

## THE HIGH COURT

[2017 No. 308 J.R.]

**BETWEEN****REDROCK DEVELOPMENTS LIMITED (IN VOLUNTARY LIQUIDATION)  
AND BELCARRIG QUARRIES LIMITED****APPLICANT****AND****AN BORD PLEANÁLA****RESPONDENT****Judgment of Ms Justice Faherty dated 21st day of October, 2019**

1. This is a judicial review in respect of two decisions of An Bord Pleanála (hereinafter “the Board”), both made on 15th February, 2017. The first decision was in relation to the first applicant’s (Redrock’s) application for “substitute consent”- a form of retrospective retention planning permission for historic development. The second decision concerned the second applicant’s application for “further development” of a quarrying operation. Both decisions concern a quarry on lands at Belcarrig Hill, Ballycanew, Co. Wexford. The site was originally an old pre-1963 quarry. The quarry, like many others, was in operation prior to the inception of the Planning Acts 1964 which meant that it had an established user and was exempt from the requirement to obtain planning permission. It appears that there are enforcement records dating back to 2000 relating to unauthorised quarrying activity at the site. An enforcement notice was issued by Wexford County Council on 3rd April, 2003, ordering the cessation of the quarry use and rehabilitation of the site. Subsequent to the enforcement notice, a planning application was lodged by Redrock on 28th April, 2003 for intensification of user and a new vehicle entrance. The planning authority refused permission. The refusal was appealed to the Board. The Board granted permission for the revised proposal on 17th February, 2004, to expire ten years after the date of grant of permission.
2. The material quarried on site is stone which is used in road and railway construction. Redrock operated the site under the permission granted. The main method of extraction was by means of blasting.
3. Before addressing the background to the within application for judicial review, and the specific decisions under challenge, it is apposite to set out the legal framework under which the two planning applications the subject of the Board’s decisions dated 15th February, 2017 came before the Board.
4. The background can only really be understood by reference to EU Directives in the environmental area which imposed obligations on Ireland to ensure that the decision-making process in the planning area included meaningful consideration of environmental issues. Council Directive 85/337/EEC (“the EIA Directive”) was promulgated to deal with the effects of public and private projects which were likely to have significant effects on the environment. It came into effect on 3rd July, 1988. This was later amended and ultimately codified in Directive 2011/92/EU, as amended by Directive 2014/52/EU. The EIA Directive sets out rigorous conditions in the area of environmental law, in particular

the need to assess the environmental impact of developments as identified in annexes to the Directive.

5. The second Directive, Council Directive 92/43/EEC (the "Habitats Directive"), was adopted to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements. It came into force on 10th June, 1994. The within proceedings largely concern the EIA Directive.
6. The EIA Directive and its recitals require that in a development with environmental effects, such effects are to be taken into account at the earliest possible stage in the decision-making process for planning permission. Article 2(1) requires that an environmental impact assessment ("EIA") should take place before consent is given.
7. The legislature, by virtue of the Planning and Development Act 2000 (hereinafter "the 2000 Act"), attempted to bring all quarries within planning control through s.261. Section 261, which commenced on 28th April, 2004, introduced an obligation for the owner or operator of a quarry to register the quarry with the relevant planning authority within one year of the coming into effect of the relevant Regulations. The quarry was then examined by the planning authority with a view to establishing its planning status and whether or not fresh conditions or a fresh application for planning permission was required. The quarry the subject of the within application was exempt from this requirement by reason of having obtained planning permission in February 2004, i.e. before the commencement of s.261.
8. In a judgment delivered on 3rd July, 2008 in the case *Commission v. Ireland* (Case C-215/06) [2008] ECR I-04911, the Court of Justice of the European Union (the "CJEU") emphasised the meaning and effect of Article 2(1) of the EIA Directive. This Article stipulated that Member States were to adopt "all measures" necessary to ensure that before planning consent is given, projects likely to have significant effects on the environment, by their nature or location, were made subject to an EIA with regard to those effects. The CJEU accepted that the then Irish legislation required environmental impact assessments to be carried out and planning permission to be obtained as a general rule prior to the execution of works. It noted, however, that the Irish legislation also established the concept of "*retention permission and equates its effects to those of the ordinary planning permission which precedes the carrying out of works and development. The former can be granted even though the project to which it relates and for which an environmental impact assessment is required pursuant to Articles 2 and 4 of Directive 85/337 as amended has been executed*". (at para. 55)
9. The CJEU went on to point out that, in the absence of exceptional circumstances, the grant of retention permission, which Ireland accepted as having been "common" in planning matters, had the result that the obligations imposed by the EIA Directive would be considered to have, in fact, been satisfied *post hoc*. While EU law could not preclude the applicable national rules from "*in certain cases*" allowing the regularisation of operations or measures which are unlawful under EU rules, such a possibility must not "*offer the persons concerned the opportunity to circumvent the Community rules or to*

*dispense with applying them, and that it should remain the exception*". (at para. 57). The CJEU highlighted the fact that a system of regularisation by retention permissions could have the effect of encouraging developers to forgo the process of ascertaining whether intended projects satisfied the criteria of Article 2(1) of the EIA Directive. (at para. 58)

10. To address the CJEU decision in *Commission v Ireland*, the 2000 Act was amended by:
  - (i) prohibiting retention permission in certain circumstances (s.34(12));
  - (ii) providing for a new species of permission described as "substitute consent" (Part XA); and
  - (iii) obliging planning authorities to examine and make decisions on quarries within their area (s.261A).
11. There are a number of mechanisms ("gateways") to obtaining substitute consent provided for in the 2000 Act. Pursuant to s. 177B, a planning authority must issue a notice requiring a developer/owner to apply for substitute consent where the planning authority becomes aware in relation to a development for which permission was granted and for which, inter alia, an environmental impact assessment was required, that a final judgment of a national court or the CJEU has been made that the permission was in breach of law, invalid or otherwise defective in a material respect.
12. Pursuant to s.177C, a developer or owner to whom no notice has been given under s.177B may make an application for leave to apply for substitute consent. The section envisages two situations where a developer/owner's application for leave to apply for substitute consent arises. The first arises if the developer/owner is applying for leave to apply for substitute consent because he or she believes that the permission granted was in breach of law, invalid or otherwise defective in a material respect. In this situation, the developer/owner is relieved from having to show exceptional circumstances. The second situation arises if the developer/owner believes that "exceptional circumstances" exist such that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent.
13. If leave is granted by the Board, then the process of the substantive application for substitute consent begins. Section 177E of the 2000 Act mandates that the application must be accompanied by a remedial environmental statement ("rEIS") and a remedial Natura impact statement ("rNIS"). Sections 177F and G set out what an rEIS or rNIS must contain, which include details of any appropriate remedial measures taken or proposed to be taken to remedy any significant effects on the environment in the case of an rEIS.
14. Pursuant to s.177K, the Board may decide to grant the substitute consent subject to, or without, conditions, or to refuse it. Twelve criteria are set out in s.177K which the Board must have regard to in deciding whether or not to grant substitute consent. These include

the provisions of the development plan or any local plan for the area, the provision of any special amenity order relating to the area, the rEIS or rNIS, or both of those statements as the case may be, submitted with the application and the significant effects on the environment or on a European site which have occurred, are occurring, or could be reasonably expected to occur because of the development being carried out.

15. Section 177K (3) sets out that the conditions which may be attached to the grant of substitute consent include conditions relating to remediation of all or part of the site on which the development is situated.
16. Section 177L deals with what may occur where there is a refusal to grant leave to apply for substitute consent or a refusal to grant substitute consent. The section provides for a process of the Board issuing a draft direction to the applicant, providing an opportunity to make submissions, and the finalisation of the draft direction. The Board's direction can:
  - (i) require the applicant to cease activity or operations on the site of the development "where the Board forms the opinion that the continuation of all or parts of the activity is likely to cause significant adverse effects on the environment or adverse effects on the integrity of a European site" or
  - (ii) (ii) require the applicant to take such remedial measures as considered necessary to restore the site to a safe and environmentally sustainable condition and to avoid, in a European site, the deterioration, inter alia, of natural habitats.
17. A further gateway to obtaining substitute consent is found in s.261A of the 2000 Act. This section was commenced on 15th November, 2011. Section 261A (2) provided that between the commencement date and 23rd August, 2012, each planning authority had to examine every quarry in its area to determine whether:
  - (i) development, which was not authorised by Part IV of the Local Government (Planning and Development) 1963, was carried out after 1st February, 1990 which would have required an EIA or a determination as to whether an EIA was required, but that such assessment or determination was not carried out or made; or whether
  - (ii) development, which was not authorised by Part IV of the 1963 Act, was carried out after 26th February, 1997, which would have required appropriate assessment, having regard to the Habitats Directive, which was not carried out.
18. If development had been carried out after these prescribed dates which should have been assessed having regard to the relevant European Directives but was not, either a developer or an owner would be required by the relevant planning authority to apply for substitute consent or they would receive an enforcement notice.

#### **The gateway by which Redrock came to apply for substitute consent**

19. Wexford County Council duly considered the quarry in issue in the within proceedings under s.261A. On 23rd August, 2012, it determined that under s.261A(2)(a) of the 2000 Act:

“Quarry related development, which was not authorised by [the 2004 planning permission] has been carried out after 1 February 1990 which development would have required a determination as to whether environmental impact assessment was required and that determination did not take place.”

20. The stated reasons for the determination were:

“The nature of development at the site;

The likelihood of significant effects on the environment and

The requirements of the Environmental Impact Assessment Directive 1990”

21. Redrock was duly directed to apply to the Board for substitute consent with the inclusion of an rEIS undertaken in accordance with s.177F and s.177G of the 2000 Act.

22. Wexford County Council’s determination was the subject of a review by Redrock to the Board. The Board duly appointed an Inspector who carried out an inspection of the quarry.

23. Having regard to Schedule 7 of the 2001 Regulations, the Inspector’s report considered that albeit that the increase in area and depth of the site since 2004 outside the scope of the 2004 planning permission was not of a substantial magnitude, the nature of development was significant in that the water table was breached. The report stated:

“Potential for adverse impacts on surface and groundwater would have arisen in the course of the unauthorised excavation and processing activities due to the removal of overburden, exposing the bedrock to percolation of polluted run-off from stored material or from activities on site...Water table lowering at quarry sites can also affect nearby wetland areas...The filling of the excavated site since dewatering ceased could also have impacted groundwater in the vicinity as such features provide a potential route for surface water pollutants to reach groundwater and subsequently surface water features such as the nearby stream.”

24. By its Decision dated 25th October, 2013, the Board duly confirmed the determination of the planning authority and required Redrock to apply to the Board for substitute consent.

25. The planning permission for the quarry granted in 2004 expired on 16th February, 2014.

26. The application for substitute consent was lodged with the Board on 25th April, 2014. It was made by PD Lane Associates, agents for Redrock. Redrock’s application form stated, *inter alia*, that the “extraction of stone outside the previously permitted boundaries of the stone quarry and below the previously permitted level of the stone quarry took place

mainly during the period 2010 to 2012.” The application was accompanied by a rEIS. As stated by Clarke C.J. in *An Taisce v. McTigue Quarries Limited* [2019] IESC 54, “the scope of an rEIS is remediation work only in the context of certain developments which originally had planning permissions, but which did not receive an EIA, a screening or an AA.”

27. The rEIS’ principal findings were that Acid Rock Discharge (“ARD”) source rock had been identified in the northeast face of the quarry and that the oxidation of sulphites was likely to have been occurring in this area between 2008 and 2010. It found a confirmed linkage present between the exposure of sulphide bearing rocks in the fault zone and the contamination of water within the quarry pond. It also believed that washing of the source rock had accidentally occurred, with wash water discharged back to the pond, which would have “greatly accelerated the deterioration in water quality”. The rEIS also found that boreholes in and around the quarry had quality issues similar to those in the quarry pond (low pH, high metals). It found a potential linkage between the contaminated pond water and the wider groundwater body but stated that the groundwater may have some naturally low pH. It found it unlikely that the quarry was impacting on surface water but stated that this linkage could not be discounted and may develop with time.
28. The rEIS reported that samples found on downgradient private wells PW6 and PW7 reported poor groundwater quality with a number of parameters outside of the drinking water limits. It found that as with the quarry wells, those private wells had been constructed as open holes which link shallow and deep water-bearing strata. This could result in cross contamination if upper water was contaminated and deeper water was not. It found that it was also possible that boreholes have intersected similar asset generating horizon (to that which occurred in the north eastern face of the quarry), therefore oxidation may be happening within the boreholes themselves. Accordingly, it found only a potential pollutant linkage present between contaminated groundwater in the quarry site and groundwater users.
29. Under the heading “Impact Determination”, the rEIS stated:

“The operation at the quarry has had a significant to profound impact on the water quality within the quarry floor and a potentially significant to profound impact on the groundwater quality in the vicinity of the site through the excavation and processing of sulphide bearing material, which originates in a relatively small faulted area encountered in the northeast boundary of the quarry.”
30. The rEIS advocated a number of short term, medium term and long term measures to address the ARD problem, which are referred to below.
31. The report of Wexford County Council was received by the Board on 27th May 2014. That report documented the planning and enforcement history of the site. It noted that there were a relatively high number of dwellings in close proximity to the quarry. The submission noted that the chapter of the rEIS on “Soils, Water and Geology” was

relatively comprehensive but that “[d]efinite remedial and mitigation proposals have not been submitted”. According to the planning authority, the impacts of the quarry on groundwater were a matter of “serious concern”. The report stated that “the rEIS does not comprehensively cover the issues of air, climate noise and vibration.” It went on to state:

“The proposed scheme to restore the site is deficient in a number of ways. The Council would not support any proposal to import materials to the site for remediation purposes. The size of the pond which would remain is not clear.”

32. Wexford County Council considered that substitute consent should be refused “primarily for the reason that the unauthorised work which it is sought to regularise has caused and/or significantly compounded the very serious issue of contamination of ground water”. It also proposed that should the Board decide to refuse the application, Redrock should be directed to undertake remedial measures to address the adverse effects on the environment, further to s.177L of the 2000 Act. It also suggested that the Board direct Redrock to cease operations at the quarry further to s.177L, in the light of adverse effects on the environment, and as the planning permission which had been granted in 2004 had expired.
33. Several other submissions were received by the Board, including those from prescribed bodies under the 2000 Act.
34. Inland Fisheries Ireland (IFI) commented on the low pH levels found, in particular, in the quarry sump/pond. It raised a concern regarding two tributaries of the Owenavorrhagh river. The Health Services Executive’s (HSE’s) submission contained complaints about the conclusiveness of information provided by Redrock in the rEIS and made reference to an absence of dust analysis for metal content. It made a submission akin to the IFI submission in terms of possible effects on the Owenavorrhagh river.
35. A number of Observations were received from residents in the area. One submission noted that it was logical that wells in the direction of the groundwater flow were at risk from groundwater pollution. It was submitted that water in private wells (PW6 and PW7) was contaminated and that the granting of substitute consent could lead to contamination of other wells. Another submission stated that these two wells were decommissioned because of contamination. A further submission was also received concerning, *inter alia*, groundwater quality.

#### *The Inspector’s Report*

36. The Board appointed an Inspector who carried out an inspection of the quarry on 25th August, 2014. He prepared a report dated 17th September, 2014.
37. Under the heading “Assessment – General Comments”, the Inspector stated that it was open to the Board to consider the issuance of a temporary cessation under s.177J of the 2000 Act. It was the Inspector’s opinion that quarrying at the eastern end of the quarry

was "clearly giving rise to a very significant current adverse effect on the environment, in the form of Acid Rock Drainage." As there was no recent quarrying or evident indication of any proposal to recommence quarrying, he did not see the benefit of invoking s.177J. As already referred to, s.177L of the 2000 Act provides that where the Board refuses substitute consent it may give a draft direction, in writing, requiring the applicant to cease all or part of the quarrying activity and/or to carry out remedial measures within a specified period. The Inspector, however, did not recommend such action noting that the issue of ARD would be better dealt with by the quarry operator and the local authority. This was because of the absence of any one specific and proven proposal to remedy the problem.

38. The Report went on to state:

"The quarry has expanded beyond the permitted boundary – particularly to the northwest, north and northeast...The difference between the permitted area of the quarry and the stated area of the quarry in this application for substitute consent is 1.36ha. The extraction of stone below the permitted level is stated to cover an area of 0.19ha – although drawings submitted with the application for substitute consent show an area below the permitted extraction level of significantly in excess of 0.19ha – which I calculate to be approximately 0.65ha."

39. The Inspector then commenced his analysis, entitled "ASSESSMENT-Environmental Impact Assessment", of the rEIS through its particular chapters, with particular emphasis on the chapters entitled "Soils, Geology and Water" (s.10.7) and "Air and Climate" (s.10.8).

40. At s.10.7.1 the Inspector states:

"An...(ARD) issue was identified at this quarry in 2012. Water in the quarry sump and quarry wells has low pH, high conductivity and elevated metal and mineral levels. The likely contamination source is an area of sulphide-bearing mud stones in a fault zone which has been exposed by quarrying..."

41. At s.10.7.2, he noted that the quarry site is located on the boundary of two river catchments, both tributaries of the Owenavorrhagh river. He stated at s.10.7.5 that limited groundwater sampling has been carried out at the quarry. In particular, levels of sulphate and metal remain elevated above drinking water standards. Hydrocarbon contamination was evident in a number of wells which could only come from the operations of the quarry itself given the ridge location. He found hydrocarbons leaking into the ground on the quarry floor from the diesel generator at the washing plant.

42. Local wells were sampled in 2012 and 2014. Private wells PW6 and PW7, located to the southeast of the quarry (and close to quarry well BH4), were found to have low pH values and elevated concentrations of metals. Water in the quarry pond was highly discoloured likely due to elevated levels of iron. The aggregate washing system was a closed-circuit system with water from the wash plant being allowed upon discharge to flow back over



the quarry floor towards the sump. Sulphide Oxidation and Oxidation Ferric Iron were the likely causes of the ARD at the quarry. The operation of the quarry was stated to have had a significant to profound impact on the water quality within the quarry floor and a potentially significant to profound impact on the groundwater quality in the vicinity of the site through the excavation and processing of sulphite-bearing material, which originated in a relatively small faulted area encountered at the northeast boundary of the quarry.

43. The Inspector noted that the remedial measures for ARD in the rEIS were divided into a number of options. Short term measures included the provision of alternative drinking water sources for PW6 and PW7, regularly monitoring of wells in the area and engineering works to cover exposed mudstones on the northeast face and limiting rock extraction to rhyolite, with no extraction in the northeast part of the quarry. Medium term remedial measures included the use of commercial grade chemicals to alter the pH of the sump water – either on-site or off-site, passive treatment of pond water in constructed wetland systems and hydraulic barriers to block the migration of contaminated ground water. He noted that the long term remedial measures in the rEIS might require planning permission and may take a number of years to complete.

44. The Inspector went on to state:

“The ARD problem at this site has been identified and is under investigation. The rEIS indicates that significant further investigation is required to achieve an understanding of the origin of the problem, the extent of the problem and the likely solutions. Water tables and ground water flow in the area are not fully understood...Not all private wells in the area have been tested and monitored, and the geology of these wells is not understood – particularly in relation to possible sulphide-bearing strata which the wells may have intersected. The rate of groundwater flow or the direction of flow is not fully understood...It is acknowledged that ARD could lead to contamination of water courses in the future, although such would be difficult to gauge without baseline records for water quality and nearby surface water bodies...The ridge feature on which the quarry is located represent a divide between groundwater bodies and the direction of groundwater flow. The rEIS does suggest a number of measures to deal with the problem of ARD, some of which are within the control of the applicant, but others which are not. In particular, the ability of the quarry owner to source an uncontaminated water supply for residents with contaminated wells has not been demonstrated. Some remediation measures would require planning permission, seem to be dependent on the expansion of the quarry. In light of so much uncertainty surrounding the geology and hydrogeology of the area, and surrounding the magnitude of the problem of ARD and workable affordable solutions to the problem, it would not be possible to state that this quarry has not had a significant negative impact on the environment. Faced with an application for substitute consent with so many unknowns, it would not be possible to state the development has not had likely significant impacts on the environment, and substitute consent should be refused

for the reasons and considerations set out within the recommendations section of this Inspector's Report."

45. Under the heading "Air and Climate", the Report stated, *inter alia*:

"There are a number of houses located in the vicinity of this quarry. In light of the potential for fugitive dust to have contained elevated levels of metals, quarrying at this site would have been likely to have had significant effects on the environment."

46. The Inspector's conclusions were in the following terms;

"The rEIS is in compliance with Articles 94 and 111 of the Planning and Development Regulations 2001 ["the 2001 Regulations"], as amended. The rEIS contains the information specified in paragraphs 1 & 2 of Schedule 6 of the Regulations. There is an adequate summary of the rEIS in non-technical language. The rEIS identified of the likely significant direct and indirect effects of the past operation of the quarry on the environment. I would be satisfied, having regard to the preceding subsections of this Report, that the operation of this quarry has had a likely significant impact on the environment by reference to Acid Rock Drainage and the impact of this on groundwater quality."

47. The Inspector duly recommended that the Board refuse substitute consent for the quarry, for the following reasons:

- "1. Having regard to the nature and scale of the subject development, the planning history of the site, and the provisions of Section 177K(2) of the Planning and Development Act 2000 (as amended), it is considered the operation of the quarry in this location gave rise to a danger to public health and to the ecology of the area by reason principally of "Acid Rock Drainage" contamination of ground water (but also from hydrocarbon contamination), and following on from this contamination of groundwater, a potential future threat to surface waters in the area. In addition, the use of contaminated water for aggregate washing may have resulted in fugitive dust emissions from this site, with elevated concentrations of metals, which may have impacted on residents of the area and road users. To grant substitute consent would, therefore, be prejudicial to public health, detrimental to ecology, and contrary to the proper planning and sustainable development of the area.
2. The remedial Environment Impact Statement states that quarrying outside of the permitted boundary took place between 2010 and 2012, a period clearly after the 3rd July, 2008. The Board is, therefore, precluded from granting substitute consent, having regard to the European Court of Justice ruling in case C-215/06, in relation to development that would have required environmental impact assessment, or screening in relation to environmental impact assessment, or where appropriate assessment was required."

*The Board's Decision*

48. The substitute consent application, the submissions and the Inspector's report were considered by the Board at a meeting held on 26th January, 2017. As noted in its Direction, the Board decided to refuse substitute consent generally in accordance with the Inspector's recommendation. Note 1 of the Direction states that having regard to the substantive reason for refusal as set out in the Reasons and Considerations part of the Direction, the Board decided not to attach refusal reason number 2 recommended by the Inspector. The Board also considered, having regard to the s.261A process in which Redrock and the planning authority had participated, that it would not be appropriate to revisit the period during which works were carried out on the site.

49. The Board's Decision sets out that substitute consent was refused for the following reasons:

"Having regard to the nature and scale of the subject development, the planning history of the site, and the provisions of Section 177K (2) the Planning and Development Act 2000 (as amended), it is considered that the operation of the development subject of this substitute consent application which included the deepening and lateral expansion of the quarry area gave rise to a danger to public health and to serious environmental pollution by reason principally of 'Acid Rock Drainage' contamination of ground water (but also from hydrocarbon contamination), and following on from this contamination of groundwater, a potential future threat to surface waters in the area. In addition, the use of contaminated water for aggregate washing may have resulted in fugitive dust emissions from this site with elevated concentration of metals, which may have impacted on residents of the area and road users. To grant substitute consent would, therefore, be prejudicial to public health, would be detrimental to ecology, and would be contrary to the proper planning and sustainable development of the area."

50. Pursuant to s. 177O (5) of the 2000 Act, the effect of the refusal of substitute consent under s. 177K is that the development is deemed to be unauthorised. Therefore, once in receipt of a copy of the Board's Decision it behoved the relevant Planning Authority to issue an enforcement notice. Accordingly, Wexford County Council took enforcement proceedings against Redrock. These proceedings stand adjourned pending the determination of the within judicial review proceedings.

**The S.37L application**

51. On 11th August, 2015 (during the currency of the substitute consent application), the Board wrote to Redrock's agent advising them of the coming into force of s.37L of the 2000 Act (inserted by Regulation 4 of S.I. No. 301/2015) and that it was therefore open to Redrock to apply for prospective development in conjunction with its then substitute consent application. On 8th November, 2015, the second applicant advised of its intention to apply under s.37L

52. Under cover of a letter dated 21st January, 2016, the second applicant applied to the Board pursuant to s.37L of the 2000 Act for:

- “(1) A proposed extension to existing quarry comprising of a stone extraction area (0.7986 hectares) together with landscaping, screen mount mounding & ancillary works,
- (2) Use of existing processing/stockpiling area, plant, offices/toilet/storage buildings, a bridge, water /oil storage tanks, entrance/access road, truck wheel-wash (proposed) and ancillary works including settlement ponds within the boundaries of the existing quarry subject of current application...”

53. The s.37L application was accompanied by a Hydrogeological and Geological report prepared by OCSC Consulting Engineers. In its executive summary, the OCSC report made reference to Redrock’s substitute consent application lodged in April 2014. OCSC stated that the scope of its work included a detailed review of the available information, site visit and geological walkover, groundwater monitoring exercise and a geophysical survey completed by Apex Geoservices. The report stated that the groundwater monitoring carried out did not show any major variation or further deterioration in groundwater quality from the monitoring which was carried out for the purposes of the rEIS which accompanied the substitute consent application. The report went on to state:

“The source of the poor water quality has been identified as the local bedrock and it is possible that the naturally occurring groundwater may have been poor in the absence of the quarry. However, quarrying and processing the high sulphide-[bearing] rock is likely to have accelerated any natural process.

The proposed extension is relatively small in comparison to the existing quarry. It is not in the area of exposed mudstone and part of the application includes the restoration (and sealing) the exposed mudstone... This element and the proposed extension could be an integral part of managing and remediating the ARD issue for the overall site as sealing the mudstone is key to the remediation.

The extension has the potential to add to the ARD issues on site if additional sulphide bearing material is exposed and not managed appropriately. The recent geophysical survey did not definitively resolve that additional sulphide material is or is not present. However, the results of the survey will enable targeting of boreholes to more definitively investigate this issue. If sulphide [bearing] material is encountered, it can be managed under an Extraction and Materials Management Plan... A number of recommendations were made in relation to the existing quarry in the rEIS and these recommendations are still valid. These recommendations cover the control of ARD generation and the assessment and treatment of the low pH water the quarry pond and monitoring wells.

It is further recommended that prior to any extension of quarrying that rotary core drilling is used to validate zones delineated by the geophysics in the area of the proposed extension.” OCSC were of the view that the proposed extension may offer an opportunity to complete the remediation outlined in the Reiss AS it can yield soils, space and resources to aid in the process.”

54. OCSC went on to recommend that the remedial measures as outlined in the rEIS be completed, including the carrying out of a hydrogeological assessment of the areas serving PW6 and PW7, and regular monitoring of quarry wells.
55. On 21st March, 2016, the Board received Wexford County Council's submission in relation to the s.37L application. It stated, *inter alia*, that "further quarrying at this site should not be authorised" and that "the implementation of measures which are deemed to be necessary to address the issue should not be dependent on further extraction at the site being authorised".
56. The second applicant responded on 19th April, 2016 enclosing a further report from OCSC. This report stated the second applicant had "affirmed its commitment to addressing the ARD issues on site. The proposed extension will provide the required resources, in terms of materials (clay and subsoil for sulphide rock armouring and pond construction) and finances, to enable the remediation of the site in a sustainable manner." It was also pointed out that the period of extraction for the purposes of the S.37L application was estimated to take between three and five years.
57. The inspection of the site by the Board's Inspector took place on 7th December, 2016. The Inspector's Report is dated 9th December, 2016. In his Report he noted that the quarry was operating at a low level on the date of the inspection and that "[a]dditional quarrying has been undertaken at the western end of the quarry with the excavation of a pit on the quarry floor, which has since flooded and was full of reddish brown-coloured water on the date of site inspection". The Report noted the submission of Wexford County Council that permission should not be granted for further extension of the extraction area until the ARD problem had been comprehensively addressed. He noted the concern of the IFI that the extension of the quarry might add to the ARD difficulties, as had been noted in the OCSC Report which accompanied the s.37L application. The Inspector also recorded the HSE's submission which stated, *inter alia*, that there had been no remediation of the ARD problem and that time limits for remediation should be specified with any grant of planning permission. The Observations filed by residents in the area were also noted and summarised.
58. In his "Assessment", the Inspector noted that the principal issues of the proposed development "relate to potential contamination of ground water and surface water; and likely impact on the wells of houses in the area, noise, dust, vibration, traffic." Under the heading "Soils and Geology", he stated as follows:

"The proposed extension area is not immediately adjacent to the exposed sulphide-bearing mudstones. It is acknowledged that the proposed development has the potential to exacerbate the ARD problem, if further veins of sulphide-bearing mudstones are unearthed during expansion. The ARD problem is estimated to have commenced sometime between 2008 – 2010 with the sulphide-bearing mudstones were exposed. Recent geophysical work did not definitively resolve that additional sulphide-bearing rock is not present within the extension area. ...I would note that the ARD problem which has existed at this quarry since 2008 – 2010 has not been

dealt with. I further note that quarrying at the western end of the quarry has breached the water table, with the former pit now filled with reddish-brown-coloured water ...

As part of the application to extend the quarry, it is proposed to seal the exposed sulphide-bearing mudstones in the north eastern sector of the quarry. This is a key to remediation of the overall quarry. Just precisely how this is to be done, is not clear. The flooding of the eastern end of the quarry has resulted in inundation of the toe of the sulphide-bearing mudstones, so that water now cuts off access from below-access from above remaining a possibility. A number of potential solutions are put forward within the substitute consent planning application-varying from short-term to long-term, but no one solution is definitively proposed. A solution has not been put forward within this proposed planning application for extension. It is stated in the substitute consent application, that additional quarrying in the extension area will fund the remediation measures necessary to deal with ARD."

59. Under the title "Surface and Groundwater", the Inspector found "insufficient information in relation to groundwater impacts, to allow of a recommendation to grant planning permission in this instance." He further stated:

"There can be no certainty that the proposed expansion will not exacerbate the existing ARD problem at this quarry, particularly where the composition/pollution levels of different strata of the main quarry pond are not known. ...Extraction of water of the principal quarry pond for washing aggregate could lead to public health problems in the form of fugitive dust blown from stockpiled aggregate. Permission should be refused for the above reasons."

60. Under the heading "Air Quality" the Inspector stated, inter alia:

"I would be concerned that the expansion of this quarry could result in fugitive dust (contaminated with metals) being carried off the site, which would be prejudicial to public health, arising from an identified ARD problem within the existing quarry."

61. In the course of his recommendation that the permission be refused the Inspector noted:

- "1. Geophysical survey work at this site has not determined, beyond reasonable doubt, that sulphide-bearing mudstone seams may lie within the proposed quarry extraction area. Rotary core drilling samples would be required to establish with some degree of certainty just what type of rock exists within the proposed extraction area. The excavation of such sulphide-bearing seams, should they occur, could result in exacerbation of the already existing ...(ARD) problem within this quarry, which would result in contamination of ground and surface waters, which would be prejudicial to public health and to the ecology of water courses in the area.

2. Blasting for rock within the proposed extension could result in the creation of preferential flow paths within the fissured bedrock, which could hasten the dispersion of contaminated water (through groundwater) in the principal quarry pond which is contaminated by ARD. This in turn could impact on private wells located down-gradient of the groundwater flow direction, which would be prejudicial to public health.
  3. The drawings submitted with this application do not accurately reflect the level of quarrying at this site. In particular, the water table has been breached at the western end of the overall quarry and the excavated pit now filled with reddish/brown-coloured water. There is no information on the composition of this water body or how it connects (if at all) the existing quarry pond wherein an ARD problem has been identified.
  4. Continued extraction of water from the principal quarry pond, which is contaminated by ARD, could result in the escape of fugitive dust from stockpiles of washed aggregate, which could negatively impact on the health of humans and farm animals. The proposed development would be prejudicial to public health and to animal health.
  5. It is proposed to extract rock to a level of 142.5mOD in the extension area. The principal quarry pond, contaminated by ARD, is currently at a level 144mOD. There is a danger that the proposed extension area could be inundated to a shallow level with contaminated waters from the principal quarry pond. This would result in contaminated waters being brought closer to down-gradient private wells in the south east of the quarry, which would be prejudicial to public health."
62. The Board's Decision in respect of the s.37L application issued on 15th February, 2017 (the same date as the substitute consent decision). The Board determined that the application be refused. The Decision reads as follows:

"The Board is not satisfied, that:

- the Geophysical survey work carried out at the site has determined, beyond reasonable doubt, that sulphide-bearing mudstone seams lies within the proposed quarry extraction area and that the excavation of such sulphide-bearing seams, should they occur, could result in exacerbation of the already existing...(ARD) problem in this quarry, which would result in contamination of ground and surface waters, and would be prejudicial to public health and to the ecology of watercourses in the area;
- blasting for rock within the proposed extension area would not result in the creation of preferential flow paths within the fissured bedrock, which could hasten the dispersion of contaminated water (through groundwater) from the principal quarry pond which is contaminated by Acid Rock Drainage which could in turn impact on private wells located down-gradient of the groundwater flow direction, which would be prejudicial to public health;

- the extraction of rock in the proposed extended area to a level of 142.5mOD would not give rise to inundation with waters from the principal quarry pond which has an indicated level of 144mOD and is contaminated by Acid Rock Drainage. This would result in contaminated waters being brought closer to down-gradient private wells to the south east of the quarry, which would be prejudicial to public health, and
- the continued extraction of waters from the principal quarry pond, which is contaminated by Acid Rock Drainage, would not result in the escape of fugitive dust from stockpiles of washed aggregate, which could negatively impact on the health of humans and farm animals. The proposed development would be prejudicial to public health and to animal health.

The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.”

63. The Decision stated that in making its decision the Board had regard, *inter alia*, to the provisions of the 2000 Act, in particular s.37L, the planning authority’s report, the report of the Board’s Inspector, the Board’s decision to refuse substitute consent and the nature and scale of the development.

**Leave for judicial review**

64. By Order of the High Court (Binchy J.) of 11th April, 2017, leave was granted to the applicants to challenge the Board’s refusal to grant substitute consent and the s.37L application for further development of the quarry.

**The substitute consent grounds**

65. The principal ground upon which Redrock seek certiorari and declaratory relief in respect of the refusal of substitute consent are as follows:

- The Board failed to discharge its obligations to carry out an EIA in accordance with the requirements of s.171A and/or s.172 of the 2000 Act. It is pleaded in particular, that the Board:
  - (a) Failed to identify, describe or assess in accordance with the relevant provisions the direct and indirect effects of the proposed development on soil and water in particular and/or the interaction between the effects on human beings, soil and/or water;
  - (b) Failed to comply with s.172 (1D) in not requiring further information from Redrock in circumstances where the Inspector found much uncertainty in relation to the geology and hydrogeology of the quarry and in relation to the magnitude of the problem of ARD and workable or affordable measures to remediate the ARD problem. The decision of the Board did not provide any evidence or record of the Board itself having considered the adequacy of the EIS which accompanied the substitute consent application. The Board failed to comply with s.172 (1D) to require Redrock to furnish such further information as the Board considered necessary to remedy the defect or deficit in information identified by the Inspector.



- (c) The Board failed to comply with s.172 (1E) in so far as it failed to require Redrock to furnish such further information as would have removed the uncertainty concerning geological and hydrological conditions, the magnitude of the ARD problem and workable/affordable solutions to that problem, which further information was necessary to enable the Board to carry out an EIA under s.172. In so far as the Board did not consider it necessary to obtain such information to enable it to carry out an EIA, the Board's decision was irrational and/or unreasonable.
  - (d) The Board's decision is invalid as it contains no record of the Board having carried out an EIA as required by s.171A.
  - (e) The Board failed to consider whether the rEIS complied with Article 94 of the 2001 regulations. In so far as the Board relied on the Inspector's conclusion that the requirements of the 2001 Regulations were met, that conclusion was unreasonable and/or inconsistent and incompatible with the finding made by the Inspector concerning the deficit in information relating to geology and hydrogeology, the magnitude of the problem of ARD and workable/affordable solutions to that problem. In the circumstances the Board was in breach of its obligations under Article 111 (2) of the 2001 Regulations to issue a notice under s. 132 requiring Redrock to submit further information as was necessary to remedy the information deficit highlighted by the Inspector.
- Neither the Board's Direction or its Decision provide any evidence or record of the Board having carried out an EIA for the purposes of S.171A and/or S.172 of the 2000 Act.
  - In breach of fair procedures, the Board failed to offer Redrock an opportunity to respond to submissions received from the HSE. Further, or in the alternative, no reasons were given for the decision not to circulate the HSE submission. Further, the decision not to circulate was irrational in circumstances where the Board circulated other submissions.
  - The Board's decision was based on speculative considerations and/or unreliable information. Specifically, the Board acted ultra vires in deciding to refuse substitute consent in the absence of adequate or reliable information relating to the geology and hydrogeology of the quarry and/or the magnitude of the ARD problem and/or the workable/affordable remediation measures. By reason of the said failure, the reasons and considerations for refusal were speculative and unsubstantiated by the evidence before the Board.
  - The Board's conclusion that the use of contaminated water for aggregate washing "may" have resulted in fugitive dust emissions which "may" have impacted on residents of the area and road users were speculative and not substantiated.
  - In failing to seek further information prior to issuing its decision on the substitute consent application, or alternatively failing to consider the imposition of a condition

requiring details of remediation to be agreed between Redrock and the planning authority, the Board abdicated its responsibility to address remediation.

- The Decision of the Board was oppressively unfair and in breach of the principle of proportionality and an unjust attack on property rights in circumstances where the Board could have requested further information to assess the geological and hydrogeological conditions, the ARD problem and the appropriate remedial measures that ought to be implemented. The Board's decision was wholly unreasonable in circumstances where the substitute consent application was the last opportunity for Redrock to have the planning status of the quarry regularised.

### **The s.37L grounds**

66. The grounds upon which *certiorari* of the s.37L Decision is sought are as follows:

- The refusal was invalid in so far as the Board had regard to an irrelevant or *ultra vires* consideration, namely the Decision to refuse substitute consent, which Decision was *ultra vires* and invalid;
- The refusal was invalid in so far as the first bullet pointed reason in the Decision does not make sense. The Board appears to have refused the s.37L application on the basis that the second applicant did not satisfy the Board beyond a reasonable doubt that there were sulphide bearing seams within the proposed quarry extraction area. Further or in the alternative, this was not a reasonable approach to decision making, appears perverse and imposed too high a standard of proof on the second applicant in circumstances where the Board did not provide any opportunity to address the implied deficit in information;
- The refusal under s.37L was invalid in so far as the reasons and consideration for refusal are tentative and speculative. Further, or in the alternative, it is apparent from the observations of the Inspector that the inadequacy of information in the substitute consent rEIS made it difficult or impossible for the Inspector or the Board to assess the likely effects on the environment of the proposed expansion under s.37L application, as is reflected in the fourth bullet pointed reason for the S.37L refusal.

The judicial review application is grounded on the affidavit of Mr. Billy O'Leary, Quarry Manager with Redrock, sworn 11th April, 2017.

### **The Board's statement of opposition**

67. In its statement of opposition, the Board pleads that both decisions were reached lawfully and properly. It asserts that it carried out its EIA function in the context of the substitute consent application fully and properly. It is asserted that there was no obligation on the Board under s.172 (1D) or (1E) to afford Redrock an opportunity to provide further information. There was no specific obligation on the Board to formally recite that it considered the adequacy of the material before it. It is pleaded that there is no obligation on the Board to provide a developer an opportunity to mend its hand. In so far as Redrock presents s.172 (1D) as so providing, that is wrong in law. The Board did not

request further information because it determined that it had sufficient information before it in order to reach the conclusion it did.

68. It is pleaded that the Board clearly determined that the operation of the development the subject of the substitute consent application gave rise to a danger to public health and to serious environmental pollution by reason principally of ARD contamination of groundwater (but also from hydrocarbon contamination). There was sufficient information before the Board on which it could reach this conclusion. The Board's determination in this regard was fully open to it on the evidence before it. Redrock's rEIS accepted the existence of ARD issues. There was no obligation on the Board to seek further information regarding remediation measures. The information before the Board was that there was no certainty that the remedial issues proposed would remedy the issues at the quarry.
69. The allegation that the Board's Decision was "invalid" because it failed to "record" an EIA is denied. The Board clearly carried out an EIA and thus fully complied with s.172 of the 2000 Act.
70. There is no inconsistency between a determination that the rEIS was adequate and the Inspector's conclusions and/or the Board's determination that substitute consent should be refused. The historic impacts on the environment of the quarry were clearly understood. It is denied that the Board did not have sufficient information to determine the application for substitute consent.
71. There was no requirement for the Board to circulate all submissions or observations received to Redrock for comment. The decision not to circulate the HSE submission did not render the Board's Decision unlawful.
72. There was no disproportionate or unjust attack on Redrock's property rights. Those rights are subject to regulation as provided in the form of the 2000 Act.
73. With regard to the s.37L grounds, the Board contends that it was entirely proper, in determining the s.37L application, to have regard to the Board's determination on the substitute consent application.
74. It is pleaded that given the accepted existence of ARD at the quarry site, the first bulleted reason for refusal in respect of the s.37L application was entirely proper and lawful. There is no basis for the complaint that the Board's reasons were tentative or speculative. The reasons given for the refusal were intelligible and lawful. The Board was fully entitled to reach the conclusion it did on the s.37L application.

On 2nd November, 2019, Mr. Chris Clarke, Secretary to the Board, swore an affidavit verifying the facts set out in the Board's statement of opposition.

#### **The applicants' submissions**

75. What occurred with regard to the substitute consent application was a refusal by the Board. Under s.177 of the 2000 Act, the Board is empowered to give certain directions before making a decision, or to impose conditions with the decision or to direct a

cessation of works pending a decision. None of those steps, however, were carried out by the Board – it simply refused the application. The upshot of the Board’s Decision on the substitute consent application is that Redrock has been left with no further option, given the provisions of s.177O of the 2000 Act. The only mechanism left is enforcement proceedings, the outcome of which is always uncertain.

76. It is submitted that enforcement proceedings presently pending in the Circuit Court are not the solution in this case and, in any event, such proceedings will leave the applicants in an impecunious state.
77. On procedural grounds, the Board were obliged to give close adherence to the provisions of the 2000 Act given that the substitute consent application was Redrock’s last opportunity to remedy matters.
78. It is Redrock’s contention that the Board failed to have regard to its jurisdiction and its obligations under s.177, including the requirement to consider remediation for the site in question. The Board failed to do that and failed to give Redrock the opportunity to provide further information to assuage the Board’s concerns.
79. Furthermore, if the Board was concerned regarding contamination at the site, then it should have directed the cessation of operations or provided a mechanism to resolve the issue by imposing conditions on any consent granted. By failing to do so, the Board has abdicated its responsibility under the legislation. All of the evidence points to the fact that if the quarry is left in its present condition it is not feasible for Redrock to operate it.
80. The Board was obliged to point out in its Decision specific problems such as could lawfully deprive Redrock of substitute consent. If that is not done, the Board cannot refuse substitute consent. There must be a concrete basis for a refusal.
81. Redrock had proposals before the Board to contain what had happened in the past. It is submitted that refusal cannot be just based on a reference to an unquantified effect on the environment in the past. Impacts on the environment have already occurred in the past, therefore, a different test must apply before substitute consent is refused. Redrock put forward solutions and quantified the effect on the environment. Counsel points to the fact that had the mudrock not been exposed, in any future planning application Redrock would have received planning permission as there would have been no reason to suspect the existence of mudrock.
82. While the rEIS was not clear as to whether the contaminated water should be treated on or off the quarry site, it is submitted that the rEIS acknowledges that treatment works will require future licences and consents. This is the norm in a great many planning applications regarding quarries and something which confronts the Board in a great many cases. The question is how is the Circuit Court to treat the issue of additional necessary consents or consider how the remediation of the site is to be achieved given that it is not imbued with the technical expertise which the Board has in considering such matters. In

such circumstance, it was illegal for the Board to put matters into the hands of the Circuit Court.

83. The rEIS was Redrock's outline of what could be done to remedy the problems in the quarry. While the rEIS was not absolutely certain with regard to all outcomes, it did deal with what presented on the ground and gave short, medium and long term solutions and prescribed that certain tests be carried out. It is submitted that Redrock should have been enabled by the Board to give effect to the solutions it proposed in the rEIS. This is particularly so in circumstances where Redrock was directed by the planning authority to apply for substitute consent.
84. It was not sufficient for the Board to refuse substitute consent just because a number of remedial options were set out in the rEIS. Nor was it open to the Board to say that just because the rEIS did not have all the answers substitute consent should be refused. While Redrock acknowledges an adverse effect occurred on wells and water in the quarry because of the ARD issue, it is denied that there was an effect on public health, as found by the Board.
85. It is submitted that the Board did not as a matter of fact decide that there was a danger to public health. The Board reached no positive or negative conclusion in that regard; it just said there was not enough information and the Board suspected that what occurred in the past gave rise to problems. The Board did not say that Redrock's proposals to remediate would give rise to a danger to public health. Furthermore, Redrock does not accept that there was necessarily an adverse impact on private wells given the contents of the rEIS.
86. As demonstrated by the rEIS, solutions can be achieved once the ARD and acid water problem is contained. It is submitted that there was evidence before the Board as to how the problem at the quarry could be remedied. In this regard, the rEIS had attached to it a preliminary report of SLR Consulting Ltd dated 22nd April, 2014. Contrary to the Inspector's conclusions, the SLR report stated that there were relatively few "unknowns". It is submitted that the Board failed to engage with the containment/remedial proposals which were set out in the SLR report by way of taking them into account and/or seeking further information, if it was felt further clarity was necessary from the experts.
87. The Board's rationale for refusal of substitute consent is future based without adequate consideration of the remedial measures proposed. This is in circumstances where all damage occurred in the past. It is therefore contended that the Board's decision is illogical and irrational on its face. Redrock is not advancing a standard irrationality test, rather it is contended that on their face, the Board's conclusions as set out in the Decision do not withstand scrutiny. Thus, the Decision defies reason.
88. The Board did not address the proper issue. The Board's position is that Redrock cannot get substitute consent because if it had applied for planning permission in the first instance it would not have received it. It is submitted that the Board's approach is wrong as the substitute consent regime is process oriented and not outcome oriented. The Board

is required to consider the effect on the environment past and future and whether the situation is so bad as merits the closing down of the site.

89. It is submitted that it was on the foregoing basis that Redrock was directed to apply for substitute consent. Yet for the very same reasons Redrock was refused substitute consent-a catch 22 situation. It cannot be the case that the *ab initio* defects would automatically debar the getting of substitute consent. The legislation requires the Board to look at what has happened and what will happen and make its decision based on that analysis. The standard by which the Board must make its decision is the proper planning and sustainable development of the area. The Board's position in this case is that it has to go back in time to see how a prospective planning application would have been treated. That is not the test. The Board must look at what proper planning and sustainable development means for the present. Hence, Redrock takes issue with the Board's decision, namely "it is considered that that the operation of the development...gave rise to a danger to public health and to serious environmental pollution..." It is submitted that that is merely the circumstance that triggered the direction to Redrock to apply for substitute consent in the first place, thus it cannot be sufficient to be the basis for a refusal of substitute consent.
90. The Inspector's conclusion that the likelihood of fugitive dust emissions should preclude the grant of substitute consent was wrong given that his conclusion amounted only to a likelihood that dust emissions could have significant effect on the environment. Accordingly, insofar as the Board determined the use of contaminated water for aggregate washing "may" have resulted in fugitive dust emissions with elevated metals and a resulting possible impact on residents in the area, the very function of an rEIS (as prescribed by s.177F and s.177G of the 2000 Act) is to put forward details of the remedial measures to address any significant adverse effects on the environment. This was done in the present case but the Board failed to appreciate the proposals put forward. Furthermore, the mere possibility of something happening in the past is not a solid ground for refusal of substitute consent. Before refusing substitute consent, the Board ought to have made a formal positive finding of fact or otherwise provide certainty on this issue.
91. It is contended that the Board should have considered a split decision, that is to allow some development on the site and delay the rest. In particular, the Board should have had regard to the fact that Redrock had planning permission for the main quarry site.
92. The upshot of the Board's refusal therefore is that Redrock is now involved in enforcement proceedings in the Circuit Court and the Circuit Court must now fill in the gaps left by the Board as a result of it having wrongly applied the law.
93. Pursuant to s.177K(2)(d) of the 2000 Act, the Board must have regard to "the significant effects on the environment...which have occurred or which are occurring or could reasonably be expected to occur because the development concerned was or is proposed to be carried out". Thus, there has to be an assessment of past and future effect.

Counsel submits that the fact of past significant adverse effects cannot of itself be the basis of a refusal.

94. In aid of his submissions, counsel cites *Hayes v. An Bord Pleanála* [2018] IEHC 338. He contends that there was no adherence by the Board to Redrock's remedial proposals, contrary to the acknowledged centrality of such a consideration, as acknowledged by Ní Raifeartaigh J. in *Hayes v. An Bord Pleanála*.
95. With regard to the s.37L Decision, it is submitted that insofar as the refusal is predicated on the Board's Decision on the substitute consent application, the s. s 37L decision cannot stand because the substitute consent Decision is invalid for the reasons advanced by Redrock.
96. It is further contended that the Board's first bulleted reason for refusal does not make sense and/or imposes too high a standard on the second applicant.
97. Furthermore, in his first recommended reason for refusal of the s. 37L application, the Inspector (and the Board in its Decision) applied the wrong legal test in seeking to establish whether geophysical survey work had established that sulphide – bearing mudstone seams lie within the proposed quarry extraction area. Before making his finding, the Inspector should have recommended that the Board seek further information from the second applicant. Counsel contends that this was the proper approach once uncertainty was identified in the information which was before the Board.
98. Insofar as the s.37L refusal was predicated on the principal quarry pond remaining contaminated, no account was taken by the Board of the proposals contained in the rEIS furnished with the substitute consent application to remedy this problem, or to the fact that the Board, in granting the s,37L permission could have conditioned that there would be no rock blasting in the extension area.
99. The second recommended refusal reason by the Inspector (reason two in the Board's Decision) could have been addressed by the recommendation that conditions be attached to the planning permission directing that there would be no blasting for rock within the proposed extension area.
100. With regard to the third recommended reason for refusal, counsel contends that the matters therein contained were never put to the second applicant and that, accordingly, the second applicant should have been afforded the process set out in s.172(1D) and s.172(1E) process.
101. It is further submitted that the Inspector's recommended fourth reason (reason four in the Board's Decision) has no merit because the dangers referred to by the Inspector will continue by reason of the failure to afford the second applicant an opportunity to redress matters by the provision of further information as to remedy.
102. Counsel also takes issue with the Inspector's fifth recommended reason for refusal (reason three in the Board's Decision) on the basis that no account was taken of the

proposals made in the substitute consent rEIS to contain the ARD dangers by covering and sealing the exposed rock.

**The respondent's submissions**

103. It is an incorrect assumption on the part of Redrock that substitute consent exists to regularise a development and that refusal should be the exception. Redrock's erroneous understanding of the substitute consent process infuses all of its submissions. The substitute consent regime first and foremost deals with unauthorised developments.
104. Redrock's contention that substitute consent is there to remedy a development is not correct. Substitute consent is the statutory regime whereby the Board may receive applications for such consent.
105. It is not correct to say that if substitute consent is refused the environmental problems can never be remedied. In the present case, the Board's view was that the difficulties could be resolved via the enforcement provisions of the 2000 Act. In this case, the Planning Authority has served enforcement proceedings on Redrock. It is submitted that the Board was entitled under the statute to leave the remedy in this case to the Planning Authority for it to act via its enforcement powers.
106. It is contended that the Board was entitled to take the view that Redrock's substitute consent application did not merit the granting of substitute consent and that what was put before it was not sufficient to merit a direction from the Board regarding remedial measures.
107. It is accepted that pursuant to s.177K, the Board in making its decision on the substitute consent application had to have regard to remediation. It is clear from the contents of Note 3 of its Direction that the Board had regard to the remediation proposals set out in the rEIS. Therefore, there was no inherent irrationality on the part of the Board in refusing substitute consent.
108. It is submitted that there is no basis for the contention that the s.37L application sought consent for the suite of remedial measures set out in the rEIS which accompanied the substitute consent application. It is clear from the contents of the OCSC report, which accompanied the s.37L application, that the remediation referred to was confined to a proposal to seal the mudstone/ARD in the original quarry site (as contained in the rEIS). What was stated in the OCSC report was that the proposed extension of the quarry would offer an opportunity to complete the remediation of the original quarry as the extension "can yield soils, space and resources to aid in the process".
109. It was the Board's function to look at the proposed remediation measures in the rEIS which accompanied the substitute consent application. The Board duly concluded those proposals were not specific enough to be the subject of an s.177L direction on remediation. It is submitted that it was entirely within the Board's jurisdiction to reach that conclusion.



110. Counsel submits that the Board's thinking and rationale is only illogical if the Court is minded to accept Redrock's submission that the Board's function was confined to the remedying of the problem in the quarry. That suggestion however is clearly wrong, having regard to the provisions of s.177K where the Board is mandated to consider "the proper planning and sustainable development of the area".
111. It is not for the Court to step into the Board's shoes. This is an important factor in the context of Redrock's invitation to the Court to say that the Board either should have sought further information from Redrock before making its decision or applied conditions to any substitute consent granted, or alternatively, given directions to Redrock by way of a draft decision.
112. Contrary to Redrock's submission, there was no obligation on the Board to give a split decision. In this regard, counsel cites *Nestor v. An Bord Pleanála* [2018] IEHC 547.
113. There is no merit in the contention that the Board, in making its Decision on the s.37L application, should not have had regard to its Decision on the substitute consent application. As the substitute consent Decision was properly made by the Board, there can be no merit in this argument.
114. The reasons given by the Board for refusing the s.37L application were not speculative. Nor is the Board's first bulleted reason illogical; it was not unreasonable for the Board to refuse permission on the basis that extension of the quarry has not been shown not to be hazardous. This is so given what is set out in the OCSC report. In respect of the second bulleted reason given by the Board, it was eminently sensible for the Board to be concerned that no proper case had been made regarding how blasting would not add the opening of fissures. The Inspector's Report expressed concern that blasting "may result in creation of preferential pathways for the escape of water from the quarry pond-which already drains to groundwater, with consequent impacts for wells located down-gradient of the quarry." With regard to the Board's third reason, there is no element of speculation in that regard. The Inspector's Report stated that the winter water level at the main quarry pond was "indicated as being above the level of the proposed lowest level working which would potentially necessitate the de-watering of the extension area or the creation of further sumps within the quarry." The Inspector noted that this could result in the accidental escape of existing polluted waters from the principal quarry pond into the extended working area with consequences for downgradient wells and drinking area for farm animals to the south east. Accordingly, the Board were correct to be concerned that flooding of the quarry site would result in contaminated waters being brought closer to downgradient private wells, which would be prejudicial to public health. With regard to the fourth reason for refusal, the Board referred to the continued extraction of water from the principal quarry pond which is contaminated by ARD. The Board stated that it was not satisfied that same would not result in the escape of fugitive dust from stockpiles of washed aggregate, which could negatively impact on the health of humans and farm animals.

115. It is submitted that the Board's reasons cannot be said to be of too high a standard. There was a clear issue with the quarry site and the Board concluded that permission should not be granted to extend. The decision fell clearly within the Board's area of expertise.

### **Considerations**

116. The standard of review by a Court of a decision of the Board was recently set out in *North Meath Wind Farm Limited v. An Bord Pleanála* [2018] IEHC 107 where Twomey J. stated:

*"The judicial review of planning decisions in the Irish courts is a very common occurrence and there is no need in this judgment to analyse in any detail the extensive number of cases which deal with this issue. This Court proposes to instead adopt the succinct analysis of the nature of judicial review in a planning matters, as set out by Hedigan J. in Dunnes Stores v. An Bord Pleanála [2016] IEHC 226 at para 8.2:*

*'Judicial review is not available as a remedy to correct errors or to review decisions so as to render the High Court a Court of Appeal from the decisions complained of (see State (Abenglen Properties) v. Dublin Corporation [1984] I.R. 381). The system of judicial review is radically different from the system of appeals. When hearing an appeal, the Court is concerned with the merits of the decision under appeal. When subjecting some administrative act or order to judicial review, the Court is concerned with its legality. On an appeal, the question is 'right or wrong?' On review, the question is 'lawful or unlawful?' (See Dunne v. Minister for Fisheries and Forestry [1984] 1 I. R. 230, at p. 237). The nature of judicial review of expert bodies was addressed in Henry Denny & sons (Ireland) Ltd. v. The Minister for Social Welfare [1998] 1 I. R. 34, where Hamilton C. J. stated at pp. 37 & 38 that:*

*"It would be desirable to take this opportunity of expressing the view that the court should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by tribunals such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgements on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review.'*

*There is, moreover, a presumption that the decisions of a body such as An Bord Pleanála are valid until the contrary is shown. One must assume, in the absence of any evidence to the contrary, that statutory bodies such as the Board in this case, exercise their powers and discharge their functions in a lawful and proper manner (see Lancefort Ltd v. An Bord Pleanála [1998] IEHC199). The burden of proof of*

*establishing any error of law or fundamental question of fact leading to an excess of jurisdiction, or of demonstrating such unreasonableness as flies in the face of fundamental reason and common sense, rests on the applicant in proceedings such as these. Once there is any reasonable basis upon which the planning authority or the Board can make a decision in favour of or against a planning application or appeal, or can attach a condition thereto, the Court has no jurisdiction to interfere (see Weston Ltd. v. An Bord Pleanála [2010] IEHC 255)."*

117. As stated by Haughton J. in *Ratheniska v. An Bord Pleanála* [2015] IEHC 18 "...the Board's decisions enjoy a presumption of validity until the contrary is shown". He went on to state: -

"68. As to the standard of review applicable to the Board's decision, in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 Finlay C.J. stated: -

*"It is clear from these quotations that the circumstances under which the court can interfere on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare. It is of importance and, I would think, of assistance to consider not only as was done by Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 the circumstances under which the court can and should intervene, but also in brief terms and not necessarily comprehensively, to consider the circumstances under which the court cannot intervene."*

*The court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it.*

...

*Under the provision of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of a planning authorities and the Board which are expected to have special skill, competence and experience in planning questions. The court is not vested with that jurisdiction, nor it is expected to, nor can it, exercise discretion with regard to planning matters.*

*I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."*

...

71. *The deference that a court should give to the decisions of different administrative bodies, depending on their nature and the extent of their expertise, was considered by Clarke J. in Ashford Castle Ltd. v. SIPTU [2007] 4 I.R. 70. In the course of this judgment he stated:-*

*"At the other end of the spectrum, expert bodies may be required to bring to bear upon a situation a great deal of their own expertise in relation to matters which involve the exercise of an expert judgment. Bodies charged with, for example, roles in the planning process are required to exercise a judgement as to what might be the proper planning and development of an area. Obviously in coming to such a view the relevant bodies are required to have regard to the matters which the law specifies (such as...a development plan). However a great deal of the expertise of the body will be concerned with exercising a planning judgment independent of questions of disputed fact. In such cases the underlying facts are normally not in dispute. Questions of expert opinion (such as the likely effect of a proposed development) may well be in dispute and may be resolved, in a manner similar to the way in which similar issues would be resolved in the courts, by hearing and, if necessary, testing competing expert evidence. However above and beyond the resolution of any such issue of expert fact, the authority concerned will also have to bring to bear its own expertise on what is the proper planning and development of an area."*

#### **The substitute consent Decision**

118. With the guidance set out in the above quoted jurisprudence in mind, I turn now to the specific grounds relied on by Redrock in support of its contention that the Board's substitute consent Decision was wrong in law, procedurally infirm and did not meet the requirements of the legislation, all of which, it is submitted, amount to a dereliction of its duties by the Board.

#### *The complaint that the Board did not conduct an EIA*

119. Section 172(1) of the 2000 Act mandates the carrying out of an EIA. Section 172A provides that an EIA must identify, describe and assess the direct and indirect effects of a proposed development on the environment. Pursuant to s.172 (1J)(b), the Board shall make its evaluation of the direct and indirect effect of the development on the environment available to the applicant and the public. Redrock contends that none of the above was done. It is submitted that the Board has given no explanation or evaluation of the interaction between the quarry and the environment.
120. It is submitted that the Board did not do an EIA in respect of what was contained in the rEIS. In the absence of an EIA, Redrock argues that it does not know how the Board arrived at its decision or the basis for the reasons given for refusal. It is also argued that the Inspector did not carry out the necessary EIA. Furthermore, Redrock contends that

insofar as the Inspector's report contains an EIA (which is denied), the Board did not refer to this in its Decision or say that it was adopting the Inspector's EIA.

121. While it is accepted that in many instances the required EIA is often found in the Inspector's report and then adopted by the Board, it is Redrock's contention that there has been no formal adoption of the Inspector's EIA by the Board. Pursuant to s.172(1J)(d), the Board has to, *inter alia*, make its evaluation of the direct and indirect effect of the proposed development on the environment available to the applicant for substitute consent and the public. In those circumstances, Redrock contends that there has to be a formal record of an EIA having been conducted. As the Inspector's report did not conduct an evaluation of the rEIS, it cannot be said that the Inspector's report contains an EIA. Thus, the Board cannot be said to have conducted an EIA or to have rejected Redrock's substitute consent application, having conducted an EIA.
122. The Board's contention that it is sufficient for the EIA to have been conducted by the Inspector (as long as it is adopted by the Board) is not accepted by Redrock. The Board is required to actually set out the EIA it has conducted and its evaluation.
123. Counsel for the Board rejects the complaint that an EIA was not done and submits that it is evident that the Board did engage in the EIA process. In the first instance, it is pointed out that the Inspector's Report essays the rEIS submitted by Redrock.
124. While it is acknowledged that it is usual for decisions of the Board to refer to the conducting of an EIA, counsel contends that the fact that same is not specifically stated in the Decision is not a basis upon which to impugn the Decision.
125. The Board's position is that it is clear from the Inspector's Report that an EIA was conducted. Thereafter, the Board also evaluated the rEIS and concluded that substitute consent should not be granted. It is submitted that the Court can be satisfied that the Board (having stated in its Direction that it decided to refuse substitute consent generally in accordance with the Inspector's recommendation and for the reasons and considerations set out in the Direction) conducted an EIA.
126. As is clear from relevant jurisprudence, the Court's function is to look at the entire range of materials when scrutinising the veracity of a complaint that the Board did not conduct an EIA. What is required of the Board is set out by Noonan J. in *Ahearne v. An Bord Pleanála* [2015] IEHC 606:

*"However, there is no requirement in the PDA that the Board must state in writing within its own decision what the EIA comprises and it seems to me that once it is clear from the terms of the decision and the documents therein referred to how the EIA was arrived at that this satisfies the Board's obligations under s. 172. Subsection (1D) and (1E) mandate the Board to consider whether the EIS identifies and describes adequately the direct and indirect effects on the environment of the proposed development and if it does not, to obtain from the applicant such further information as it requires to enable it to carry out an EIA".*

127. In this regard, Noonan J. followed *Ratheniska v. An Bord Pleanála*, [2015] IEHC 18, where Haughton J. stated that he was: -

*“ . . . satisfied firstly that the Board did undertake a comprehensive EIA in relation to this aspect of the Development and that this is recorded in the body of the decision where the Board stated that it was satisfied that the information available on file was adequate to allow an EIA to be completed. It is also apparent from a reading of the decision as a whole that the Board considered and assessed the EIS, the Inspector's Report (where an assessment of the EIS and this issue was carried out by the Board's nominated officer) and other relevant documentation. . . .”*

128. *Ratheniska* clearly demonstrates that the Court's scrutiny of the EIA carried out does not begin and end the textual output of the Board in either the Inspector's report or the Board's decision. In *Ratheniska*, in response to a complaint that the Board's decision did not expressly set out that it considered the “*cumulative direct or indirect effects on the environment on the proposed development*”, Haughton J. stated: -

*“ . . . the decision falls to be considered in its entirety and if on a fair reading it includes an evaluation of the cumulative environmental effects which it is required by law to consider including those impacts and matters canvassed in the EIS, the Inspector's Report and other documentation before it, then the Board complies with its statutory obligation to carry out an EIA”.*

129. In *Aherne v. An Bord Pleanála*, Noonan J. put the matter as follows: -

*“ . . . once it is clear from the terms of the decision and the documents therein referred to how the EIA was arrived at that this satisfies the Board's obligations under s. 172”*

130. At para. 23, he went on to hold: -

*“ . . . Subsection (1H) expressly permits the Board to adopt in whole or in part any reports prepared by its own officials, such as the Inspector here, or by consultants, experts or other advisors . . . in carrying out its EIA. The Board is not required to separately identify, describe and assess the direct and indirect effects of the proposed development within its decision where these matters are contained within an EIS which the Board considers is sufficient to enable it to carry out an EIA. In the present case, CDL provided a comprehensive EIS which the Board were entitled to adopt, as did its Inspector, particularly in the absence of any contrary evidence on the traffic issue”.*

131. In *Sweetman v. An Bord Pleanála* [2016] IEHC 277, McDermott J. addressed the manner in which the Board carried out an EIA in the following terms: -

*“The court is satisfied that in carrying out the Environmental Impact Assessment, the Board in this case considered the Environmental Impact Statement, the further information furnished on request, and the submissions and observations made in*

*relation to the environmental effects of the proposed development as stated in the decision. In doing so, the Board noted and adopted the Environmental Impact Assessment and concluded that the proposed road development would not be likely to have significant adverse effects on the environment. I am satisfied that a reading of the EIS and the Inspector's report gives a complete understanding of the Board's decision and the reasons for the relevant findings concerning the effect of the development on the environment".*

132. In *South West Regional Shopping Centre v. An Bord Pleanála* [2016] 2 IR 481, one of the arguments raised was that no written record existed of the Board screening for EIA. The Board had not formally stated in its Decision that it had screened out EIA. Costello J. addressed this issue as follows: -

*"It is clear that the question as to whether or not an EIA was required was raised in the papers before the Board. It was thoroughly addressed in the Inspector's Report. The Board adopted the Inspector's Report. It is well-established that a court may impute the reasons set out in an inspector's report to the Board where the Board accepts the recommendations of the Inspector and does not differ from the inspector's report in reaching its decision. In those circumstances, I am satisfied that the Board carried out a proper screening as required by the provisions of Class 13(c) and Class 14 in this case, reaching the decision on the basis of its expertise and within its jurisdiction that no EIS (and thus no EIA) was required and a decision to that effect was available to the public". (at para. 135)*

133. I accept the above dictum as support for the proposition that there is no requirement for the Board in its decision to specifically say that it carried out an EIA, once it is discernible that the requisite exercise was carried out. This is also clear from the dictum of Barrett J. in *Board of Management of Temple Carrig Secondary School v. An Bord Pleanála* [2017] IEHC 452: -

*"Planning decisions are not a form of incantation whereby a valid planning permission is conjured up solely through the recitation of a particular form of words; a court must be attentive to the substantive truth of matters presenting in any one set of proceedings. . . . . An Bord Pleanála, on the facts as described, has clearly done what is required of it at law, and has clearly stated what it has done, even if it has not done so in the form that Temple Carrig contends for."*

134. It is well settled that planning documents are to be constructed "*in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning*", as stated by McCarthy J. in *re XJS Investments Limited* [1986] IR 750. Furthermore, as can be seen from the above-quoted case law, there is a long line of authority to the effect that the Board's decision and the Inspector's report must be read together. Thus, if the Board accepted the Inspector's report and did not demur, then the Board is taken as in effect as adopting the Inspector's report. In *Maxol Ltd. v. An Bord Pleanála* [2011] IEHC 537, Clarke J. put the matter thus: -

*“5.1 The starting point has to be to note, as previously mentioned, the fact that Maxol, in its appeal to Bord Pleanála, did raise, amongst many other issues, the question of the capacity of the Clonakilty Waste Water system to absorb further waste water such as might be expected from Mr. Crowley’s proposed development. I have already quoted the response by Mr. Crowley’s advisers and the text of the relevant passage from the report of the inspector appointed by Bord Pleanála. No evidence was put before the court to suggest that the view adopted by Bord Pleanála itself differed from the view contained in the inspector’s report. In those circumstances it seems to me that the appropriate inference to draw is that the reasoning of Bord Pleanála was the same as the reasoning of the inspector. In cases where Bord Pleanála has different reasons for its conclusions to those contained in the relevant inspector’s report, then it seems to me that it is incumbent on Bord Pleanála to place those different reasons before the court in an appropriate form whether by arranging for the swearing of an appropriate affidavit or exhibiting relevant documentation in evidence. In the absence of Bord Pleanála taking any such course of action, it seems to me that the court is entitled to assume that Bord Pleanála’s reasoning is the same as its inspector’s.”*

135. In *Ogalas v. An Bord Pleanála* [2015] IEHC 205, Baker J. agreed with the approach of Clarke J. in *Maxol*, stating:

*“The judgment of Clarke J in Maxol Limited v. An Bord Pleanála is perfectly clear, and requires some evidence to be identifiable if an inference is to be drawn that the Board did not wholly adopt the reason of its Inspector”.*

She went on to state: -

*“There is no legal uncertainty as to the respective roles of the inspector and the Board . . . The inspector’s recommendation is part of the evidence or part of the mix of evidence or part of factors that are taken into account by the Board but the decision must always be the decision of the Board”.*

136. The above quoted jurisprudence provides a helpful roadmap in the context of the Court considering whether in fact the Board conducted an EIA in accordance with its statutory obligations.
137. The first thing to be noted is that the rEIS submitted with the substitute consent application was comprehensively addressed in the Report of the Inspector. Secondly, the Board specifically states in its Decision that it decided to refuse the substitute consent application generally in accordance with the Inspector’s recommendation and for the reasons and considerations set out in the Decision. Thirdly, the Board’s Direction clearly refers to the rEIS. Fourthly, both the Board’s Direction and Decision reference matters which were canvassed in the rEIS. By and large, the Board’s reason for refusal of substitute consent replicates the Inspector’s first recommended reason for refusal. The Inspector’s first recommended reason for refusal clearly followed upon his appraisal of the



rEIS which accompanied the substitute consent application. To my mind, all of those factors lead to the undoubted conclusion that the Board conducted the requisite EIA.

138. I am thus satisfied that the Board has discharged its statutory function in conducting an EIA with regard to the substitute consent application.

*The complaint that the Board did not apply s.172(1D) and/or s.172(1E) of the 2000 Act*

139. Under the heading "Environmental Impact Assessment", the Inspector's report includes a finding that the rEIS was in accordance with the 2001 Regulations and that the rEIS identified the legally significant direct and indirect effects of the past operation of the quarry on the environment. The Inspector went on to find, under the heading "Soil, Geology Water", that the substitute consent application should be refused based on many "unknowns". The Board effectively adopted the Inspector's view that the rEIS met the statutory requirements. It is Redrock's case that this was inconsistent with the subsequent concerns expressed in the Inspector's Report, and by the Board, that the remediation proposals in the rEIS were not sufficiently developed. Redrock takes issue with this finding on the basis that it was arrived at in the absence of the Inspector or the Board having sought further information from Redrock.
140. It is accepted by Redrock that there is a significant environmental issue and some "unknowns" on the quarry site. Counsel submitted, however, that the issue is what was the Board's obligation when confronted with such a situation. It is argued that the Board cannot say just because there was a risk in the past that substitute consent must be refused. It is contended that that is an intolerable proposition in the context of substitute consent. It is not accepted by Redrock that the "unknowns" were at an insurmountable level. While the Inspector identified some unknowns, he did not suggest getting further factual information from Redrock or prescribing additional surveys or monitoring of the quarry site. Counsel for Redrock argues that all of these options were open to the Board to direct pursuant to s. 172 (1D) and (1E) of the 2000 Act. Redrock posits that if the Board had a doubt regarding the level of information provided as to effects on the environment, pursuant to s.172 (1D) and (1E) the Board was required to look for further information. Redrock's complaint is that this was not done in the instant case despite these sections mandating such an approach. There was no further information request made by the Board save a request for additional mapping. Thus, Redrock contends that it was not given an opportunity to deal with the matters that informed the Board's decision.
141. In particular, Redrock complains that the Board did not enquire if damage had occurred or is continuing as a result of the ARD, or ask for further information in this regard. It is argued that had the Board sought additional information the matters which informed the Board's decision could have been addressed by Redrock. It is emphasised that the issue in the case is not that there is a recognised problem regarding ARD in the quarry or that Redrock engaged in unauthorised development beyond what was permitted in 2004. All of this is acknowledged at this stage. It is also argued that the issue is not the difference between Redrock and the Board as to the degree to which accepted issues of water

contamination in the quarry caused difficulties for groundwater, including outside the quarry.

142. Albeit that it is accepted by Redrock that ARD is a potentially significant difficulty for the environment, it is contended that the more problematic issue is leaving the mudrock exposed to water, as is now the case on foot of the Board's Decision. The mudrock remains exposed to the elements until the Circuit Court makes its decision in the enforcement proceedings. Asking the Circuit Court to make a decision is not the answer as the Board itself could have acted in the matter by requesting Redrock for more information before coming to a decision. It is submitted that in those circumstances, given the paucity of information in the rEIS as found by the Inspector, the Board was obliged pursuant to s. 172 (1E) to request further information. That was not done in the present case. Counsel submits that the failure to do so is contrary to the 2000 Act and to fair procedures.
143. The Board does not accept the contention that it was statutorily obliged to revert to Redrock for further information. It is submitted that it was a matter for the Board, exercising its discretion and authority, to make a judgment call in this regard.
144. I cannot agree with Redrock's submission the Board was obliged pursuant to s.172(ID) to revert to Redrock and seek further information before making its decision on the substitute consent application.
145. Section 172 (1D) mandates the Board to carry out an EIA i.e. to consider whether the rEIS from an applicant has addressed the direct and indirect effects on the environment of the proposed development. It further provides that where it is considered that the rEIS does not adequately identify or describe such effects the Board "shall" require the applicant to furnish "such further information ...as the Board considers necessary to remedy such defect."
146. It is clear from s.10.12 of the Inspector's report that he found that the rEIS identified "the likely significant direct and indirect effects of the past operation of the quarry on the environment". As the Board Decision does not demur, the Court can take it that the Board adopted the Inspector's finding in this regard.
147. To my mind, Redrock's complaint that the Board was obliged to revert to Redrock conflates the statutory obligation set out in s. 172(ID) with the entitlement of the Board, once it is satisfied that s.172(ID) has been complied with, to form its view on the evidence before it as to whether substitute consent should be granted. It is clear from the Inspector's report, to which the Board had regard in coming to its decision, that the deficit in the present case related not to the information in the rEIS which pertained to the direct and indirect effects on the environment of the proposed development but rather to the quality of the remedial solutions therein proposed to address the direct and indirect effects on the environment, as identified in the rEIS. The Board, essentially, formed the view that the potential options to address the ARD issue had not been sufficiently developed to such extent that they could be relied on by the Board. To my mind, that was

a conclusion that was rationally and reasonably open to the Board based on the contents of an rEIS which the Board had deemed met the requirements of the 2001 Regulations.

148. The Board made its Decision on the basis of the information before it, which it deemed adequate to support its conclusions. I accept counsel for the Board's submission that as a matter of legal structure, there is nothing inconsistent between Article 94 and 111 of the Planning and Development Regulations 2001 and an rEIS that describes uncertainty. This is a difference recognised in case law. As set out by McKechnie J. in *Kenny v. An Bord Pleanála* [2001] 1 IR 565:

*"Once the statutory requirements have been satisfied I should not concern myself with the qualitative nature of the Environmental Impact Study or the debate on it before the Inspector. These are not matters of concern to this Court. The [planning authority] and the respondent, as these bodies must under the regulations, were satisfied as to the Environmental Impact Statement, with the Inspector and the respondent also being satisfied with the evidence, both documentary and oral, produced at the oral hearing. That in my view, concludes the matter."* (at p. 578)

149. In *Klohn v. An Bord Pleanála* [2009] 11R 59, MsMahon J. also agreed that the content of an environmental impact statement is determined by the wording of the 2001 Regulations and that *"adequacy is determined by the decision maker"*. He further opined that *"[t]he adequacy of the information supplied in the environmental impact statement, however, is primarily a matter for the decision maker and is thus much more difficult to challenge"*.

150. I am satisfied that, in this case, nothing has been put before the Court which establishes that the Board was not sufficiently informed in order *"to conduct an examination, analysis and evaluation of and identify the direct and indirect effects of the [development] on the matters specified in section 171A(1)"*, as per Finlay Geoghegan J. in *Kelly v. An Bord Pleanála* 2014 IEHC 400.

151. Equally, I adopt the above dicta with regard to Redrock's arguments in relation to s.172(IE) of the 2000 Act. Nothing has been advanced before the Court which suggests that the mandatory aspect of s.172(IE) was triggered in this case. Clearly, the Board did not find it *"necessary"* to require further information before it could carry out the requisite EIA. Short of Redrock establishing irrationality or unfairness in the Board's approach (which, I am satisfied, has not been established), the failure of the Board to invoke s. 172(IE) cannot be impugned.

152. As noted by Haughton J. in *Ratheniska v. An Bord Pleanála* [2015] IEHC 18, the Board *"has a discretion in reaching its decisions provided it decides on the basis of relevant materials"*. (at para.85)

153. In *Element Power Limited v. An Bord Pleanála* [2017] IEHC 550, Haughton J. stated:

*"... it is a matter for the Board to determine whether a particular issue warrants refusal of permission, or could be dealt with by a condition on a grant of*

*permission. As submitted by the respondent, 'this is a question of fact and degree, and one eminently within the expert decision-making function of the Board...'* (Paragraph 72 of its written submission). *The Board's conclusion is not irrational, or 'unreasonable' in the O'Keefe sense of that term".*

154. In all the circumstances, I am satisfied that there was a sufficient basis upon which the Board could determine the substitute consent application without having to revert to Redrock for further information.

*Was the Board obliged to grant consent with conditions attached?*

155. Counsel for Redrock contends that the Inspector did not set out why Redrock's proposals were unsatisfactory. Nor did he say that the proposals would not work. The Inspector does not specify what the "unknowns" are or what could be done to remediate the problems in the quarry. It is thus submitted that the deficits highlighted by the Inspector could have been remedied by his having recommended to the Board the granting of substitute consent with conditions. The Board is mandated to consider, in the context of the proper planning and sustainable development, conditions that may be imposed on a planning permission under s.34(4) of the 2000 Act, and conditions relating to remediation of all or part of the site the subject of the substitute consent. (s.177K(3) (a) and s.177K(3)(b) refer)
156. The Board argues that it was not obliged to grant substitute consent to Redrock with conditions attached.
157. I accept the Board's submission in this regard. Section 177K(1) of the 2000 Act provides that the Board may decide to grant the substitute consent application subject to or without conditions, or to refuse it. In coming to its decision to grant or not to grant substitute consent, the Board "shall consider the proper planning and sustainable development of the area" having regard to the matters set out in (a) to (l) of s.177K(2). The Board's Direction sets out what the Board had regard to in coming to its Decision. As it determined to refuse the substitute consent application, no question of imposing conditions attaching to a planning permission arose. The question as to whether the refusal of substitute consent was properly arrived at is further discussed below.

*The complaint that the Board did not adhere to the requirements of s.177L of the 2000 Act*

158. As already set out, Redrock does not gainsay the assessment at para. 9.1 of the Inspector's report that the ARD is giving rise to very significant adverse effect on the environment. However, it takes issue with the Inspector's recommendation to the Board not to invoke s. 177L. The Inspector made this recommendation on the basis of what the rEIS itself stated, namely that there was no certainty that the proposals advocated would remedy the problem and that further studies and tests were needed. It is submitted, however, that the Inspector's approach was wrong and that further information should have been sought from Redrock regarding its proposals for remediation before a decision on those proposals would be made.

159. In Note 3 of the Board's Direction, the Board determined that it would not invoke s. 177L, which provides for the Board to require an applicant to cease all or part of the quarry activity or to carry out remedial measures within a specified period.
160. It is Redrock's contention that the Board's determination that an order under s. 177L was not necessary is fundamentally at variance with the reasons the Board gave for refusal of substitute consent.
161. It is submitted that the Board acknowledged, implicitly, that Redrock had submitted proposals for remediation. Counsel asserts that it was not stated by the Board that those proposals would not work; the Board just stated that the proposals have not been sufficiently developed. Accordingly, at the end of the day the Board refused the substitute consent application on the basis of a problem all acknowledge existed but at the same time it did not consider that problem serious enough to be addressed by an order under s. 177L.
162. It is argued that the substitute consent is not a mere artifice. The system enacted for the control of quarries (s.261 and s.261A) was set up to remedy a problem. It was inherently designed to sort out historical difficulties. Accordingly, remediation considerations are essential to the substitute consent process. Redrock argues that in the absence of a refusal of substitute consent coupled with a draft direction (as provided for in s.177L), it is left in a position where it cannot remedy the situation save to meet the enforcement proceedings in the Circuit Court.
163. Counsel for the Board contends that the fact that the Board did not direct remediation is not to say that it was not considered. It is clear from the papers in the case why the Board did not direct remediation by way of a draft decision pursuant to s.177(L) of the 2000 Act.
164. I do not find merit in Redrock's submission with regard to s.177L. Note 3 in the Board's Direction clearly states that the Board considered s.177L and the question of whether Redrock should be required to cease all or part of its operations or to carry out remedial measures within a specified period. The Board noted that while rEIS identified potential options for addressing the ARD problem, those options had not been developed to such extent that they could be relied on by the Board. The Board expressly concurred with the Inspector that an order under s.177L was not necessary and that the matter should be addressed through the appropriate enforcement mechanisms available to the planning authority. In light of the uncertainties with which the Board was faced, Note 3 is clear evidence as to why the Board did not direct remedial works pursuant to s.177L. To my mind, based on the evidence before it that was a decision open to the Board. It is not for the Court to substitute a different course of action.

*Alleged failure by the Board to comply with s. 172(1J)(d) of the 2000 Act*

165. It is argued by Redrock that the Board paid no regard to s.172 (1J) of the 2000 Act which, it is submitted, obliges the Board, upon the grant or refusal of substitute consent,

to make the information set out in s.172(1J) available to the applicant and the public, including at s. 172(1J)(d) “where relevant, a description of the main measures to avoid, reduce, and, if possible, offset the major adverse effects” of the development on the environment.

166. With regard to this particular complaint, the Board’s obligation to engage in the s. 172(1J)(d) assessment arises only “where relevant” as set out in s.172(1J)(d) of the 2000 Act. As is clear from its Direction, the Board determined not to go down the remediation route but rather left the issue of addressing the ARD issue to the mechanisms available to the relevant Planning Authority under the 2000 Act. In those circumstances, I accept the Board’s argument that the provisions of s.172(1J)(d) were not applicable.

*The non-circulation by the Board of the HSE submission*

167. Issue is taken by Redrock with the non-circulation by the Board of the HSE’s submissions. The Board asserts that there is no merit in the contention that the Board’s decision should be impugned because of the failure to circulate the HSE submission. Section 131 of the 2000 Act vests a clear discretion in the Board in terms of circulating submissions for content. The relevant jurisprudence has determined certain principles in this regard. Firstly, that there must be an end to submissions. There is no reason to circulate submissions that, in a reasonable view of the decision-maker, do not raise new issues. The second is that the applicant must be able to show that he has been deprived of actually making comment on a particular issue. (*Egan v. An Bord Pleanála* [2011] IEHC 44 and *Wexele v. An Bord Pleanála* [2010] IEHC 21 refer).

168. Clearly, the non-circulation of the HSE submission was not an oversight. The Board determined that it not be circulated. This was a decision within its jurisdiction. The HSE submission did not raise new issues. As was held in *West Wood Club Limited v. An Bord Pleanála* [2010] IEHC 16 by Charleton J.: -

*“I am satisfied that the submissions in question raised no new issues requiring the respondent to circulate them for comment. There is no obligation on the respondent to repeatedly circulate submissions treating of the same matter. . . .”* (at para. 44).

169. I am satisfied that all of the matters raised by the HSE in its submission of 4th June 2014 had been raised in earlier submissions by the Planning Authority, the IFI and residents in the area, all of which were circulated to Redrock.

170. Furthermore, it is of note that Redrock did not make any comment on the submissions actually circulated to it. Thus, it is difficult to see what particular issue is now being said that would have prompted a specific reply to the HSE submission when, in effect, everything in that submission had already been flagged in the submissions that were circulated to Redrock and in respect of which no response from Redrock was received.

*Was the Board’s decision devoid of proper reasoning, irrational or otherwise illogical?*

171. Redrock asserts that the reasons are given for the refusal are insensible. Counsel pointed to the Board having referred to uncertainty regarding the description of the site and that not enough information has been put before the Board. It is submitted that the Board's reasons cannot be taken to be rational when there were various mechanisms available to the Board to remove the uncertainties and/or ensure that the ARD problem would not continue on the site.
172. It is contended that even if the quarry had an adverse effect on the environment, that of itself is not sufficient for a refusal of substitute consent. It is contended that the Board stating that it could not be certain that the development did not have an adverse effect on the environment in the past is not the correct test. A negative effect has to be proved by the Board, which was not done. It is submitted that the Board refused substitute consent based only on possible uncertainties and without any reference to the remediation proposals contained in the rEIS. Therefore, the Board's decision cannot be said to meet the legal requirements.
173. The Court has already addressed Redrock's reliance on ss. 172(ID) and (IE), ss. 177K(2) and (3), and s.177L of the 2000 Act. The Court has found no frailty in the Board's Decision with regard to those provisions. Accordingly, the rationality of the Decision cannot be undermined by reference to those statutory provisions. I now turn to a consideration of whether the Board's Decision is otherwise irrational.
174. I am satisfied, however, that no irrationality or unreasonableness attaches to the substitute consent Decision. I am also satisfied that the reasons for the Board's refusal of substitute consent are easily discernible by the applicant and the public, as required by law.
175. The answers to the question as to why substitute consent was refused are to be found in Redrock's own rEIS. In the first instance, it referred to the profound impact which the ARD issue had on the environment. In its proposed short term remedial measures, the rEIS suggested engineering controls to minimise the continued exposure of the mudstones but conceded that this would prove difficult. The rEIS states that it "may" be possible to install a vertical impermeable and neutralising barrier on the northeast rock face subject to the level of water dropping during extended dry periods. Under the heading "Medium term remedial measures", two main options for treating ARD water were set out. The active treatment option was said to be subject to "further site characterisation and Regulatory approval". It was further stated that if in – situ treatment of the acidic water is not possible, then a dedicated lime facility treatment (temporary or permanent) may be required. It was acknowledged that this would be subject to land availability and would require necessary land use and environmental consents including planning permission and would have cost and sludge disposal implications. These adjusted active and passive treatments were based on the contents of an SLR report. That report stated that the passive treatment would require a discharge licence and that the in situ lime dosing would require licensing from either the EPA or the relevant local authority. Those licences have not been sought.

176. The Board made its decision on foot of the material before it. It is clear that the Board understood what was being proposed by Redrock. It determined to refuse the application on the ground that the remediation proposals were not sufficiently specific. The Board's Decision identified both the problems and Redrock's remediation proposals. As is clear from the Board's Direction, it determined not to direct remediation pursuant to s.177L for the reasons stated. As already stated, the absence of remediation measures under s.177L cannot be taken to mean that the Board was satisfied with the remediation proposals contained in the rEIS.
177. It was submitted by Redrock that Note 2 and Note 3 of the Board's Direction are confined to the Board's determinations regarding the applicability of s.177J and s.177L to Redrock's situation and that they cannot be taken to encapsulate the Board's reasoning to refuse substitute consent. In particular, counsel for Redrock pointed out that it was not stated by the Board in its Decision that Redrock's remediation proposals were not sufficiently developed. I note however that the Inspector's report says as much. Counsel for the applicants also contended that the Board did not justify how it could refuse substitute consent and at the same time leave exposed mudrock on the quarry site. It was further argued that the approach of the Board in Note 3 of the Direction was to wash its hands of the entire issue. Counsel asserted that it cannot be correct for the Board merely to say that consequent on the Board's refusal of substitute consent the development shall be deemed unauthorised (as provided by s. 177O of the 2000 Act). It is Redrock's submission that the very basis of its application for substitute consent was the significant adverse effect caused to the environment by the ARD issue, which of itself rendered the development unauthorised. Thus, it is argued that Note 3 can be said to add nothing of substance to the Board's reason for refusal. Counsel submitted that it is not sufficient for matters to have been left by the Board to the Planning Authority when the Board could have dealt with matters using its s.177K jurisdiction, in particular the powers vested in it pursuant to s.177K(1) and s.177K(3)(a) and (b).
178. I disagree with the submission that Notes 2 and 3 as set out in the Board's Direction have to be read as being confined to the Board's determination not to invoke its powers under ss.177K and 177L. Even if I am wrong in this regard, a perusal of the Board's Decision, and its Direction, shows that the Board directed its mind to Redrock's remediation proposals. The Inspector's Report (which considered Redrock's remediation proposals-see recommended refusal reason no. 1) was adopted by the Board in arriving at its Decision.
179. The Board's Decision itself clearly refers to the deepening and lateral expansion of the quarry area which gave rise to a danger to public health and to serious environmental pollution by reason principally of ARD contamination of groundwater but also from hydrocarbon contamination. The Board then determined that there was a potential future threat to surface waters in the area. Redrock's own rEIS referred to a potential pollutant linkage between groundwater at the quarry site and other surface water in the area.
180. It is thus clear, when the rEIS is considered, why and how the Board came to its Decision. The rEIS clearly identified the presence of ARD at the quarry site. The identified likely



contamination source was a small area of sulphide-bearing mudstones and rhyolites in a fault zone which had been exposed and subject to oxidation in a part of the quarry. Water within the quarry sump and quarry wells demonstrated low pH, high conductivities and elevated metal and mineral levels. Under the heading "Hydrogeology" the rEIS states that "[g]iven the lack of any protective overburden, the groundwater vulnerability at the site can be classified as Extreme". It also found that private wells PW6 and PW7 located directly to the southeast of the site and close to quarry well BH4 included a number of parameters which were "outside the limits set in the drinking water regulations". Graphs in the rEIS showed acid water moving off the site. All of those matters were noted in the Inspector's report together with submissions from other bodies. In particular, the Inspector noted that quarrying at the eastern end of the quarry was "clearly giving rise to a very significant adverse effect on the environment in the form of [ARD]". Accordingly, there was more than sufficient evidence from the Inspector's report to support the Board's decision to refuse substitute consent.

181. The Board's Decision recites that it considered that the operation of the development gave rise to a danger to public health and to serious environmental pollution. That was a permissible finding pursuant to the provisions of s. 177K(2) of the 2000 Act. Moreover, it was not simply the occurrence of the past adverse effects that resulted in the refusal of substitute consent but rather the deficits in the remediation measures proposed by Redrock, hence the Board's determination of "a potential future threat to surface waters in the area". This was a conclusion that was open to the Board from the evidence before it and a basis upon which to refuse substitute consent on grounds of proper planning and sustainable development, as provided for in s.177K(2).
182. Furthermore, it is not the case, as contended by Redrock in its submissions, that the contents of para. 10.7.14 of the Inspector's report include, *inter alia*, an erroneous legal test. What the Inspector did was to set out as a matter of fact that one could not say that there has been no significant effect on the environment. The Inspector is reporting to the Board on the evidence and not advocating the adoption of a legal test.
183. It was argued that the Inspector failed to deal with the SRL Report. I do not accept Redrock's submission in this regard. Clearly the Inspector's report engaged with the containment proposals in the SLR report as they were replicated in the rEIS with which the Inspector engaged in great detail.
184. Section 177J makes provision for the Board to direct the temporary cessation of operations pending its decision. As evidenced in Note 2 of its Direction, the Board determined that it would not invoke s. 177J. Counsel for Redrock contends that the Board's determination in this regard is consistent with the Board having determined that there was risk arising at the time it was considering the substitute consent application. This being so, it is submitted that the determination of the Board with regard to s.177J is inconsistent with the reasons given by the Board to refuse substitute consent, which was on the basis that there was a risk to the environment.

185. It is clear from Note 2 in its Direction that the Board considered the issue of a temporary cessation of activities but concluded that the need for temporary cessation had been superseded by the length of time it had taken to process the substitute consent application. The time taken to process the substitute consent application was caused by the subsequent submission of the s. 37L application. The Board thus decided to determine the substantive substitute consent application without invoking s.177J. To my mind, that was a judgment call for the Board to make. Furthermore, this approach was not irrational or unreasonable given that the Board was in a position to determine the substantive application without further ado.
186. Furthermore, I do not accept the argument that the Board's decision with regard to s.177J can be read as a finding that no risk to the environment arose, or that the decision on the s.177J issue was inconsistent with the Board's expressed reason for refusing the substitute consent application or otherwise illogical.
187. Reliance was placed by Redrock on the affidavit of Kevin Cleary, professional geologist and chartered environmentalist, wherein Mr. Cleary avers that he does not believe the Board had the relevant technical information to support the contention that the quarry gave rise to a danger to public health. At para. 10 of his affidavit, Mr. Cleary avers that the Board had no information before it to conclude that the ARD problem was linked to the quality of water experienced in private wells on neighbouring lands. He points to other sources of potential risk or danger to ground water quality in private wells, namely naturally occurring low pH elevated metals in igneous volcanic bedrock aquifers in the area, the possibility that private wells located downgradient of the quarry may have encountered pyrite rich bands during their private well drilling, the absence of construction details for the private wells and the detection of bacteriological contamination in one of the supplies. To my mind, Redrock's reliance on Mr. Cleary's affidavit is to invite the Court to substitute Mr. Cleary's opinion for that of the Board. This is not the function of the Court on judicial review.
188. Counsel also pointed to Mr. Cleary's averment that there was no information before the Board to allow it to conclude that hydrocarbons from oils and vehicle fuel used in the quarrying operations gave rise to a danger to public health. He found the concentration of hydrocarbons on site not very elevated. He averred that a study conducted by the EPA in March 2017 found naturally very low pH in water in the area of Belcarrig quarry. With regard, to this argument, I note that the Inspector made a finding of fact relating to hydrocarbons, having inspected the locus. The Inspector's Report was accepted by the Board. It is not, therefore, for the Court to substitute the opinion of another expert for that of the Board.
189. It was also Mr. Cleary's opinion that any potential future threat to surface waters was caused by the failure to remediate the ARD more so than the quarry operations themselves. It was also his view that the remediation works proposed in the rEIS could be completed within a phased progressive restoration plan with potential risks to public health and the environment addressed by the implementation of agreed monitoring and

management plans. The fact of the matter, however, is that the Board did not find Redrock's remediation proposals sufficient to address the ARD problem. To my mind, that was a judgment call for the Board to make based on the evidence before it. Mr. Cleary also found no technical support in the information before the Board to support the Board's conclusions with regard to dust emissions. Again, however, in my view, the Board's conclusion in this regard fell within its particular expertise, based on the information before it. All in all, I agree with the Board's contention that the contents of Mr. Cleary's affidavit amount to argumentative submissions on the merits of the Board's decision, and which submissions were not before the Board when it made its Decision.

190. Notwithstanding the submissions advanced by Redrock in the course of the judicial review hearing, for all the reasons already set out I am satisfied that there is no frailty in the Board's substitute consent decision. As already stated, the Board had materials before it from which it could draw its conclusions. These materials included the Inspector's Report, the contents of which reflect the EIA assessment undertaken by the Inspector. This assessment was based on the rEIS which was before the Inspector. The rEIS was also before the Board, as is clear from the Board's Direction. Both the Inspector's Report and the Board's Decision reflect engagement with the rEIS. Contrary to the argument advanced by Redrock, there was meaningful engagement by the Board with Redrock's rEIS and the remedial solutions contained therein. Clearly, consent was refused consequent upon the EIA having been conducted on the basis that the development was not capable of being retained on the ground of proper planning and sustainable development.

191. I am satisfied that the discernibility of the Board's reasoning complies with the test laid down in *Connolly v. An Bord Pleanála* [2018] IESC 31, where Clarke J. opined: -

*"7.5 ...it is possible that the reasons for a decision may be derived in a variety of ways, either from a range of documents or from the context of the decision, or in some other fashion. However, as is clear from the above analysis, this is always subject to the requirement that the reasons must actually be ascertainable and capable of being determined. In this regard, I refer to my judgment in EMI, where I stated at paragraph 6.8: -*

*"While the comments made in Christian related to the specific circumstances of that case and derived from the context of a development plan, it seems to me that there is a more general principle at play. Legal certainty requires, as was pointed out in Christian, that it must be possible to accurately determine what the reasons were. There should not be doubt as to where the reasons can be found. Clearly, an express reference in the decision itself to some other source outside of the decision document meets that test. Where, however, it is suggested that the reasons can be found in materials outside both of the decision itself together with materials expressly referred to in the decision, then care needs to be taken to ensure that any person affected by the decision in question can readily determine what the reasons are*

*notwithstanding the fact that those reasons do not appear in the decision itself or in materials expressly referred to in the decision.'*

7.6 *Again, it is worth emphasising the point made earlier. The range of persons who are able to challenge a particular decision will vary from case to case, as will the extent of their involvement in the process. Thus, as a consequence of the above analysis, the requirement that reasons given for a decision must be adequate necessitates that, where the reasons are not included in the text of the decision itself, they must be capable of being readily determined by any person affected by the decision. Clearly, the ability of a person who was not involved in the process, but who is nonetheless entitled to challenge the decision, to identify the reasons for a decision, where those reasons are to be derived from a diffuse range of sources, will differ greatly from the ability of a person who was involved in the process to do so.*

...

9.2 The test is, in my view, that identified in *Christian*. Any materials can be relied on as being a source for relevant reasons subject to the important caveat that it must be reasonably clear to any interested party that the materials sought to be relied on actually provide the reasons which led to the decision concerned.

...

*The reasons [for the decision] may be found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning. If the search required were to be excessive then the reasons could not be said to be reasonably clear.*

...

9.4 *In the context of a process such as that which occurred in this case, the reasonable observer would undoubtedly look to the Inspector's report but also have regard to the reservations expressed in that report, to the further information, including the NIS, which the Developer was required to submit because of those reservations and to the rationale found in the decision itself for the Board expressing itself as being satisfied that those reservations had been met.*

...

11.1 *In my view the same rules apply, at the level of principle, to the reasons which must be given in a case involving an EIA as compared with a case where an application for permission is dealt with purely under national law.*

192. It is common case that Redrock was directed by Wexford County Council to apply for substitute consent pursuant to s.261A (2) of the 2000 Act following a determination having been made (duly confirmed by the Board) that development had occurred which would have required an EIA. That was the trigger for the Planning Authority to direct

Redrock to apply for substitute consent. Clearly, the notice served on Redrock by the Planning Authority contained no latent legislative or other evaluation as to whether the development was acceptable. The substitute consent application direction was triggered by the fact of the development. The issue to be determined in the substitute consent application was the quality of that development. There was no presumption that substitute consent would be granted. This is clear from the *dictum* of Barrett J. in *An Taisce v. An Bord Pleanála* [2018] IEHC 315. All substitute consent applications are subject to assessment and consent will be refused if the development is found to be contrary to proper planning and sustainable development.

193. In the course of his submissions, counsel for Redrock relied on the dictum of Ni Raifeartaigh J. in *Hayes v. An Bord Pleanála* [2018] IEHC 338:

*"What is of particular significance about the substitute consent procedure, for present purposes, is that consideration of possible harm done to the environment in the past (or continuing harm as a result of past activity) and remediation of the land are central considerations. The developer must submit a remedial impact assessment and the Board is empowered to impose conditions for remediation."* (at para. 43)

194. While I accept that the submission of an rEIS, and the power of the Board to impose conditions for remediation, are indeed central to the substitute consent process, I do not accept Redrock's suggestion that if the rEIS describes the environmental defects and proposes remediation measures then substitute consent cannot be refused. I agree with counsel for the Board that Redrock's submission in this regard is to misunderstand the statutory regime.
195. What Redrock got via the s.261A notice was an opportunity to apply for substitute consent because development had occurred. Redrock was directed to put that development before the Board for a decision. There is no inherent notion in the legislation that the substitute consent has to be granted once a developer or owner furnishes the required rEIS with the substitute consent application. It was for the Board to evaluate the rEIS and the remediation proposals as part of its statutory obligation under s.172A to carry out an EIA when considering an application for, *inter alia*, substitute consent. The Board has complied with its statutory obligation regarding the substitute consent application. It has rendered a Decision which the Court finds to be rational. The consequences of that Decision is that Redrock is now subject to enforcement proceedings. It is not for the Court to second guess those proceedings or their outcome, save to note that such proceedings are expressly provided for in the legislation.

*Was the decision to refuse substitute consent a disproportionate response on behalf of the Board?*

196. It is Redrock's contention that the Board's failure to seek further information pursuant to s.172 (ID) and (IE) of the 2000 Act, or apply the provisions of s.177L, or the provisions of s. 177K (2) and (3), amount to a disproportionate substitute consent decision. It is

argued that this is so because Redrock has no second chance to make a further application for substitute consent under s. 177 E of the 2000 Act. The only option left for Redrock is to apply for leave to apply for substitute consent. It is argued that in making such a leave application Redrock would be none the wiser as to how to present things differently to the Board, given the Board's abdication of its obligations in the context of the substitute consent application already made to the Board. The Board's reasoning was that unless Redrock could have gotten prospective planning permission it cannot get substitute consent. Accordingly, the Board cannot now say that Redrock is not sterilised. In all of the circumstances, Redrock's argument is that it has been left with no pathway to substitute consent.

197. Counsel for the Board contends that there is no merit in the argument that the Board's decisions have sterilised the applicants' operations. It is submitted that it remains open to the applicants to apply for planning permission under s.34 of the 2000 Act as long as any such application equips the Board with information regarding past development effects. In this regard, counsel refers to the dictum of Ni Raifeartaigh J. in *Hayes v. An Bord Pleanála*: -

*"... EU law does not always and necessarily require that developments which have failed to submit environmental impact assessments in the past must be permanently sterilised into the future (i.e. a particular outcome); rather, it seems to me that EU law requires that information about past adverse environmental effects (if any) be made available to the decision-maker and a decision made by the decision-maker about the future in light of all relevant information (i.e. a particular process)". (at para. 85)*

198. Redrock submits that contrary to the Board's submissions, a s.34 planning permission application cannot be the way forward for Redrock as it will require the "Janus faced" regularisation process articulated by Ni Raifeartaigh J. in *Hayes & Hayes & Sweetman v. An Bord Pleanála*. Redrock has thus been left with no solution, save the uncertain application for leave to apply for substitute consent process. It is argued that this renders the Board's Decision entirely disproportionate, particularly when a determination has been made by the Board that the grant of substitute consent to Redrock would be contrary to proper planning and sustainable development.
199. I am not persuaded by the argument that Redrock has been left without a way forward. The pathway identified by Ni Raifeartaigh J. remains open to the applicants and, to my mind, is not affected by the coming into effect of s. 37L of the 2000 Act. There is nothing in s.37L which states that s.37L is the only mechanism for prospective planning permission available to the applicants. The s.34 route is available to the applicants as long as they provide the Board with information regarding past adverse environmental effects. Moreover, there also remains open to the applicants the exceptional circumstances gateway for substitute consent and the mechanism by which they can apply for leave for substitute consent. Accordingly, the applicants' sterilisation argument has not been made out.

200. In all the circumstances, the challenge to the substitute consent Decision has not been made out.

**The s.37L Decision**

201. In the first instance, the applicants' seek to impugn the Board's s. 37L Decision on the basis that is invalid by reason of the Board having stated (at para. H in its Direction) that it took account of its decision to refuse substitute consent a decision which Redrock claimed was unlawful. Since the Court has found that no unlawfulness attached to the substitute consent Decision, the fact that the Board had regard thereto in coming to its decision on the s.37L application cannot be a basis to impugn the latter decision.
202. The Inspector first recommended refusal of the s.37L application was on the basis that geophysical surveys had not established beyond reasonable doubt that sulphide bearing mudstone bearing seams lay within the proposed quarry extraction area. He stated, at para. 4, that should such sulphide bearing seams occur, their excavation could result in the exacerbation of the ARD problem within the quarry which would result in contamination of ground and surface waters, which would be prejudicial to public health and the ecology of water courses.
203. I will return later to the Board's first bulleted reason for refusal (which purports to deal with the concerns expressed by the Inspector in his first recommended reason for refusal). The applicants contend that the Board's first bulleted reason for refusal is "insensible".
204. It is clear that the second, third and fourth bulleted reasons given by the Board for refusing the s.37L application largely mirror recommended reasons 2, 4 and 5 in the Inspector's Report. Insofar as the Board's second, third and fourth bulleted reasons are concerned, I do not find that the applicants' complaints have been made out. I accept the Board's submission that the contents of the Inspector's Report (which itself referred to submissions made with regard to already fissured bedrock) was a sufficient basis for the Board's second bulleted reason. I am also satisfied that there was a rational and valid basis for the Board's third and fourth bulleted reasons. I note that the OCSC report, which accompanied the s.37L application, attributed the poor water quality in the quarry site to local bedrock but stated that "quarrying and processing the high sulphide-bearing rock is likely to have accelerated any natural process". This is noted by the Inspector. Clearly, the basis for the Board's reasons are found in its Inspector's Report, which highlighted, inter alia, that no remediation had been undertaken with regard to the problem of groundwater. To my mind, it was thus open to the Inspector and the Board (consistent with their particular expertise) to conclude that extraction of rock in the proposed extension area "would give rise to inundation with waters from the principal quarry pond" (a pond already contaminated by ARD) and thus bring contaminated waters closer to down-gradient private wells. Similarly, based on the evidence before it, the Board were entitled to conclude as it did in relation to the issue of fugitive dust from stockpiles. The Board's conclusions in the foregoing regards were matters for the Board. Absent any irrationality or breach of fair procedures, which I do not find attach to the Board's second,

third and fourth bulleted reasons, it is not for the Court to interfere with the function with which the Board is charged under the 2000 Act.

205. Complaint was also made by the applicants with regard to the Inspector's third recommended reason for refusal of the s.37L application. As the Board did not adopt this reason as a ground of refusal, there is no merit to this complaint.
206. I turn now to the Board's first bulleted reason for refusing the s.37L permission.
207. The Board "was not satisfied" that "the Geophysical survey work carried out at the site has determined, beyond reasonable doubt, that sulphide-bearing mudstone seams lies within the proposed quarry extraction area and that the excavation of such sulphide-bearing seams, should they occur, could result in exacerbation of the already existing...(ARD) problem in this quarry, which would result in contamination of ground and surface waters, and would be prejudicial to public health and to the ecology of watercourses in the area".
208. The Board's Direction addressed the first reason in the following terms:
- " The Board is not satisfied that;
- ...the Geophysical survey work carried out at the site has determined, beyond reasonable doubt, that sulphide-bearing mudstone seams do not lie within the proposed quarry extraction area and that the excavation of such sulphide-bearing seams, should they occur, could result in exacerbation of the already existing...(ARD) problem in this quarry, which would result in contamination of ground and surface waters, and would be prejudicial to public health and to the ecology of watercourses in the area".
209. With regard to the first bullet-pointed reason given by the Board in its Decision on the s. 37L application, counsel for the Board submitted that the reason therein set out refers to the failure by the second applicant to show that the new area for extension will not replicate the ARD problems already extant in the quarry. If as counsel for the Board submits that is the import of the Board's first reason for refusing s.37L permission, then that would be an entirely rational basis for refusal of s.37L permission, consistent with the analysis done by the Board's Inspector. In other words, by reason of the potential for sulphide-bearing seams to lie within the proposed extraction area, the excavation of those seams could result in the exacerbation of the ARD problem.
210. Counsel for the applicants submits that the Board's first bulleted reason for refusal appears on its face to have refused the s.37L application on the basis that the second applicant did not satisfy the Board beyond reasonable doubt that there was sulphide-bearing mudstone seams in the proposed extension area. By any degree of logic, if that were to be established permission would be refused, absent presumably any conditions that might be attached with regard to remediation and the like. However, the question is why would an applicant be required to establish beyond reasonable doubt something that



by its very nature could result in a denial of permission? That, it appears, on one reading of the first bulleted reason, is what is being asked of the second applicant by the Board.

211. Furthermore, I do not accept counsel for the Board's submission that the clear import of the first bulleted reason for refusal is that the Board refused the s.37L permission on the basis that the extension of the quarry has not been shown not to be hazardous. While the Board's Direction might suggest as much, to my mind, the formulation of the first bulleted reason in the Decision does not clearly and unambiguously reflect the Inspector's rationale for his first recommended reason for refusal.
212. On another reading, the Board's first bulleted reason for refusal of s.37L permission, on its face, suggests that the Board was not satisfied that sulphide-bearing mudstone seams lie within the proposed quarry extension area. If the Board were so satisfied in this regard, then that determination would surely have to be viewed as a factor in favour of the second applicant when considering the s.37L application, and could hardly be a rational reason for refusal.
213. All in all, I am satisfied that the Board's first bulleted reason for refusing the s.37L application lacks the clarity and rationality that is to be expected from a decision-maker. The applicants' ground of claim that the first bulleted reason is insensible has been made out.
214. The question that now arises is where does this leave the balance of the Board's Decision, the Court having found that no frailty attaches to the Board's second, third and fourth bulleted reasons for refusal? The difficulty is that the Court has no means of ascertaining the relative weight attached by the Board to each of the factors which led to the refusal of s.37L permission. In the absence of any indication on the face of the Decision of the weight given to each individual basis upon which the s.37L application was refused, it is not open to the Court to sever the Board's first refusal reason from the Decision and leave the balance intact and thus uphold the s.37L Decision.
215. In all the circumstances, the Court proposes to grant the relief sought by the applicants at d. 2 of the statement of grounds, namely an order of certiorari quashing the Board's refusal of the s.37L application.

### **Summary**

216. For the reasons set out in the judgment, the relief sought at (d) 1. of the statement of claim is denied and the relief sought at (d) 2. thereof is granted.