity of any kind (including storage of materials and vehicles) shall take place within 30 metres of the line of the outer bank of the enclosure listed in the Sites and Monuments Record as GA054-039 (cillin). Any ground clearance outside this exclusion zone but in the vicinity (50 metres) of this monument should be undertaken only under the supervision of a suitably qualified archaeologist."

80. He goes on to aver:

"18. I beg to refer to an aerial photograph of the monastic enclosure ... Of particular concern is the south western flank of the enclosure, which is under extreme pressure from the quarry expanding. Of particular concern as I stated above is the extent of the enclosure. The 50 meter exclusion zone is from the extremity of the site and not the pin on the monuments viewer and, as such, the circular enclosure of the site is where the 50 meter exclusion zone begins. As is clear therefore, the quarry has encroached within 50 meters of the extremity of the site, in breach of the condition in the Quarry Registration.

19. I say and believe that there is a clear and present danger to the integrity of this Monument if this quarry is permitted to continue to encroach into the vicinity of the site. There is I believe the distinct possibility that such encroachment could interfere with yet unrecorded archaeology, including human remains. Sight must not be lost that ultimately this is a burial ground and must be respected as some of these are within living memory. Archaeological deposits lying outside of the enclosure must be protected within the 50 meter exclusion zone from the enclosure marked on the original Osi maps and due regard to their safety and interpretation must be ensured. Finally it is important to bring attention to the following: the 50 Metre exclusion zone as set down by law (National Monuments Service) pertaining to all protected sites begins not from the pins on the National Monuments Online Viewer but from the large enclosure wall of the actual site boundary and as such the Quarry has posed a clear and present danger to the site as it has destroyed and encroached the 50 Metre zone in in its entirety on the West and Southwest flank of the site, as can even be seen on the most recent version of Google Maps Satellite viewer. (This enclosure may be seen fully on the original 6 Inch last edition OSI map ...)."

81. In his final affidavit, Mr Doyle comments as follows in respect of the third respondents denial of encroachment:

"28. As regards other averments, Mr Noel Welby at paragraph 35 of his affidavit regarding burial ground encroachment says that 'no part of the operations are carried out closer than approximately 50 metres from the perimeter wall and I say therefore that the site has had no effect on these activities'. I say this is manifestly untrue as evidenced by satellite and drone data and Affidavits sworn on behalf of the Applicants in the present proceedings."

Sufficiency of replies

82. The replies to these points join issue in what are at times general terms, which in certain respects do not constitute detailed refutation. In many respects the replies offer legal type defences or blanket denials rather than directly engaging effectively with the applicant's evidence. It isn't necessary to set out the replies in detail because cumulatively are not such as to outweigh at this stage the evidence supporting a fair question to be tried and supporting the balance of convenience in favour of an injunction on the basis of a risk of significant environmental damage. That is so even in the absence of cross-examination and even bearing in mind the onus of proof being on the applicant. Even if there had been a clear conflict of evidence on all issues, which there wasn't, I

would have been of the view that the applicant's evidence, albeit contradicted, was capable of showing a fair question to be tried. But all that isn't by any stretch of the imagination to dismiss the points made by the relevant respondents. Any of those points can be revisited at the substantive stage when the applicant will have to do more than merely set out a fair question. It will have to, among other things, actually demonstrate that unauthorised development has been or is being carried out. In that context, the relevant respondents' EU law points will need particular detailed attention and consideration, but at this juncture those considerations are not such as to outweigh the factors in favour of an injunction pending the hearing.

Potential defences

83. Again for the avoidance of doubt I am taking into account all of the potential defences, but I don't find them such as to outweigh the case for making an order at this stage. Any comments on the defences should be read as being in the context of how the matter appears at the interlocutory stage, and such matters can be more fully developed at the substantive hearing. I am not endeavouring to definitively decide on the application or otherwise of any of them here.

84. In general, an alleged pre-1964 use does not in itself render lawful any wider developments since then: *Weston Ltd v. An Bord Pleanála* [2010] IEHC 255, [2010] 7 JIC 0102 (Charleton J.), *Limerick County Council v. Tobin (No. 2)*, (Unreported, High Court, Peart J., 1st March , 2006), *Paterson v. Murphy,* 1978 WJSC-HC 3275, [1978] I.L.R.M. 85, [1978] 5 JIC 0401 (Costello J.), *Westmeath County Council v. Quirke & Sons* [1996] 5 JIC 2306 (Unreported, High Court, Budd J. 23rd May 1996).

85. Even if pre-1964 use applied, the EU law context would impose a requirement for EIA and AA for ongoing activities requiring assessment: *per* Phelan J. in *Harte Peat Ltd v. EPA and the AG* [2022] IEHC 148, [2022] 3 JIC 1606.

86. The second and third respondents argue that the substitute consent decision *does* authorise future quarrying activities rather than merely regularising past activities. I am rejecting that argument for interlocutory purposes as it is not readily reconcilable with the terms of the inspector's report and board order. If I have missed something at this stage, that is something that can be debated in due course at the substantive hearing.

87. The fact that the council didn't effectively close the quarry to date isn't a decisive factor – see *Doorly v. Corrigan & Anor* [2022] IECA 6, [2022] 1 JIC 2104 at para. 212(iv):

> "any ... High Court decisions to the extent that they place emphasis on the lack of action by a relevant local authority under s. 160 as a significant basis for refusing relief sought by a private applicant must now be read as superseded by the judgment of this court in *Bailey v. Kilvinane Windfarm Ltd*. [2016] IECA 92, [2016] 3 JIC 1602, 2016 WJSC-CA 1837 (Unreported, Court of Appeal, 16th March, 2016),where Hogan J. (Finlay Geoghegan and Irvine JJ. concurring), said that the attitude of the Council in not acting was 'largely a neutral factor and it is certainly not one which could deprive an otherwise meritorious applicant of his or her entitlement to obtain s. 160 relief where the unauthorised status of a particular development had been clearly established'. If the Council's lack of action were in practice a bar to an injunction or something close to such a bar, that would amount to a nullification of the clear statutory intention that private actors can invoke the court's jurisdiction even if the Council doesn't."

88. That is also consistent with *An Taisce v. McTigue Quarries Ltd.* [2018] IESC 54, [2019] 1 I.L.R.M. 118, [2018] 11 JIC 0702 (MacMenamin J.)

89. As regards an undertaking as to damages, the applicant submits (convincingly for present purposes, but I am very much open to further argument at the substantive stage) that:

> "62. Any requirement for the Applicant to provide an undertaking as to damages would be inconsistent with its rights pursuant to Article 9(3) of the Aarhus Convention, the special cost rules pursuant to section 50B of the Planning and Development Act, 2000 and the decision of the Court of Justice in *Commission v. United Kingdom* (Case C-530/11). The Applicant has only minimal assets and would not be in a position to give such a undertaking if it was required."

90. The applicant also relies in this regard on *Meath County Council v Murray & Anor* [2017] IESC 25, [2018] 1 I.R. 189, [2017] 2 I.L.R.M. 297, [2017] 5 JIC 1906 para. 78 per McKechnie J., per Holland J. in *Jennings & Anor v. An Bord Pleanála* [2022] IEHC 16; and *Waterford City and County Council v. Centz Retail Holdings Ltd*, [2020] IEHC 540, [2020] 11 JIC 2704 (Simons J.) para. 20 (albeit in the context of an application by a council, but the legislation gives equal authority to other actors to seek an injunction).

91. The argument that closure would have an effect on employment at the quarry is at best a factor (to be considered among other factors as part of the overall circumstances), but does not itself outweigh the requirement for environmental protection. In *An Taisce v. McTigue Quarries Ltd.* [2018] IESC 54, [2019] 1 I.L.R.M. 118, [2018] 11 JIC 0702 (MacMenamin J.) the Supreme Court granted a s. 160 order (reversing Barrett J. who had placed reliance on the lack of action by the

council and on the employment impact). MacMenamin J. identified the considerations as including *inter alia*:

> "(v) The public interest: There is a strong public interest in upholding the integrity of the planning and development system;
>
> (vi) The public interest, such as employment for those beyond the individual transgressors, or the importance of the underlying activity: The Court has insufficient evidence on these issues to express any view, but this cannot be a bar to an order being made in this case;"

92. The relevant respondents argue that the complaint is "statute-barred" having been going on since 2015. Again I would not entirely dismiss that but it is not so clearly correct as to be a basis for refusing an injunction at this stage.

93. Likewise as regards alleged delay I see this as something that can be revisited at the substantive stage and not a sufficient basis for refusal of the order at this point. That said, whether delay by an applicant, even if there was delay, is really a proper basis to refuse to make an order that is necessary for environmental protection, is not entirely self-evident and certainly needs further consideration.

94. The alleged lack of urgency of the application is also debateable but ultimately the potential for future environmental damage is what injects urgency into any given matter, not the acts or omissions of any given party. Much of the opposing position came down ultimately to what one might call the principle of continuity, being the alleged entitlement to keep doing what one is doing. But there is no such principle. Any continuity of arrangements is part of the overall circumstances to be considered but is not in itself a metaphorical get-out-of-jail-free card. The fact that one has been doing something (the applicant would say "getting away with something") for a period of time does not create a right to keep doing it (or keep getting away with it, if that is one's perspective). Obviously that is only a generalisation and there are such things as limitation periods and reliance interests, but there are also European legal requirements that may come into play to counterbalance that. The application of such rules is one thing, but in the absence of any relevant rule, mere continuity of an existing arrangement is not a legal reason to continue something that would otherwise be unlawful, if that is the position. Nor does the fact that something that would otherwise be unlawful (if such be the case – all to be debated in due course) has been continuing for some time mean that any attempt to rectify the matter has to be dismissed as lacking in urgency. Such a Catch-22 is impressive and one has to hand it to the relevant respondents for coming up with an argument that sends us down that path. But the ultimate problem for that defence is that mere passage of time does not render lawful that which is not, or render inoperable mechanisms for a remedy, unless some specific legal doctrine such as a limitation period applies. Such doctrines will be very much on the agenda for the substantive hearing but they haven't been shown at this point to preclude the order sought.

95. The relevant respondents plaintively ask "why should the quarry be closed" pending the hearing. That is a reasonable question, but it has a fairly straightforward answer. Normally, and certainly here, the answer is the environmental risk, looking at the environment in a broad sense as including water, habitats, species, cultural sites, and humans. Environmental risk normally outweighs other considerations and does so here. The environment isn't just some kind of mere neutral factor among other factors. Environmental protection is an imperative of national and EU law as reflected in art. 37 of the EU Charter, and arts. 11 and 191 TFEU. It's only stating the obvious to say that any given generation is only a leaseholder, responsible for stewardship of the earth in trust for all humankind and for future generations. Where the law creates actionable justiciable standards, those must translate into meaningful and effective decisions and orders, not merely into cheap pious verbiage.

96. That doesn't preclude a debate about what sort of development best supports long-term environmental goals, and modern environmental litigation is very often more about competing visions of environmental guardianship rather than a crude protection-versus-exploitation conflict. However the present case has not been unduly complicated by this nuance.

The appropriate respondents

97. Having addressed the issue of principle as to whether an injunction should be granted, I now turn to the question of against whom such an order should be made.

First named respondent

98. As noted above, the applicant agreed not to seek the injunction as against the first named respondent. I therefore released that respondent from further attendance at the hearing.

Second named respondent

99. As the landowner, the second named respondent is at the level of broad principle a potentially appropriate respondent in an application regarding unauthorised development.

100. While Mr Power deposes to the fact that he has no involvement in the day to day running of the quarry, this does not effectively counter the evidence of at least some involvement with the development, a conclusion that can be drawn even in the absence of cross-examination.

101. Mr Power was listed as owner in the application under section 261 of the 2000 Act and is the addressee of the subsequent registration.

102. The second respondent and the third respondent met with members of the applicant in September, 2022. Mr Doyle avers:

> "28. A meeting with the Quarry owner, Mike Power (the second named respondent) and Operator Noel Welby (the third named respondent) was organised and hosted by Councillor Tom Welby in the Lake Hotel in Oughterard on the 9th September. Hillary Sharpe, Muriel McGuaran and myself represented the local community. At the meeting the third named Respondent admitted that 'things had gotten out of hand'. At the end of the meeting, it was agreed by the second named Respondent that the quarry would be compliant with its conditions of Registration from the next day and I asked Tom Welby if he could ensure this would happen. He said he would."

103. As recently as last year Mr Power accepts that he authorised a further party to draw material from the quarry (para. 12 of his affidavit), at a time when Noel Welby Plant Hire Ltd was the ostensible licensee, a situation not readily compatible with Mr Power having no role in occupation or control of the quarry.

104. Overall there is ample evidence of a degree of control and involvement that makes Mr Power an appropriate respondent to answer for the alleged unauthorised development.

Third named respondent

105. The complaint being made is that the third named respondent is not an appropriate respondent because his role is only as director and sole owner of a company, Noel Welby Plant Hire Ltd, which was not itself a respondent as of the hearing date.

106. Mr Doyle in his final affidavit (2nd November, 2023) avers as follows in relation to the relationship between the third and proposed fourth respondents:

> "22. Mr Welby throughout his affidavit seeks to hide behind the existence of a company called Noel Welby Plant Hire Limited. I have obtained the latest financial reports as well as the Memorandum and Articles of Association of that Company. In the first instance it is clear that Mr Welby is the sole shareholder in the company. Furthermore, it is clear that the principal activity of the company is described as:
>
> To carry on the business of a plant hire operator and all related activities including the haulage of sand, gravel and all other materials and all related activities.
>
> I say and believe that there is nothing in the constitutional documents of the company indicating that the company is authorised to engage in the extraction of aggregates and quarrying. ...
>
> 23. It is therefore entirely disingenuous for Mr Welby to swear an Affidavit averring at para. 19 that 'it is difficult to engage in the issues that are required to be addressed' as the proper Respondent has not been joined. To repeat Mr Welby is the sole shareholder of the company and has been directly communicating with residents concerning the operation of the quarry. For Mr Welby to claim some ignorance of these matters is therefore not credible.
>
> 24. I say and believe that it is important to point out that our solicitors wrote to Mr Welby on 18th May 2023 at the address of Killola Quarries, Oughterard, Co. Galway. That letter was responded to the following day by O' Connell Clarke Solicitors on behalf of Mr Welby. At no time after that did Mr Welby or his solicitors write to our solicitors to advise them of the existence of Noel Welby Plant Hire Limited and that there was some other person other than Mr Welby operating the quarry.
>
> 25. I say and believe that it is entirely inappropriate that at the eleventh hour, Mr Welby would seek to hide behind the corporate veil in order to avoid his responsibilities in respect of compliance with planning and environmental law, either in his personal capacity or as a Director of a Company.
>
> 26. Mr Welby was issued with an Enforcement Notice by Galway County Council in September 2022. He issued judicial review proceedings in his own name against the issuing of said Notice. It was entirely reasonable for the Applicant to rely on the Enforcement Notice as indicating that Mr Welby was operating the quarry. As aforementioned in any event, Noel Welby Plant Hire Limited does not appear to be authorised to operate a quarry.
>
> 27. At no stage in our dealings with Mr Welby has he indicated that he was representing Noel Welby Plant Hire Ltd. Furthermore, we are ordinary citizens and it is not for us to establish the minutiae of the commercial structure of the Quarry operations."

107. The applicant makes the following points in submissions as to the status of the company:

> "39. Mr Welby says that the operator of the Quarry is Noel Welby Plant Hire and not him personally and exhibits a Licence agreement between Mr Power and the company dated 22nd February 2019 to that effect. He signed the licence agreement in his capacity as director of that company.
>
> 40. This is a remarkable document for a number of reasons:

41. Firstly, it has three operative paragraphs which address the business terms in the scantiest possible manner. It says nothing at all about terms and conditions, insurance, indemnity, restoration, respective responsibilities, grievance clauses and does not even identify where Noel Welby Plant Hire is entitled to extract rock from, how they are to do it or what they are to do with it.

42. Secondly, the constitution of Noel Welby Plant Hire registered with the CRO on 2nd February 2007 records that it is a company established to 'carry on the business of a plant hire operator and all related activities including the haulage of sand, gravel and other materials and all related activities'. The Constitution says nothing at all about blasting or quarrying and it is completely unclear what a haulage firm is doing engaged in primary extraction.

43. Thirdly, the Applicant has been able to identify no relationship between Noel Welby Plant Hire Ltd and the Quarry other than the fact that they are identified as the consignee for a delivery of explosives in 1st February 2023. All other consignments, dating back to 2016, are identified simply as consigned to 'Killola Quarry'.

44. Fourthly, while Mr Welby accepts that he is a Director of the company he neglects to mention that he is the 100% Shareholder in that company. The idea that Mr Welby is anything other than the sole controller and director of the company is therefore ludicrous. Mr Welby is clearly entirely familiar with the operations of the quarry and the Applicant will make an application, if necessary, to join the Company at the hearing for interlocutory relief.

45. Fifthly, at no point prior to the delivery of the Respondent's Affidavits on 31st October 2023 some three days prior to the application for interim relief, did the Respondent's or their Solicitors identify to the Applicant the alleged involvement of Noel Welby Plant Hire Ltd as the operator of the Quarry."

108. In *Dublin County Corporation v. Elton Homes Ltd* [1984] I.L.R.M. 297, 1983 WJSC 2517, [1983] 5 JIC 1903 Barrington J. made the point as follows in the context of s. 27 of the 1963 Act, the precursor to s. 160 of the 2000 Act:

> "Let me say at once that I think it may be quite proper, in certain circumstances, to join the directors of a company as respondents when an application is made by a planning authority against a company pursuant to the provisions of s. 27. Mr Gallagher, who appeared for the planning authority, referred me to a motion Dublin County Council v Crampton Builders Ltd & Ors. which came before the President on 10 March 1980 in which directors of a building firm had been joined as respondents to the motion. The President did not in that case make an order against the directors but he apparently said that, in his view, s. 27 was sufficiently widely drafted to empower the joining of company directors as respondents, but that whether an order would or would not be made against them would depend on the facts of each individual case. There may be many cases, particularly in the case of small companies, where the most effective way of ensuring that the company complies with its obligations is to make an order against the directors as well as against the company itself. But in such a case the order against the directors would be a way of ensuring that the company carried out its obligations. A body corporate can only act through its agents and the most effective way of ensuring that it does in fact carry out its obligations might be to make an order against the persons in control of it."

109. There is a degree of nuance in the jurisprudence as to whether a fall-back order should be made against a director in respect of waste management proceedings, with some authority stressing the need for an expansive approach in an EU context where a requirement of an effective remedy exists. Whether that nuance has a follow through to planning injunctions would need to be debated further. Here the proceedings do have a European context pursuant to the water framework and habitats directives.

110. For reasons set out below, I think it is appropriate to join the company as a fourth named respondent. On that basis, without prejudice to revisiting this issue at the substantive stage following further detailed argument, I think that for the purposes of an interlocutory injunction it is just and convenient to ensure that the company complies with its obligations by enjoining its director Mr Welby.

Proposed fourth named respondent

111. At the hearing the applicant applied to join Noel Welby Plant Hire Ltd as a fourth named respondent on an *ex parte* basis and to grant an *ex parte* interim injunction. The applicant also asked for directions as to service and make provision for the company to apply to discharge the order as necessary. This "in no way detracts from" the order sought against the existing second and third respondents as was submitted. The relevant respondents submitted that perhaps the order against the proposed further named respondent company should just be made with the claim against the second and third respondents adjourned. But the adjournment application doesn't

logically follow from the possibility of another respondent being joined and nor is it otherwise appropriate

112. The applicant has made out a sufficient case for an interim order against the company (including when one has regard to the averments on behalf of the second and third respondents, which identify the company as the quarry operator).

113. Thus there is a sufficient case for first joining the company as a fourth named respondent, so I will make that order, with appropriate directions, and the consequent injunction that is appropriate in the circumstances against the third and fourth respondents.

Terms of the order

114. I will grant the order in the terms sought, that is as set out at paragraphs 1 and 2(a) of the Notice of Motion recited above, subject to the following.

115. Firstly, where an order under s. 160 of the 2000 Act (such as the order claimed at paragraph 1) refers to unauthorised development, that is to be construed as meaning the development that the court is satisfied at the interlocutory stage to be unauthorised development. Here that includes any works or use associated with the quarry. It is not intended and nor could the legislation be meaningfully interpreted as having no practical effect pending the heading if the respondents concerned merely continued to dispute whether the development was unauthorised. If they win that claim at the substantive hearing they can resume the development but the injunction is meant to specify the position in the meantime, not merely use a legal formula that allows facts on the ground to continue unaltered. The context is that for the purposes of the interlocutory disposal of the matter (but to be revisited at the full hearing) I am rejecting the proposition that works and uses on the site are to be treated as exempted development under the 2000 Act. Even assuming some pre-1964 use, that appears so limited in scale and methodology and so geographically confined as not to be relevant to the order required to be made ("occasional" and "small-scale" was what the inspector said at para. 3.2), and is in any event even a pre-1964 use was subject to the overlay of EU environmental law through the substitute consent system, the actual consent for which is purely historic. There is no current consent demonstrated to be in existence for any form for ongoing activity. The relevant definitions in the 2000 Act are:

> "unauthorised development" means, in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use;
>
> "unauthorised structure" means a structure other than—
>
> (a) a structure which was in existence on 1 October 1964, or
>
> (b) a structure, the construction, erection or making of which was the subject of a permission for development granted under Part IV of the Act of 1963 or deemed to be such under section 92 of that Act or under section 34, 37G or 37N or 293 of this Act, being a permission which has not been revoked, or which exists as a result of the carrying out of exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act);
>
> "unauthorised use" means, in relation to land, use commenced on or after 1 October 1964, being a use which is a material change in use of any structure or other land and being development other than—
>
> (a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or
>
> (b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34, 37G, 37N or 293 of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;
>
> "unauthorised works" means any works on, in, over or under land commenced on or after 1 October 1964, being development other than—
>
> (a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or
>
> (b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34, 37G, 37N or 293 of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;

116. Thus if we subtract from the situation the existence of a regular planning permission under Part IV of the 1963 Act or under section 34, 37G, 37N or 293 of the 2000 Act, which is clearly absent, and if we subtract the defence of exempted development which is currently unpersuasive for the reasons outlined, we are left with the situation that the carrying out of any works on the site come within the definition of unauthorised development. Again that is only the position for the purposes of the terms of the interim and interlocutory orders but matters may (or may not) look different after a full hearing.

117. I appreciate that there may be the possibility of works which may require clarification, for example such as any standard site-closure measures, so for the purpose of ensuring the enforcement of the order made what I propose in that regard is that the second to fourth respondents would give the applicants appropriate advance notice of an intention to carry out any such site-closure measures or other works or uses so that any dispute as to whether the actions proposed to be carried out come within the terms of the injunction can be resolved by agreement or if necessary by the court rather than result in a situation where the order is not complied with. If the parties want such a proposal, or any other clarification, formally embodied in an order they can activate the liberty to apply.

118. The terms of the order sought include an order preventing the respondents from storing materials on site. In the absence of qualification this would impose a requirement to immediately remove all materials on site, which seems at first sight disproportionate, at least in terms of timescale, so I will exclude existing materials but with liberty to apply for an order as to how the site is to be properly closed pending the hearing.

119. Secondly the order sought at paragraph 2(b) is in the nature of liberty to apply because it does not in itself require the second to fourth respondents to do anything. However it does give notice that the parties can come back to the court to particularise any steps that should or should not be taken, including mandatory orders such as by way of remediation. However I am not getting into that issue now, so it is probably clearer if, rather than reflecting para. 2(b) in the order, I take it as being covered by the liberty to apply.

120. It isn't entirely clear to me why the applicant has included remediation relief in this particular motion under the 1977 Act (para. 2(b) of the motion) but not under the 2000 Act (s. 160(1)(b) covers remediation but para. 1 of the motion refers only to s. 160(1)(a)). But that doesn't arise at this stage.

121. Before concluding overall, I repeat that I by no means definitively dismiss the various points made so eloquently by the second and third respondents in relation to many of the headings set out in this judgment. These raise significant issues of domestic and more particularly EU law and will require further detailed legal argument. All that needs to be said for present purposes is that in the more restricted context of the injunction, when the court is not deciding the actual outcome of the case, the applicant has done more than enough to surmount the established standard to obtain interim or interlocutory relief. Insofar as the factors relied on in opposition are not sufficient to counterbalance that at the present stage, that is entirely without prejudice to their detailed consideration at the substantive hearing.

Order

122. For the foregoing reasons, it is ordered that:

(i) the proceedings be admitted to the Commercial Planning and Environmental List;

(ii) the listing in the Master's Court on 18th January 2024 be vacated and the motion for remittal returnable before the Master be treated as being before the court;

(iii) that motion seeking remittal to the Circuit Court be refused;

(iv) Noel Welby Plant Hire Ltd be added as a fourth named respondent;

(v) the first named respondent be released from the injunction application with liberty to apply;

(vi) an order be made against the second and (for the purpose of ensuring compliance by the fourth named respondent) third named respondents on an interlocutory basis until further order (and in particular, the order against the third named respondent lasting co-terminously with any order against the fourth named respondent subject to any further order to the contrary) and against the fourth named respondent on an interim basis until further order and in particular pending the making and determination of an application for an interlocutory injunction, as follows:

(a) an order pursuant to section 160(1)(a) of the Planning and Development Act 2000 (as amended), the inherent jurisdiction of the court or otherwise, requiring the second to fourth respondents, their respective servants, agents, licensees, or any person acting in connection with them or on their instruction, or anyone acting in concert with them and all persons having the knowledge of the making of any Order herein, forthwith to cease and/or refrain from carrying out unauthorised development at Killola Quarry, Rosscahill, Oughterard, Co. Galway comprising unauthorised quarrying and associated activities including the blasting, extraction, processing, production, storage, distribution of any quarried and/or associated materials, and for this purpose all quarrying and associated activities at the site are to be treated as unauthorised until further order, and in addition the prohibition on storage of any materials on site will not apply to materials already on site as of the date of making of the order with liberty to apply for further order in that regard;

(b) an order pursuant to section 11 of the Local Government (Water Pollution) Act 1977 as amended, and/or pursuant to the inherent jurisdiction of the court prohibiting the second to further respondents, their servants and/or agents, or anyone acting in concert with them and all persons having the knowledge of the making of any Order herein, from causing or permitting or continuing to cause or permit the entry and/or discharge of polluting matter and/or trade effluent into drains, watercourses and/or waters on and/or in the vicinity of the lands at Killola Quarry, Roscahill, Moycullen, Co. Galway other than under and in accordance with a licence granted pursuant to Section 4 of the 1977 Act;

(vii) the fourth named respondent be served with notice of the injunction by email to the solicitors for Mr Welby the sole owner and director, to be followed by letter sent by ordinary post to the company's registered office;

(viii) a motion seeking an interlocutory order against the fourth named respondent be issued within 7 days of the date of this judgment returnable for mention on the next sitting Monday after the expiry of 14 days from the date of this judgment;

(ix) the proceedings be given an early date for the substantive hearing, preferably in Hilary 2024;

(x) the parties be directed to endeavour to agree:

(a). a draft issue paper subject to approval or amendment by the court that sets out a list of the propositions of fact, domestic law and EU law on which the parties disagree;

(b). subject to the foregoing being prepared in draft as soon as possible, whether agreed possible hearing dates in Hilary 2024 can be provided for consideration by the court;

(c). whether the matter can be accommodated in 3 days or less;

(d). whether there is any ongoing necessity for the first respondent to be a party to the proceedings;

(e). a schedule of exchange of affidavits;

(f). whether there will be a requirement for cross-examination, and if so as to how this can be kept focused;

(g). arrangements for written submissions (which if so agreed can be subject to oral amplification following cross-examination if any); and

(xi) there be liberty to apply; and

(xii) unless any party applies otherwise by written submission within 14 days, the foregoing order be perfected forthwith thereafter on the basis of:

(a). costs of the motion for an interlocutory injunction against the second and third respondents including costs of written submissions being awarded to the applicant against the second and third respondents, to include two counsel for the avoidance of doubt, subject to a stay on the execution (as opposed to adjudication) of such costs until the determination of the proceedings; and

(b). all other costs including costs of the motions to admit to the list and to remit the matter to the Circuit Court and of the applications for an injunction against the first named respondent, for an order joining the fourth named respondent and for an interim injunction against the fourth named respondent being reserved.