THE HIGH COURT
PLANNING AND ENVIRONMENT

Record No. H:JR:2024:550
[2026] IEHC 539

IN THE MATTER OF SECTIONS 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

Between:

BREEDON CEMENT IRELAND LIMITED

Applicant

AND

AN COIMISIÚN PLEANÁLA

Respondent

AND

MEATH COUNTY COUNCIL AND KENNETH PAYNE

Notice Parties

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JUDGMENT OF MR JUSTICE DAVID HOLLAND DELIVERED 31 JULY 2026

INTRODUCTION[1]

THIS APPLICATION

1. The Applicants ("Breedon") seek certiorari quashing the decision ("the Impugned Decision") of the Respondent ("the Commission"[2]) made on 16 February 2024 granting leave to the second Notice Party ("Mr Payne") to appeal to the Commission decision 22/1184 of the First Notice Party ("Meath CC") made on 1 November 2022 (the "Council Decision"[3]) to grant planning permission to Breedon for development consisting of the deeper quarrying of a quarried area ("the Site") forming part of 'Kinnegad Quarry', Killaskillen, Kinnegad, County Meath.

2. I will refer to the development which the Council Decision decided to permit as the "Permitted Development". I will use the phrase "permitted development" as non-specific to the development with which we are concerned. However, I do so for convenience and, strictly, inaccurately. That is because these phrases refer, not to development for which permission has been granted, but to development which the planning authority has decided to grant permission but will not do so pending decision of any appeal to the Commission. Indeed, this distinction informed the amendment of s.37(6) PDA 2000 in 2002.[4] To complicate the matter further, in the events which have occurred and as will appear, permission has in fact issued from the Council. I will use the phrase "Proposed Development" to refer to that proposed in Breedon's planning application ("the Planning Application") - as opposed to the Permitted Development. Those usages facilitate the analysis which here follows, but should not be taken as themselves implying that the Permitted Development differs from the Proposed Development.

3. Mr Payne had not participated in the planning process before Meath CC which resulted in the Council Decision. He complains that this was because Breedon's site notices of the Planning Application were inadequate and so he was unaware of the application. Breedon denies that alleged inadequacy. Mr Payne is litigating that issue separately[5] and it is of some importance to say that it does not concern me.

[1] Headings are for general navigational assistance only and are not curial or determinative of content.
[2] References below to the "Board" may be read as references to the Commission.
[3] A copy of the Council Decision is enclosed with the Mr Payne's exhibited appeal to the Commission dated 11 March 2024. The Notification of that Decision is separately exhibited.
[4] Planning and Development (Amendment) Act 2002 (32/2002), s. 10 for the phrase "land adjoining land in respect of which permission has been granted" the phrase "land adjoining land in respect of which a decision to grant permission has been made".
[5] 2023/2 JR Payne v Meath County Council.

4. Because he had not participated in the planning process before Meath CC, Mr Payne required the Commission's leave, under s.**37(6) PDA 2000**,[6] to appeal the Council Decision to it. The Commission's refusal of that leave ("the First Leave Decision"[7]) was quashed in judicial review and remitted for redecision. On remittal, the Commission changed its mind: it made the Impugned Decision granting him leave to appeal.

LOCUS, PARENT PERMISSION & HISTORY OF DISPUTE

5. At Kinnegad Quarry, Breedon operates a shale and limestone quarry which supplies raw material to its on-site cement factory.[8] It is a large operation – the factory can produce up to 700,000 tonnes of cement per annum.[9] Breedon's total landholding in the area is about 286 hectares – essentially in two plots (together, "the Blue-Line Lands"[10]). The eastern and larger plot is mostly occupied by the quarry, the cement factory and an asphalt plant. Though significant areas of that plot and of the other, western, plot are not, at least yet, used by the business, that need not detain us. Operations started in about 2002.[11] The planning history of the holding is complex.[12] The cement factory and quarry were first permitted in 1999[13]/2000 by permission PL17.111198. That is still the primary planning permission governing the Breedon operation ("the Parent Permission"). I have not seen it.

6. The site of the Permitted Development ("the Site" and "the Red-Line Lands"[14]) is an area of about 4.13 hectares already quarried pursuant to planning permission - which area the Development seeks to deepen by further quarrying.

7. As to the Blue-Line Lands, Breedon's on-site quarrying, cement production and waste activities, including waste incineration as fuel, are regulated by an Industrial Emissions Licence issued by the EPA.[15] Inter alia, the IEL regulates emissions to air and to water, noise and vibration emissions, water emissions from the site and dangers by emissions to watercourses, inter alia from leaks and spillages. Emission limit values are set for specified emissions, including to waters. Interference by emissions with amenities or the environment beyond the site is prohibited. Prohibited also are discharges to surface water other than stormwater, pumped groundwater, treated sewage effluent and overland flow from undeveloped lands. All other environmentally significant emissions are prohibited. The IEL provides that no potentially polluting substance or matter shall be permitted to discharge to ground or groundwater under the site. Monitoring is

[6] Planning and Development Act 2000, as amended.
[7] ABP-315215-22.
[8] For a description, see generally, EIAR §8.4.
[9] TPA Report §4.3.
[10] This refers to the obligation in planning applications, imposed by Article 22(2)(b) PDR 2001 to provide a map showing, bounded by a blue line, "Any land which adjoins, abuts or is adjacent to the land to be developed and which is under the control of the applicant or the person who owns the land which is subject of the application lands on which the Proposed Development will occur."
[11] Under other ownership.
[12] Table 8.A.1 List of Planning permissions at the site is exhibited as appended to Chapter 8 of Breedon's EIAR in the subject planning application. It lists 11 permissions.
[13] 17.111198 (An Bord Pleanála).
[14] This refers to the obligation in planning applications, imposed by Article 22(2)(b) of the Planning & Development Regulations 2001 as amended ("PDR 2001") to provide a map showing, bounded by a red line, "the land or structure to which the application relates".
[15] Industrial Emissions Licence P0487-07 issued by the Environmental Protection Agency is exhibited as appended to Chapter 8 of the EIAR in the subject planning application.

stipulated in some detail – but for water quality, not groundwater levels. Beyond these general observations, the IEL contains much detail on these issues which it is impractical to set out here.

8. Mr Payne's lands – his family farm and home - lie generally west of and adjacent the Breedon Quarry. They are lie between and are contiguous to – share boundary with – both plots of the Blue-Line Lands. But they are not contiguous with the Red Line Lands - they are not contiguous with the Site of the Proposed Development as identified in Breedon's Planning Application.

Figure 1 – General layout

9. Figure 1 below is extracted from an exhibit by Mr Payne. It is not disputed. It corresponds in relevant respects to the Planning Application location map submitted by Breedon as required by Article 22(2)(b) PDR 2001.[16] But it also contains additional information.

[16] Planning and Development Regulations 2001 as amended.



Figure 1 - Legend[17]

- The M6 motorway runs east/west in the north of the figure.
- Breedon's Blue Line Lands are depicted in two plots. To the east lie the quarries and the cement factory,[18] an asphalt plant and some unused or agricultural lands in a salient to the south. The western plot of Breedon's Blue Line Lands consists of agricultural lands.
- The Payne farm and home are outlined in green. They lie between and are directly bordered on both sides by - they are "sandwiched" by and undoubtedly adjoin - Breedon's Blue Line Lands.
- Breedon's Site – the Red Line Lands,
  - Lies entirely within Breedon's eastern Blue Line Lands.
  - Consists, as the description above states, of an already-quarried area in the northern sector of the limestone quarry.

[17] For ease of reading I have edited brightness, contrast and highlighting from a somewhat dark original. For a cleaner version, albeit with less added information, see EIAR Fig 8.2 Planning Context.
[18] The cement factory building is the rectangular grey building south west of the cement factory label.

  - Lies north-east of the Cement Factory.
- The distances from the Red Line Lands to the Payne farm boundary at its nearest point and to the Payne home are depicted as 630m and 950m respectively. I am told that Mr Payne's well is near his home.[19]
- The distance from the cement factory to the Payne farm and home is clearly less than the depicted distances from the Red Line Lands to the Payne farm and home.
- The yellow dotted line running generally southwest/northeast represents a public road.

10. Generally, and while no doubt there are many variables, the deeper a quarry, the more likely it will be flooded by groundwater in greater or lesser degree. Not unusually, it may need to be pumped out on an ongoing basis to allow continued quarrying. So the possibility may arise over time that groundwater levels at and near the quarry will be reduced and thereby adversely affect local wells. Accordingly, it seems,[20] the Parent Permission prescribed, and continues to prescribe, monthly monitoring of the levels of certain off-site wells. They do not include Mr Payne's well. However, as I have not seen the Parent Permission and as I am not otherwise informed, I am unaware of the precise terms in which the Parent Permission prescribed such monitoring – or, for that matter, whether by "Boland Condition"[21] it left that issue to agreement with the Council. I am not told expressly how the wells to be monitored were chosen or how the results of that monitoring is to be interpreted as requiring remedial action and of what wells. I am not told, specifically, why Mr Payne's well is not monitored.

11. This litigation is an iteration of a lengthy dispute involving multiple proceedings.[22] Mr Payne and his family have for many years alleged, and Breedon has for as many years denied (at least generally), that Breedon's operations have caused great environmental harm, in various forms, to the Payne farm and home and family, especially its water well (their principal water supply), such that, inter alia, Mr Payne's wife and children have had to abandon their home and move away. He says he has, as a result, suffered medical conditions such as rashes and skin irritations, depression and anxiety. He also alleges unauthorised dumping for many years, on the Proposed Development Site, of large quantities of toxic ash both from on-site incineration, as fuel, of animal remains, tyres and other wastes and from the cement kiln. That dumping, he says, poses a risk to watercourses and groundwater. He says that Breedon first admitted this dumping by affidavit of 26 February 2025 sworn in waste injunction proceedings by Mr Payne against Breedon.[23] He alleges much-increased livestock mortality. The EPA in 2015 rejected a complaint by Mr Payne.[24] He criticises that decision but I am unaware that he challenged it. Mr Payne issued nuisance proceedings against Breedon in 2021[25] and Waste Management Proceedings in 2024. I have not seen them. I do not know precisely what they allege – though his appeal to the Commission dated 11 March 2024[26] does recite complaints in the Waste Management Proceedings.

[19] Transcript 15:23.
[20] EIAR 8.4.6.4 Historic Groundwater Levels.
[21] Boland v An Bord Pleanála [1996] 3 IR 435. the Supreme Court allowed for planning conditions leaving details to agreement with the planning authority if certain legal conditions were satisfied. See e.g. Shadowmill v ABP & Lilacstone [2023] IEHC 157.
[22] It includes High Court proceedings bearing record numbers 2021/708P, 2023/2JR, and H.MCA.2024.101.
[23] 2024/101 MCA Payne v Breedon Cement Ireland Limited.
[24] EPA letter 17/11/15. Enclosed with Mr Payne's exhibited Appeal dated 11 March 2024.
[25] 2021/708P Payne v Breedon Cement Ireland Limited.
[26] See below - §9.0. Waste Disposal.

12. More particularly, Mr Payne complains that, though Breedon's activities have already adversely affected his well, Breedon deliberately excluded it from the wells listed and considered in Breedon's EIAR of September 2022[27] in their Planning Application.

Site Layout Plan 2000

13. The Commission, undoubtedly belatedly,[28] exhibited a site layout plan (the "Original Site Layout Plan") and deposed that it was submitted in the planning application which resulted in the Parent Permission. The Commission's explanation of the belatedness of its exhibition was of lawyer's oversight. Breedon objected to the admission of this evidence. I considered it de bene esse and it was agreed that I could rule on the issue in this judgment. I did indicate a provisional view that I would admit the Original Site Layout Plan in evidence.

14. Importantly, Breedon cited the Parent Permission in the Planning Application and accompanying EIAR which resulted in the Council Decision. The Planning Application form recorded that the Red Line Site of 4.16 ha is "*within existing quarry*". The form cited Breedon's Planning Report in the Planning Application ("the TPA[29] Report") dated September 2022 as disclosing "*valid planning applications previously made in respect of this land*". The TPA Report

- listed the Parent Permission as the first entry in a table summarising "*the planning history relating to the subject site and the wider Breedon Cement Ltd. landholding*."
- cited the Parent Permission as having permitted "*new cement works and associated quarrying of limestone and shale including access road and associated activities on a site of 161.43ha*."
- also listed in that table Permission TA/900603, granted in 2009, for "*an extension to the existing limestone quarry over an area of approximately 52.45 hectares to provide a final overall extracted area of 77.25 hectares*".

I have not seen those planning permissions.

15. Breedon's EIAR, in describing the Proposed Development, included the following:

> *"…… the proposed development involves the deepening of c.4.13ha of an area on the northwestern boundary of the main working floor of the existing limestone quarry. The area proposed for development is already a worked limestone zone in which the limestone has been extracted from ground level to an elevation of c.70m OD (TA/900603). The proposal under consideration here is to deepen an area of 4.13ha from an elevation of 70m OD to 10m OD, which equates to 4 no. 15m extractive benches. This proposal is deemed necessary for the efficient functioning of the main quarry floor area, which is already permitted under Planning Ref. 98/2026 (An Bord Pleanála Ref. PL17.111198) to a depth of 10m OD."*[30]

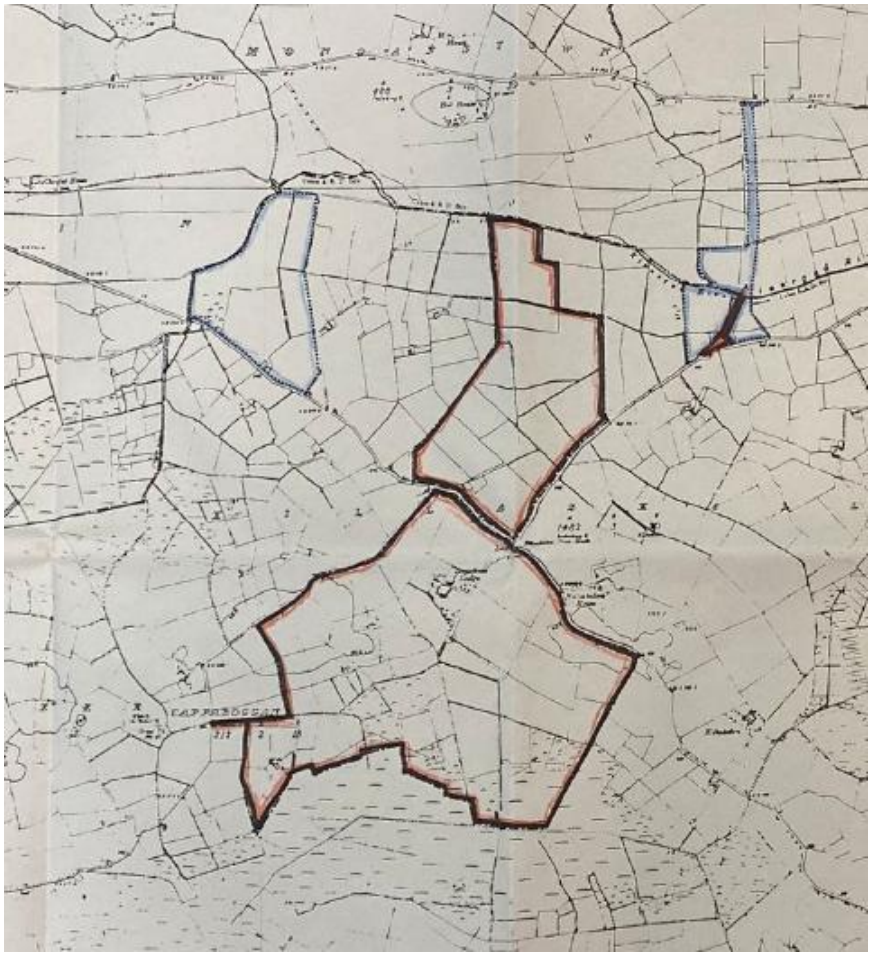
[27] Environmental Impact Assessment Report on behalf of Breedon for the purposes of Environmental Impact Assessment by the Commission.
[28] Breedon was in substance notified at close of business on Friday 27 June 2025. The trial took place on Tuesday 1 July 2025.
[29] Tom Phillips + Associates, Town Planning Consultants.
[30] EIAR §8.1.3 Project Description.

16. It is clear that Breedon itself, at all material times, considered,

- The Parent Permission as essential in the planning history informing the Planning Application.
- The Proposed Development to be necessary for the efficient functioning of the main quarry floor area permitted under the Parent Permission.

17. These factors were long-since clear from the exhibits to the papers in the present proceedings. It has further been clear from the papers that the Commission and Mr Payne emphasised that the Permitted Development must be viewed in the context of the pre-existing and greater quarry and cement factory operation. I therefore cannot see what prejudice Breedon will have suffered by my admission of the evidence in question. It is evidence of which they can only have long-since been aware. Breedon did not articulate any such prejudice in any degree convincingly. I therefore admit that evidence and set out an extract from the Original Site Layout Plan as Figure 2 below.

Figure 2 Original Site Layout Plan – extract



Legend

- As will be seen, the Original Site Layout Plan preceded the advent of the M6 motorway.
- As comparison with Figure 1 reveals, the Red Line Lands in the Parent Permission,

- generally, though not precisely, coincide with the eastern Blue Line Lands identified in the Planning Application.[31]
- includes the Red Line Lands - the Site of the Permitted Development.

18. In short, the Blue-Line Lands in the Planning Application, as here relevant, can be thought of as coinciding with the red line in the Parent Permission. On this basis

- The Red Line Lands the subject of the Planning Application lie within the red line lands the subject of the Parent Permission and have already been quarried under Permission TA900603.
- Permission PL 17.111198 can properly be thought of as the Parent Permission.
- Permission TA/900603 and the permission contemplated in the Council's Decision can be thought of as, in substance, permissions amending the Parent Permission.

PROPOSED DEVELOPMENT, COUNCIL DECISION, CONDITION 3 & PERMITTED DEVELOPMENT

19. The Proposed Development is described in Breedon's Planning Application form, in its EIAR[32] and in the Council's Decision as follows.

> *"The development will consist of the deepening of the north-western portion of the existing limestone quarry extraction area (as permitted by Meath County Council Planning Register Ref: TA900603[33]) by four extractive benches[34] to 10m OD, over an area of c. 4.13 hectares.*
> *The proposed development will not result in any increase to the annual output of the existing limestone quarry or to the production capacity of the existing cement plant.*
> *The proposed development will be served by the existing on-site haul road from the existing vehicular access point on the L8021.*
> *An Environmental Impact Assessment Report (EIAR) has been prepared in respect of this planning application.*
> *The application site forms part of EPA Industrial Emissions (IE) Licence Ref: P0487-07 for Breedon Cement Ireland Ltd …."*

20. As its description indicates, the Proposed Development consists essentially of the quarrying of limestone by deepening an existing 4.13ha area of quarry, by up to 60m, from the existing maximum extraction depth of 70m OD permitted by permission TA900603,[35] to a maximum extraction depth of 10m OD. That area is part of a larger quarry, the rest of which is already permitted to a maximum extraction depth of 10m OD. The historic working of the entire quarry, including that in what is now the Red Line Area, was enabled by the services of the overall site, such as access roads, water supply, wastewater services,

[31] The main difference is that the southern salient and some lands to the south east had, it seems, not yet been acquired by Breedon.
[32] See generally, EIAR §8.4.
[33] TA/900603 Permission granted by Meath County Council in 2009 for an extension to the existing limestone quarry over an area of approximately 52.45 hectares to provide a final overall extracted area of 77.25 hectares.
[34] As I understand, an extractive bench can be understood as a quantification of quarrying depth in layers of extraction.
[35] The bedrock has been quarried down one bench, from the pre-development ground elevations of 80-87m OD to the permitted 70m OD – EIAR §8.4.2.

water management systems and discharge licensing. Those services will also service the Permitted Development.[36] Specifically, the Site is already part of the catchment of the main quarry water management system. The surface water management regime will continue to operate as before.[37] In particular, to maintain a dry working environment on the quarry floor, groundwater seepage into the quarried area will be pumped out. Excess waters from the overall site are discharged, under the IEL, to the Kinnegad River.

21. The Council's Decision consisted in the acceptance of the Council's Planner's Report dated 25 October 2025[38] - including its EIA. While some comment appears and conditions are recommended, that EIA in substance consists in the adoption of Breedon's EIAR. Such adoption is not, per se, objectionable in law as long as it represents a thoroughly independent, critical and expert judgement of the comprehensive adequacy of the EIAR such that it may properly be adopted as the EIA. The Council's Planner's Report concluded:

> *"It is considered that the Environmental Impact Assessment that has been carried out, gives full consideration to the Environmental Impact Assessment Report submitted with the application, all submissions and observations validly made in relation to the Environmental effects of the development.*
> *It is considered that the EIAR gives a fair and reasonable assessment of the likely significant effects of the development on the environment and Is considered acceptable."*[39]

22. Condition 3 of the Permission which the Council Decision contemplates ("Condition 3") was recommended by the Council's water services department without comment beyond absence of objection to the Proposed Development.[40] It is as follows.

> *3. Prior to the commencement of development hereby permitted, the applicant shall submit/ address the following for the written agreement of the Planning Authority in relation to surface water management:*
>
> *(a) The applicant shall agree details of remedial actions which they will undertake in the event that quarry activities impact existing wells in the locality as indicated on table 8.12.*
> *(b) The applicant shall agree surface water treatment and discharge details to comply with up to dated*[41] *discharge license.*
> *(c) All work shall comply fully with the Greater Dublin Strategic Drainage Study (GDSDS Regional Drainage Policies Volume 6.*
> *(d) Development shall not commence without the prior written agreement of the Planning Authority and shall there after*[42] *only be authorised to commence in accordance with the agreed details/plans.*

[36] EIAR §8.4.
[37] EIAR §8.4.3.
[38] Enclosed with the exhibited Payne Appeal dated 11 March 2024.
[39] Sic.
[40] Council's Planner's report 25/10/22.
[41] Sic.
[42] Sic.

Reason: *In the interest of proper planning and sustainable development of the area and to ensure a satisfactory form of development. (Water Services)*

23. EIAR Table 8.12 is entitled "*Details for off-site monitoring wells routinely monitored as SOP*". It lists and locates 17 wells in the vicinity[43] ("the 17 Wells"), and the names of the persons/families whom each serves, as "*included in the monthly monitoring round*". The Payne well is not listed – though it lies closer to the Blue-Line Site than at least some of the 17 Wells monitored. Various and possibly complex reasons, perhaps in the context of lengthy dispute, may explain why it is not listed. But the cause is not revealed either in the EIAR or in these proceedings. The accompanying EIAR text states that *"42 wells were visited as part of the initial groundwater level survey in 1998. This list of wells has been maintained and is updated on an ongoing basis."* I do not know if the Payne well is on this larger list but it seems likely. Nor do I know for sure why only the 17 Wells of the 42 wells are monitored. But I think it safe to assume that they are those considered most at risk and/or representative of any risk to the generality of the wells in the vicinity and are wells in respect of which the owners have consented to monitoring. Perhaps others may have refused Breedon access to monitor. Most of the 17 Wells are outside the Blue-Line Lands[44] and, it seems safe to infer, very many of the 42 wells (or the updated number of such additional wells) are likely to be outside the Blue-Line Lands.

24. In any event, Condition 3(a) notably contemplates remediation if *"quarry activities impact existing wells in the locality as indicated on table 8.12."* As to its interpretation on an "**XJS**"[45] basis as if by an intelligent, informed, layperson, Condition 3(a) is somewhat ambiguous. It is not in terms limited to remediation of effects on the 17 Wells listed in table 8.12. The word "indicated" is suggestive that the 17 Wells are considered likely to be indicative of – considered as indicators of – adverse impact on a more general category of "*existing wells in the locality".* In other words, Condition 3(a) is suggestive that the 17 Wells are "canaries in the coal mine" as it were. This impression is amplified by the contextual reference in the EIAR text accompanying table 8.12 to the ongoing maintenance and updating of the greater list of local wells – to what end updated if not to enable consideration of possible impact thereon by quarrying? Interpreting Condition 3(a) in context and from a purposive point of view, I cannot see what precautionary, preventive or other rationale of environmental protection would seek to confine any remediation obligation to specifically the 17 Wells listed in table 8.12 to the exclusion of other local wells – presumably including Mr Payne's - if in fact other local wells were adversely impacted by quarrying. That would make no sense that I can see or that I consider would be seen by an intelligent, informed, layperson.

25. On that basis, I consider that Condition 3(a) acknowledges that monitoring is limited to the 17 Wells and that such monitoring is the permitted means of identifying any impacts on wells - but as indicative of potential impacts on other local wells also. Condition 3(a) does not limit the contemplated remediation to remediation of those 17 Wells. On that basis, Condition 3(a) requires remediation of Mr Payne's well if

[43] mapped also on EIAR Figure 8.8 GW Level Monitoring Wells.
[44] EIAR Figure 8.8 GW Level Monitoring Wells.
[45] In Re XJS Investments Ltd [1986] I.R. 750

impacted by the Proposed Development. That protection is, of course, in addition to any other legal protection of which he may avail – for example in the law of nuisance.

26. However, all parties have argued the case on the basis that Condition 3(a) relates only to remediation of the 17 Wells and remediation of excludes Mr Payne's well. Despite my contrary view, I must accept that common case in deciding these proceedings.

PAYNE APPLICATION FOR LEAVE TO APPEAL TO THE COMMISSION

27. Mr Payne, by solicitor's letter dated 28 November 2022, applied to the Commission for leave pursuant to s.37(6) PDA 2000, to appeal the Council Decision. The letter is lengthy and somewhat repetitive. It asserts that s.37(6) applies in that

- Condition 3 of the Council's Decision renders the Permitted Development materially different from that proposed in Breedon's Planning Application and
- thereby Mr Payne's enjoyment of his lands and/or their value will be materially affected.

28. Inter alia, the letter dated 28 November 2022 seeking leave to appeal states that:

a. In about 2007, Breedon's quarrying rendered the Paynes' well unfit for use. Breedon dug a new well.[46] It was never fit for use – especially since about 2014. As a result, and perhaps also as a result of Breedon's waste activities, his family have been sick and moved away, many livestock have died and washing machines, dishwashers and the like have been perennially blocked, requiring replacement. Breedon fitted a filtration/treatment system in 2016 to no real effect. A High Court nuisance action is pending. (Oddly, the letter does not enclose any expert water quality report, test results, medical report or the like. Nolan J made a similar observation of the documents tendered by Mr Payne in Payne v Meath County Council.[47])

b. The scale of the Permitted Development will exacerbate these effects. Inevitably, given the local groundwater regime, Mr Payne's will be the most seriously affected well.

c. Yet, though aware of these events, Breedon omitted – suppressed - any mention of them and of Mr Payne's well from its Planning Application and EIAR and so predicts negligible effect of the Development on groundwater.

d. Whereas Breedon's Planning Application and EIAR contemplated only slight/negligible/no impact on water supplies and existing wells, Condition 3 contemplates an entirely new scenario. That scenario renders the Permitted Development materially different (within the meaning of s.37(6)(d)(i) PDA

[46] It is unclear if they dug a new well or deepened the existing well but nothing turns on that.
[47] Payne v Meath County Council [2025] IEHC 540 §§55, 65, 68.

2000) from that proposed in Breedon's Planning Application - in that it accepts possible adverse effects on water supplies which it allows Breedon to remediate.

e. Condition 3, in acknowledging the possibility of adverse effect on wells, implies the Council's acceptance that the Development proposed in Breedon's Planning Application was unacceptable.

f. Condition 3 (presumably in that it is a Boland Condition) excludes Mr Payne from participation in the agreement by Breedon and the Council of what such remedial works will be – nor can he appeal any such agreement. Given the history of Breedon's damage to his well and failed remediation, he has no faith in any such agreement.

g. Remedial works to Mr Payne's well are likely to require entry on and works on his lands.

h. The value of Mr Payne's lands has already been greatly diminished by the dangerous water supply caused by Breedon. The Permitted Development will reduce it further.

FIRST, QUASHED, LEAVE DECISION & GRANT OF PERMISSION

29. As stated above, the Commission's First Leave Decision, dated 15 December 2022 refused Mr Breedon leave to appeal. It did so as:

> *"… it has not been shown that the development in respect of which a decision to grant permission has been made will differ materially from the development as set out in the application for permission by reason of conditions imposed by the planning authority to which the grant is subject."*

30. On 20 December 2022, following the First Leave Decision, Meath CC issued a final grant of permission to Breedon. Mr Payne, in January 2023, sought judicial review of that permission.[48] He also sought judicial review of the First Leave Decision.[49] Mr Payne says Breedon was notified of both those judicial reviews in July 2023.

31. Breedon started quarrying on foot of the Council's Permission in April 2023. While the parties have speculated as to the scope and nature of the remedial works which might be done on foot of the agreement contemplated by Condition 3, it is a strange aspect of this case that neither side has put in evidence, even contextually, the agreement on foot of Condition 3 which must have been made between Breedon and the Planning Authority before Breedon started quarrying on foot of the permission. I do not know what remedial works it contemplated or at what level of generality or detail it contemplated them. Nor, for that matter, am I aware that any expert or technical report has emanated from any party – whether before the Council, the

[48] Payne v Meath County Council (2023/2 JR).
[49] Payne v An Bord Pleanála (2023/128 JR).

Commission or the Court - as to what remedial works might consist of or as to any likely effect thereof on Mr Payne's well. However, whatever they may be, their purpose will be remedial of reduced well levels.

32. In November 2023, the First Leave Decision was quashed by consent. Certiorari issued accordingly on 23 January 2024. The resultant order does not record the basis on which the First Leave Decision was quashed. But the Commission had conceded that it had given inadequate reasons for the First Leave Decision. Mr Payne's application for leave to appeal was thus remitted to the Commission for redecision – which remittal resulted in the Impugned Decision on 16 February 2024. In October 2025 Mr Payne failed to get an order that Breedon cease quarrying pending his application to quash the permission.[50]

IMPUGNED DECISION & EVENTS THEREAFTER

33. At a meeting of the Commission on 16 February 2024, following remittal of the First Leave Decision, the Commission, by the Impugned Decision, decided to grant Mr Payne leave to appeal. It is not apparent that the Impugned Decision was informed by any Inspector's report or memo by a Commission officer or the like. That is not, per se, a criticism of the Impugned Decision – it is merely a point of factual distinction from the position in **Morehart**.[51]

34. The Commission's Order,[52] dated 26 February 2024, records the following Reasons and Considerations:

> *"It is considered that it has been shown that –*
>
> *(i) The development, in respect of which a decision to grant permission has been made, will differ materially from the development as set out in the application for permission by reason of condition numbered 3 imposed by the planning authority to which the grant is subject, and*
>
> *(ii) The imposition of condition numbered 3 will materially affect the applicant's enjoyment of the land adjoining the land in respect of which it has been decided to grant permission or reduce the value of the land.*
>
> *The Board noted that by reason of condition number 3 imposed by the planning authority the development will differ materially from the development as set out in the application as it is not clear what the extent and scope of any remedial actions that will be required in the event that the quarry activities impact existing wells and will materially affect the applicant's enjoyment of the land adjoining the land in respect of which it has been decided to grant permission."*

[50] Payne v Meath County Council [2025] IEHC 540.
[51] Morehart v An Bord Pleanála & Abbott [2025] IEHC 418. See further below.
[52] ABP-319010-24.

35. It will be seen that the only substantive element of the reason set out above for the finding of material difference by reason of Condition 3 is the following ungrammatical formulation:

> *"… as it is not clear what the extent and scope of any remedial actions that will be required in the event that the quarry activities impact existing wells and will materially affect the applicant's enjoyment of the land adjoining the land in respect of which it has been decided to grant permission."*[53]

However, I think the sense is reasonably clear. On an XJS basis, I think the reason can be read as follows:

> *"… as it is not clear what <u>is</u> the extent and scope of any remedial actions that will be required in the event that the quarry activities impact existing wells and <u>whether they</u> will materially affect the applicant's enjoyment of the land adjoining the land in respect of which it has been decided to grant permission."*

36. On 11 March 2024, in reliance on the Impugned Decision, Mr Payne filed with the Commission his appeal against the Council Decision.[54] It is a long document. I need not recite its detail here. It asserts the inadequacy of, inter alia[55]

- Breedon's site notices - as explaining his non-participation in the planning process before the Council.

- The EIAR and the Council's EIA – inter alia, in
  - Ignoring Mr Payne's well and the long history of alleged damage to Mr Payne's well – evidenced, inter alia, by Breedon's drilling him a new well and (allegedly surreptitiously) installing a treatment system for the well – and ignoring resultant damage to his family and farm.
  - Reliance on monitoring of the 17 Wells listed in EIAR table 8.12, which do not include Mr Payne's well.
  - Its assessment of effect of the proposed quarrying on the local hydrological and hydrogeological environment, including groundwater and local wells. Mr Payne asserts that the deepened quarrying will inevitably reduce ground water levels and his well level.

- Condition 3 - as it
  - Raises an entirely new and drastically different scenario, not contemplated in the Planning Application (as it predicted no impacts), of remedial actions to be effected if quarrying impacts local wells.
  - Implies that the Council considered the Proposed Development unacceptable.
  - Exceeds the proper scope of the points of detail permitted in a Boland condition.
  - Inherently accepts the possibility of impacts to Mr Payne's water supply and well.
  - Implies works on Mr Payne's lands to his well.
  - Excludes Mr Payne from both participation in the process of agreement as to well-remediation and any possibility of appeal of that agreement.
  - Excludes the possibility of EIA of well-remediation works.

[53] Sic.
[54] The appeal was given reference ABP-319254-24.
[55] Inadequacy is also asserted with reference to the Habitats law and the plans and particulars of the proposed development and the Council's proposed planning conditions. Illegal waste activities are asserted.

37. Mr Payne's appeal also recites[56] the alleged effect of Breedon's various activities – including quarrying and allegedly illegal waste activities, on the Paynes' well and other amenities and, thereby, on the Payne family and farm. It refers to proceedings in those regards. The appeal does not confine itself to impugning specifically the Permitted Development. It impugns the entire Breedon operation on many and various grounds. I make no comment on the relevance of those matters to the appeal before the Commission. The appeal encloses a large number of documents but unfortunately does not list or index them. They do not include expert reports, test results, factual materials or the like. That is not necessarily fatal to an appeal to an inquisitorial Commission in light of the decision in **Balz**[57] that *"The imbalance of resources and potential outcomes between developers on the one hand, and objectors on the other, means that an independent expert body carrying out a detailed scrutiny of an application in the public interest, and at no significant cost to the individual, is an important public function."* An objector need not bespeak expensive expert reports – it is for the Commission to deploy, and if needs be retain, the necessary expertise. Nonetheless, it is prudent of an objector, if he/she has probative material, to give the Commission something to work with and reason to consider an objection substantial. In this case, the omission is at least odd in the context of years of dispute.

38. As has been noted,[58] this Appeal, with the Impugned Decision, resulted in the present incongruous position in which, simultaneously, there exist both the permission of 20 December 2022 on foot of the Council Decision and an appeal to the Commission of that Council Decision.

39. On 9 April 2024, Breedon replied to Mr Payne's appeal by a brief letter. It disputes the validity of and intimates judicial review of the Impugned Decision to grant Mr. Payne leave to appeal. These proceedings ensued. Inter alia, the letter of 9 April 2024 denies as unsubstantiated all Mr Payne's substantive allegations but stands well aloof of the fray as to the substance of those issues. Notably, it provides no explanation of why Mr Payne's well was not considered in its EIAR and was omitted from the 17 Wells. Rather it states: *"If the Board is at all concerned about any issue arising, we suggest the Board exercise its power to request further information from Breedon so that it is fully apprised of the current facts applicable to the appeal."* While I can understand what I infer was a tactical decision by Breedon, nonetheless it is hardly satisfactory that, when presented with its statutory opportunity to address the substance of the appeal, Breedon declined it and invited the Commission to give it a second bite at that cherry if the Commission is dissatisfied with its first bite.

S.37(6) & S.34(4)(A) PDA 2000 & ARTICLE 22(2)(B) PDR 2001

40. **S.37(1)(a) PDA 2000** limits the right to appeal to the Commission to *"An applicant for permission and any person who made submissions or observations in writing in relation to the planning application to the planning authority …."* **S.37(6) PDA 2000** creates one of a number of exceptions to this limitation as follows:

[56] §§7. Impact on the Payne Family; 8. Impact on Water Supply, Ground 'Water and Surface Water; 9. Waste Disposal; 10. Diminution in Property Value.
[57] Balz & Heubach v An Bord Pleanála, Cork County Council & Cleanrath Windfarms [2019] IESC 90, [2020] 1 I.L.R.M. 367.
[58] By Nolan J in Payne v Meath County Council [2025] IEHC 540 in Payne v Meath County Council 2023/2 JR. I infer that these seek to quash the permission issued to Breedon On 20 December 2022.

"(6) (a) … a person who has an interest in land adjoining land in respect of which a decision to grant permission has been made may, …. apply to the Board for leave to appeal against a decision of the planning authority under section 34.[59]

(b) An application under paragraph (a) shall state the name and address of the person making the application, the grounds upon which the application is made, and a description of the person's interest in the land.

(c) The Board shall, within one week from the receipt of an application under paragraph (a), require, by notice in writing, the planning authority concerned to submit to the Board copies of the materials referred to in subparagraph (i) of section 128(a),[60] *the report referred to in subparagraph (ii) of that section, and the decision and notification referred to in subparagraph (iii) of that section and the planning authority shall comply with such requirement within one week from the date of receiving the notice.*

(d) The Board … shall, where an applicant under this subsection shows that—

(i) the development in respect of which a decision to grant permission has been made will differ materially from the development as set out in the application for permission by reason of conditions imposed by the planning authority to which the grant is subject,
and

(ii) that the imposition of such conditions will materially affect the applicant's enjoyment of the land or reduce the value of the land,

within 4 weeks from the receipt of the application grant the applicant leave to appeal against the decision of the planning authority under subsection (1).
……

(g) …… where an application is made under this subsection a planning authority shall not make a grant of permission unless the application is refused."

41. **S.34(4)(a) PDA 2000** permits the imposition in a planning permission of conditions "*for regulating the development or use of any land which adjoins, abuts or is adjacent to the land to be developed and which is under the control of the applicant*" – inter alia, where the planning authority considers such a condition "*to be expedient for the purposes of or in connection with the development*".

[59] S.34 governs the power of planning authorities to decide to grant or refuse planning permission.
[60] This should refer to Section 128(1)(a) – which reads as follows: 128.—(1) Where an appeal or referral is made to the Board the planning authority concerned shall, within a period of 2 weeks beginning on the day on which a copy of the appeal or referral is sent to it by the Board, submit to the Board—
(a) in the case of an appeal under section 37—
(i) a copy of the planning application concerned and of any drawings, maps, particulars, evidence, F572[environmental impact assessment report], other written study or further information received or obtained by it from the applicant in accordance with regulations under this Act,
(ii) a copy of any submission or observation made in accordance with regulations under this Act in respect of the planning application,
(iii) a copy of any report prepared by or for the planning authority in relation to the planning application, and
(iv) a copy of the decision of the planning authority in respect of the planning application and a copy of the notification of the decision given to the applicant,

42. **Article 22(2)(b) PDR 2001**[61] requires that a planning application be accompanied, inter alia, by

> *"a location map … marked so as to identify clearly:*
>
> *(i) the land or structure to which the application relates and the boundaries thereof in red,*
>
> *(ii) any land which adjoins, abuts or is adjacent to the land to be developed and which is under the control of the applicant or the person who owns the land which is the subject of the application in blue."*

43. Article 22(2)(b)(ii) PDA 2000, in providing for the "blue line", is generally understood as facilitating the identification of lands to which conditions imposed under s.34(4)(a) might lawfully relate.

JR GROUNDS – ADJOIN, ALTER, REASONS

44. Breedon pleads three grounds on which, it says, the Impugned Decision to permit Mr Payne to appeal the Council Decision should be quashed. They can usefully be briefly set out at this point.

45. **Ground 1** alleges that the Commission misapplied s.37(6)(a) PDA 2000 as Mr Payne's lands do not, within the meaning of S.37(6), adjoin the land in respect of which the Council's Decision to grant permission was made.

46. **Ground 2** alleges that the Commission misconstrued Condition 3 and so incorrectly applied, as to Condition 3, the criteria set out in s.37(6)(d)(i) and (ii) PDA 2000 for the granting of leave to appeal. Those criteria, expressed in terms of the present facts, are:

- s.37(6)(d)(i) – that the Permitted Development differs materially, by reason of Condition 3, from that for which Breedon sought permission.
- s.37(6)(d)(ii) – Condition 3 will materially affect Mr Payne's' enjoyment of his land or reduce its value.

47. As to Ground 2, Breedon says that Condition 3,

- required pre-commencement[62] agreement of remedial surface water management works to be done in relation to the 17 Wells listed by reference in Condition 3 – such works being contingent on adverse impact by the quarrying of the Proposed Development to those wells only. As I have said, I consider this

[61] Planning and Development Regulations 2001 as amended.
[62] i.e. before quarrying started.

submission misconceived inasmuch as it limits Condition 3's remediation provisions to the 17 Wells and excludes Mr Payne's well from them. However, as it is agreed by the parties, I must accept that misconception.

- does not result in a Permitted Development materially different from that for which it sought permission.

48. Breedon also says that as Mr Payne's well is not listed by reference in Condition 3, so the Condition cannot affect his enjoyment of his lands or reduce their value. As I have said this submission is misconceived. But the question remains whether Condition 3 can affect enjoyment of his lands or reduce their value.

49. **Ground 3** alleges that the Commission failed to give adequate reasons for its decision and so the decision was irrational. It says that, on exactly the same facts and materials, the Commission, by the Impugned Decision, reached a diametrically opposite decision to its First Leave Decision on Mr Payne's application for leave to appeal - which it had refused. The Commission in the Impugned Decision gave no reasons for its

- volte face - why it had reached a different conclusion on the same facts.
- finding that Mr Payne was materially affected by Condition 3.

PROPOSED DEVELOPMENT & GREATER BREEDON ENTERPRISE - RELATIONSHIP

50. I have already made certain observations as to the relationship between the Proposed Development and the greater Breedon enterprise. Some elaboration is now required. As has been seen and notably, the Proposed and Permitted Development consists of the deepening of an already-permitted quarry area forming part of the greater limestone quarry.

TPA REPORT

51. The TPA Report expands on that relationship. What follows here is a sample of extracts only as there is much repetition in that Report.[63]

> *"1.5 Rationale for the Proposed Development*
> *The proposed development is intended to facilitate the continued operation of Breedon Cement Limited limestone at Kinnegad and will take place within an area already permitted for quarrying activities. The proposal will involve deepening of an area of 4.13 hectares by 4 extractive benches to a level of 10m OD, having previously been permitted to a level of 70m OD."*

[63] That is not a criticism of it.

"The proposed deepening of this section of the existing quarry will be consistent with the permitted depths of the adjacent permitted quarry area and is intended to facilitate the efficient extraction of material from the overall limestone quarry ……. the adjacent permitted quarry area and the proposed development area will be quarried of material in tandem."

"The manufacture of cement combines both the cement works and the quarries on site. The main raw materials used are limestone and shale."[64]

4.0 DESCRIPTION OF PROPOSED DEVELOPMENT
4.1 Proposed Development (As Per Statutory Notices)"[65]

"4.2 Summary of Proposed Development and Rationale
The proposed development is intended to facilitate the continued operation of Breedon Cement Limited limestone quarry at Kinnegad and will take place within an area already permitted for quarrying activities. …… The proposed development will be served by the existing on-site haul road ……."

"4.4 The Quarrying Process
There are five broad stages in the quarrying process:
1. *Blasting of rock faces;*
2. *Transport to crusher;*
3. *Crushing;*
4. *Stockpiling; and*
5. *Conveying to cement plant."*[66]

"…… as the wider quarry area occupies an area of c. 286 hectares and the proposed area of deepening constitutes a part of the larger quarry, it is considered appropriate that an EIAR be carried out in relation to this development."[67]

"The applicant's existing quarry at Kinnegad produces high quality limestone rock that represents a critical raw material required for the manufacture of cement at the applicant's cement plant at Kinnegad. …… The current proposal will aid the continued successful operation of the quarry and will ensure that raw materials for the adjacent cement plant will continue to be sourced locally and in a sustainable manner."[68]

[64] §2.3
[65] See above.
[66] There follows a description of each of the 5 stages.
[67] §5 – EIA.
[68] §9 Conclusion.

52. TPA concludes that the Proposed Development would be acceptable in various respects and in accordance with the proper planning and sustainable development of the area, inter alia

> *"Having regard to*
> - *Established use of the existing quarry site;*
> - *Extent of the remaining mineral resource and mineral resource on adjoining lands and the extent of existing capital investment at the site;*
> - *Level of existing employment at the site and contribution to the local economy; and*
> - *Assessment of impacts and proposed mitigation in the enclosed Environmental Impact Assessment Report"* [69]

EIAR

53. There is much duplication of content as between the TPA Report and the exhibited extracts of Breedon's EIAR.[70] I will try to minimise it here. Also, much EIAR content is highly technical and impenetrable to a layperson such as me. However, the EIAR does include the following:

> *"Generally, at all quarry sites the primary activity with potential to impact the local and regional hydrological and hydrogeological environment is the removal of rainfall-runoff and groundwater from the local hydromorphological regime."*[71]

> *"The application site is already part of an overall site whose operations are overseen by the EPA and whose activities are controlled in an Industrial Emissions Licence*[72] *…. Therefore, all site operations, emissions and discharges are regulated."*[73]

> *"All waters arising at the site proposed for development in this application are already integrated into the Water Management Systems for the overall landholding and are regulated by the EPA in the Integrated Pollution Control (IPC) …."* [74]

> *"The area proposed for development is already a worked limestone zone in which the limestone has been extracted from ground level to an elevation of c. 70m OD (TA/900603). This proposal is deemed necessary for the efficient functioning of the main quarry floor area, which is already permitted under Planning ……. PL17.111198*[75]*) to a depth of 10m OD."*[76]

> *"The proposed development is a part of an existing, operational, permitted limestone quarry at Killaskillen. In addition to the limestone quarry, there are ancillary operations including the permitted*

[69] §9 Conclusion.
[70] Again, this is not a criticism.
[71] EIAR §8.7.2
[72] The Licence is at EIAR Appendix 8.B.
[73] EIAR §8.1.
[74] EIAR §8.1.
[75] i.e. the Parent Permission.
[76] EIAR §8.1.3 Project Description.

and operational shale quarry, cement manufacturing plant, asphalt plant, settlement ponds, administration building and storage buildings (Figure 8.3). These activities are all complimentary[77] to one another with operation and management the responsibility of Breedon …… The application site occupies a total area of approximately 4.13 hectares ……. within an overall landholding of c. 286 hectares."[78]

"In the 1998 application the applicant highlighted that potential long-term extension areas lie to the north in the land around Lansdown Lodge and that extension in depth may also be feasible. Breedon are now seeking to further develop this relatively small northern portion of the limestone quarry in order to safeguard the strategic limestone reserves on the subject lands and thereby secure the long-term viability of cement production and the significant capital investment already on the site. The application site is the northern part of the existing limestone quarry. …… The purpose of the current development proposal is to provide space on the periphery of the main quarry so as to enable efficient working on the main floor and enable boundary perimeter access routes to the permitted main quarry. Activities in the application area will be a continuance of those that have already taken place within the application area and those currently being carried out at the main limestone quarry, …."[79]

"The management of rainfall, groundwater and process waters, within the existing permitted limestone quarry, is in accordance with the Conditions of the IE licence (Appendix 8.B). The proposed development is already part of the catchment to the water management system of the main limestone quarry. The surface water management regime will continue to operate as it does now. The primary features of the surface water management system are illustrated in Figure 8.3 …"[80]

"….. the application site is underlain by massive structured Waulsortian limestones with low permeability, … This means that little future groundwater will be encountered in the long term. … there is little groundwater in the competent Waulsortian Limestone."[81]

"Given that the proposed development is an extension to an area that is already worked, these exposed faces already exist in the permitted area and beneath it (i.e., the boundary of the application area and the current working floor of the main limestone quarry). Regardless of whether the proposed application is approved or not, the same groundwater flow regime will occur. Therefore, the Conceptual Site Model remains as it was in the previous applications. The proposed application is unlikely to introduce significant additional groundwater above that which will enter when the permitted development is approaching its target depth of 10m OD."[82]

"…. the groundwater component of the depth proposed for excavation at the site is small, therefore, to extend and excavate is unlikely to change the 'do-nothing' scenario. …… there will be little new groundwater encountered. The porosity of the bedrock is very low …"[83]

[77] Sic.
[78] EIAR §8.4.2 Site Layout.1 et seq.
[79] EIAR §8.4.2 Site Layout.
[80] EIAR §8.4.3 Water Management at the Site.
[81] EIAR §8.5.7&8.
[82] EIAR §8.6. Conceptual Groundwater Model.
[83] EIAR §8.7.9 Do Nothing Scenario. & 8.7.11 Application of EA Hydrogeological Risk Assessment Methodology.

54. EIAR Plate 8.1: is a *"Schematic representation of Breedon site water management system".* It clearly depicts the surface water management system as it relates to the entire larger site of which the Proposed Development Site forms only a small part. The system is thereafter described in terms which confirm a single integrated and licensed water management system for the entire larger site – of which the Proposed Development will avail.[84]

55. The Commission refers me to EIAR "*Table 8.19: Summary of Mitigation Measures & Residual Impact Assessment"* and specifically to the following entries:

- As to the risk to surface waters due to mobilisation and migration of suspended solids and sediment deposition in channels disrupting sensitive riverine habitats in movement of aggregate stockpiles, it is said that

  > *"All rainfall-runoff generated on the application site will drain towards the existing limestone sump. These waters are pumped via the balancing pond to the settlement lagoons prior to being discharged to the Kinnegad River. Discharge quality is monitored under an existing EPA IE Licence P0487-07. An extensive network of water management systems are already in place and already serve the proposed application area."*

- As to the risk of reduction in third party well yields by quarry dewatering – lowering groundwater levels in the surrounding area - it is said that

  > *"Runoff generated from rainfall landing on the application area already drains to the limestone quarry sump. …….. The site's IE licence contains the discharge licence for water and this is the Mitigation Measure …"*

56. As I understand, this amounts to an assertion that rainfall on the already quarried Site, as it already drains to quarry sump, does not even now contribute to groundwater levels and (as the quarry footprint on which rain falls will not change) that position will not change by reason of the Proposed Development.

57. As to settlement ponds (which I understand already exist and are outside the Red Line Lands), it is said that

> *"Discharge waters pass through a sequence of existing settlement ponds which are in good condition. These serve to clarify pumped quarry waters prior to them leaving site. The quarry sump and settlement lagoon system have sufficient volumetric capacity to accommodate all waters for the required residence time. ……"*

[84] EIAR §8.4.3 Water Management at the Site.

EIAR & LOCAL WELLS

58. As there is no mains water supply in the area, and as has been seen, most local homes and farms get their water from private domestic wells. The water source is generally groundwater.[85] Quarries may flood due to ingress of groundwater. So they are pumped out – as is the Breedon quarry. It is a recognised risk of dewatering quarries that it may risk reduction of groundwater levels in the area generally – potentially drying up local wells. As I have already recorded, in considering Condition 3, the EIAR records that the Parent Permission required a programme of monthly groundwater level monitoring of both on-site wells and 17 off-site wells, not including the Payne well, to track changes in groundwater levels due to quarry pumping.[86] Notably, the monitoring is specifically of groundwater levels – the issue which troubles Mr Payne.

59. EIAR Table 8.16: Summary of Potential Impacts and Table 8.19: Summary of Mitigation Measures & Residual Impact Assessment, include the following information.[87]

Scenario		Operational Phase
Activity		**Quarry dewatering – lowering of Groundwater levels in surrounding area**
Attribute/receiving environment		Bedrock aquifer
Importance of attribute		Aquifer: Medium
Effect	Nature	**Reduction in third party well yields**.
	Quality	Negative
	Significance	Moderate
	Extent & Context	Third party wells within 1 km
	Probability[88]	**Likely**
	Duration/frequency	Long-term, Constant, Reversible
	Type	Direct
Mitigation		Runoff generated from rainfall landing on the application area already drains to the limestone quarry sump.[89] ….. Beneath the application area, almost the entire depth to the proposed floor level of 10 mOD is homogenous limestone of very low permeability. Hence proposed works are unlikely to introduce notable volumes of additional bedrock groundwater. There is some water close to the floor of the application area but this does not persist in depth or sustained pumping.

[85] EIAR 8.4.6.4 Historic Groundwater Levels.
[86] EIAR 8.4.6.4 Historic Groundwater Levels; Table 8.12; Fig 8.8 GW Level Monitoring Wells.
[87] Which I have edited and combined from the two tables without altering relevant meaning. I have emphasised some entries.
[88] Pre-mitigation.
[89] I presume the point here is that such rainfall does not even, before the Proposed Development, recharge groundwater.

		The proposed works have potential to push some small drawdown effects further northwest. However, …[90] this is not likely to be a significant impact. There will be no net loss or gain in the GWB[91] system because volume intercepted and managed at the site represents, by calculated water balance, 2.3% of the regional groundwater volume. In any case, any waters intercepted at the site are returned to the place they were originally going, which is the Kinnegad River. This maintains the hydromorphological and hydrogeological regime. The IEL licences water discharge. This is the mitigation measure.
Residual effect[92]	Significance	Slight
	Probability	Likely

60. The EIAR section on groundwater levels[93] ends by stating:

> *"These data are included here for the purposes of the development of a conceptual understanding of the site's overall landscape setting. In overall conclusion, long term monitoring of local wells suggests no potential for interaction with the bedrock in the application area."*

61. Considered in isolation, this passage is a bit obscure to the lay reader. It could have been more direct. As I understand, the reference to "the application area" is to the red line area. Overall, and read in the context of the EIAR's ongoing updating of the greater wells list, it appears to me that, though based on monitoring the 17 Wells, this is a conclusion as to local wells generally. Indeed, were it not, it is difficult to see how the EIAR could have been considered comprehensive. In context, the reference to "*interaction with bedrock in the application area*" seems to be an assertion that quarrying that bedrock to the depth intended in the Planning Application will not affect local wells. This seems consistent with the assertion recorded above that: "*Beneath the application area, almost the entire depth to the proposed floor level of 10 mOD is homogenous limestone of very low permeability. Hence proposed works are unlikely to introduce notable volumes of additional bedrock groundwater."* While it is again less than ideally clear, the word "introduce" seems to relate to any possibility that the proposed quarrying will introduce groundwater to the quarry floor, requiring pumping out via the water management system. As to effect on wells, the net gravamen seems essentially to be that, as there is little groundwater in the rock to be quarried, quarrying it will remove little groundwater from the local groundwater system and hence will not reduce the levels of local groundwater wells. That, it appears, is how the Commission understood it.[94]

62. But whatever else might be said as to any risk of reduction in groundwater levels in the area generally by quarry pumping – potentially drying up domestic wells including the Payne well - any such risk

[90] For technical reasons given.
[91] Groundwater Body.
[92] i.e. After mitigation.
[93] EIAR 8.4.6.4 Historic Groundwater Levels.
[94] Transcript 15:23.

appears clearly to derive from the Proposed Development itself, as described in Breedon's Planning Application - in essence, the deeper quarrying of the Red Line Area. Any such risk is as inherent in the Proposed Decision as in the Permitted Decision. With reference to s.37(6)(d)(i) PDA 2000, any such risk does not appear, even stateably, to derive from the effect of any condition imposed in the Council Decision – specifically Condition 3 - in causing the Permitted Development to differ materially from that proposed in the Planning Application. I have seen no evidence of any such effect of Condition 3.

63. The gravamen of the case put by the Commission and Mr Payne was as to risk of drying up the Payne well. The possibility of its contamination by pollutants was much less forcefully put. However, I assume for argument's sake that such a risk derives from the Proposed Development described in Breedon's Planning Application – the deeper quarrying of the Red Line Area. Even on that assumption, I have seen nothing beyond speculation that any such risk of contamination of the Payne well derives from Condition 3. And given that any works on foot of Condition 3 would be remedial in nature, the possibility seems inherently unlikely.

EIAR - CHAPTER 8 – APPENDICES & FIGURE SERIES

64. The EIAR's Chapter 8 on water issues includes 9 appendices and a figure series.[95] As indicated above, EIAR Fig 8.2, Planning Context, is a useful overview of the area. EIAR Fig 8.8, GW Level Monitoring Wells, identifies the locations of the 17 Wells listed as monitored in EIAR table 8.12. Though none lies in a direct line between the Site and the Payne home, three are generally close to the Payne home and nearer the Site than is the Payne home. Much of the content of the Appendices is technical and beyond me. Appendix 8D[96] presents data from monitoring of the 17 Wells. It says that long-term lowering of levels in some shallow wells to the east may or may not be due to existing quarrying but won't be affected by the Permitted Development. I note that Mr Payne's well lies west of the quarry.

WHAT THIS CASE IS NOT ABOUT

ACCURACY & VALIDITY OF RED LINE

65. This is not a case in which the accuracy or validity of the red line identified by Breedon in its planning application has been challenged. I must presume that red line to fulfil accurately the requirement of **Article 22(2)(b) PDR 2001** – i.e. as identifying clearly the land "*to which the application relates and the boundaries thereof*".

[95] The full list is as follows: 8.A List of Previous Planning Determinations; 8.B IE Licence P0487-07; 8.C Desktop Hydrology & Hydrogeology Reports; 8.D Long Term Local Area Groundwater Levels - Off Site Well Monitoring; 8.E Site Investigation Results: Production Well Logs; 8.F Mathematical Analysis of Site Investigation Tests; 8.G Water Quality Analysis Result Tables & Certificates of Analysis; 8.H CWSL Reports for Rain and Flow Monitoring; 8.I Site Specific Flood Risk Assessment. The Figure Series is of Figures 8.1 to 8.10.
[96] Long Term Local Area Groundwater Levels - Off Site Well Monitoring.

INADEQUACY OF NOTICE OF PLANNING APPLICATION

66. I ignore Mr Payne's suggestion that the site notices of the Planning Application were unlawfully placed such that, not having seen them and through no fault of his own, he did not participate in the planning application before the Council. Whatever, if any, unfairness occurred in that regard will be considered in other proceedings and is irrelevant both to the terms and to the purpose of s.37(6). S.37(6) is not a means of remedying that particular type of unfairness, if it occurred. S.37(6) appears to me to address the position of a person who, actually or presumptively aware of a planning application, actually or presumptively decides not to participate as (s)he considers that the proposed development will not affect him/her, but later finds that the development which the planning authority has decided to permit will differ materially, by reason of the imposition of a planning condition(s), from that for which application was made, such that the development to be permitted will unexpectedly affect him/her as to the enjoyment and/or value of his/her lands.

67. What one may call this "unexpectedness factor" seems to me crucial to the unfairness to which s.37(6) is addressed. It implies that something was initially expected by the intending appellant on foot of the planning application, which expectation was not realised in the decision to grant permission. In turn, that implies that intending appellant either considered the planning application and formed such unrealised expectation or (as in the present case) must be presumed for the purposes of s.37(6) to have done so.

ALLEGED FAILURE IN EIA TO CONSIDER MR PAYNE'S WELL

68. It is important to be clear here. That Mr Payne wants to appeal the Council's Decision as based on alleged inadequacy of the EIAR and EIA as it relates to his well is relevant to my present decision. Whether they were in fact or in law inadequate is not relevant.

69. Nonetheless, I confess to being discomfited that Breedon's Planning Application and EIAR ignored the history of controversy as to Mr Payne's well – which, it is not disputed, they had replaced, albeit, Mr Payne alleges, unsuccessfully as concerns water quality. Mr Payne complained bitterly of that history in these proceedings as supportive of the purpose for which he seeks to appeal to the Commission. An EIAR, as necessarily prepared by relevant professional experts, must be independent, comprehensive and objective – **Nomarchiaki**.[97] Otherwise, it is unsafe in law for the decision-maker to rely on it in EIA. The scope and content of an EIAR and of an EIA, which must be comprehensive, are determined by the degree of risk of significant environmental effects and by the proper and objective professional judgements in those regards of the experts preparing the EIAR and those conducting the EIA. Neither an EIAR nor EIA may properly be influenced by other litigation or dispute in respect of environmental effects or by partisan interests in such effects or such disputes. An EIAR and EIA are properly interested only in the objective and comprehensive identification, description and assessment of the substance of environmental risk and in its mitigation with a view to identifying significant residual risk. Mr Payne's well is much nearer the Permitted Development than

[97] Nomarchiaki Aftodioikisi Aitoloakarnanias v Ipourgos, (Case C-43/10) [2013] Env L.R. 21.

are other wells which the EIAR did consider. Of course, there may have been good reasons – for example, I imagine that distance may not be the sole determinant of risk as to complex groundwater effects. Yet Breedon offered no explanation in these proceedings, even by way of narrative context, for the exclusion of Mr Payne's well from the EIAR by the experts who prepared the EIAR. In response to my inquiry, counsel for Breedon

- Accepted that the Payne well was not considered in Breedon's EIAR.
- Argued that the reason for the Payne well's exclusion from the EIAR was not relevant in these proceedings and that, in the context of other proceedings between the parties, that was not a "rabbit-hole" down which Breedon wished to go.[98]

Nonetheless, the omission to address the issue in the proceedings is striking.

70. What the EIAR in fact did was identify 17 Wells which Breedon had monitored monthly for many years – which did not include Mr Payne's well. The EIAR did not explain the choice of this 17 in particular. Nor did it precisely indicate the relationship between the monitoring of those 17 Wells and the 40-plus wells mentioned in the EIAR as being in the vicinity. But the EIAR took care to observe that the larger list was kept up-to-date – one infers, for a purpose. As I have said, on my reading of the relevant EIAR text, it seems to me that the 17 Wells are to be considered as being monitored as representative of the generality of nearby wells. On that view the EIAR's findings may apply to Mr Payne's well. However the context of alleged actual pollution of his well may still suggest a lacuna in the EIA.

71. I emphasise that I take no sides on the substantive issue whether there is such a lacuna in the EIA. Nor do I suggest what, substantively, the relevant EIAR content and conclusion as to Mr Payne's well ought to have been. However, it must be said that any deficiency in the EIAR was apparent on the Planning Application or in any event must be presumed to have been apparent to Mr Payne. As counsel for Breedon said,[99] we must in these proceedings proceed on the footing that Mr. Payne had opportunity to read the EIAR and hat dates to the Planning Application not to the publication of Condition 3. It was not generated, or even brought to light, by the Council's Decision or Condition 3. Again, s.37(6) is not a means of remedying that particular type of unfairness – if there was any. Accordingly, I can draw no conclusions on the substantive issue whether there is a lacuna in the EIA and it does not affect my decision. However there is no suggestion, nor could there credibly have been, that had he adverted to the Planning Application in time he would not have ventilated those issues in that process.

SUBSTANCE OF HISTORY OF CONTROVERSY AS TO MR PAYNE'S WELL

72. Omissions from the EIAR apart, essentially the same point can be made as to the substance of the history of controversy as to Mr Payne's well and its effect on his family and farm. S.37(6) is not a means of remedying his failure (however explicable by reference to any alleged deficiency in site notices or the like) to participate in the planning process and bring those matters of controversy to the Council's attention as it

[98] Transcript 15:24 et seq.
[99] Transcript 16:01.

related to the development proposed in Breedon's Planning Application. Again, there is no suggestion, nor could there credibly have been, that had he adverted to the Planning Application in time he would not have ventilated those issues in that process. Perhaps Mr Payne has a remedy in other proceedings but it does not seem to me that he has a remedy in these proceedings in that regard.

NOT A NUISANCE ACTION

73. Also, the present case is not a nuisance action. Whatever the potential relevance of any planning permission to the issue of liability in nuisance, it is difficult to conceive that, if Mr Payne demonstrates that Breedon's quarrying is rendering his well water unfit for use, the planning permission deriving from the Council's Decision will much avail Breedon as a defence in nuisance. See, for example, **Webster**.[100] A planning permission does not licence a developer to render a neighbour's well-water unfit to drink or for normal domestic and farming use. In so observing, I make no assumptions as to where right lies in this regard as between Mr Payne and Breedon. Nor is the allegation of nuisance due to waste activates relevant to these proceedings.

NOT A CHALLENGE TO VALIDITY OF CONDITION 3 OR THE COUNCIL DECISION

74. Mr Payne complains that he was/will be shut out of any agreement between Breedon and the Council, contemplated by Condition 3, as to any required remedial works. As a part-articulation of his anxiety to appeal to the Commission on the merits of the Breedon's Planning Application, that complaint is understandable. But these proceedings are not a challenge to Condition 3. I must take it as lawful - as not exceeding the proper scope of a Boland Condition. More generally, the validity of the Council Decision is not in issue. The same approach was taken in **Morehart**.[101]

INTERPRETATION OF S.37(6) – INITIAL OBSERVATIONS

S.37(6) – NON-DISCRETIONARY

75. As to the nature of the decision to be made by the Commission, **Browne**,[102] citing **Gleann Fia**,[103] says:

> *"The decision which the Board must take under s.37(6) is not a discretionary decision. If the parties seeking leave to appeal hold an interest in "adjoining" lands, and if the criteria in s.37(6)(d)(i) and (ii) are met, then they are entitled to pursue an appeal; if they are not met, the Board has no discretion."*

[100] Webster v Meenacloghspar [Wind] Ltd; Shorten v Meenacloghspar [Wind] Ltd [2024] IEHC 136.
[101] Morehart v An Bord Pleanála & Abbott [2025] IEHC 418 §128 & 129.
[102] Simons on Planning Law, 3rd Ed'n (Browne, 2021) §6-21.
[103] Gleann Fia Homes v An Bord Pleanála, O'Sullivan & Dunlea [2019] IEHC 618; [2019] 9 I.C.L.M.D. 60.

76. While this observation is strictly correct, it should not be mistaken for an assertion that the Commission's decision on an application for leave to appeal will always be simple or automatic. The ultimate decision whether to grant leave will follow automatically from the satisfaction of the three criteria of s.37(6). But whether, on particular facts, those criteria are satisfied requires evaluative fact-based judgement – not least as to materiality issues.

S.37(6)(A) – "INTEREST IN LAND ADJOINING LAND IN RESPECT OF WHICH A DECISION TO GRANT PERMISSION HAS BEEN MADE"

77. In arguing that, within the meaning of s.37(6) PDA 2000, Mr Payne's lands meet its first criterion – that they adjoin *"land in respect of which a decision to grant permission has been made",* the Commission[104] and Mr Payne[105] accept that the word "adjoin" requires contiguity and that Mr Payne has no interest in land adjoining the Red-Line land. Rather they argue for a broad interpretation of the phrase "land in respect of which a decision to grant permission was made" as encompassing lands including but greater than the Red-Line Land. They emphasise the words "in respect of which" - as encompassing the Blue-Line Lands which, it is clear, the Payne lands adjoin. As will be seen, this invocation of the Blue Line is in substance a function of the identification of what the Commission and Mr Payne say is the relevant planning unit as comprising the entirety of Breedon's operations.

78. However, I think it is necessary, to properly understand s.37(6) and the cases interpreting it, to understand the word "adjoining".

S.37(6)(a) – "Adjoining" - Purpose of

79. As has been said, s.37(6) PDA 2000 creates one of three exceptions to the limitation by **s.37(1)(a) PDA 2000** of the right to appeal a planning decision to the Commission to participants in the process before the planning authority. **Browne**[106] identifies those exceptions as relating to persons with an interest in adjoining lands; in EIA cases, environmental NGOs; and prescribed bodies not properly notified of the planning application. Given the quite different positions and interests of environmental NGOs and prescribed bodies, I do not think that the exceptions in their favour shed much contextual light on the exception in favour of adjoining landowners. As to adjoining landowners, Browne identifies what he considered to be the purpose of the exception:

> *"The purpose of this exception seems to be to ensure that a neighbouring landowner is not prejudiced by a modification to the development introduced by way of planning condition. The neighbouring landowner may have had no objection to the development as initially applied for, and thus may not have bothered to make submissions or observations to the planning authority. It is only*

[104] Written Submissions §5a & 8.
[105] Written Submissions §9.
[106] Simons on Planning Law, 3rd Ed'n, (Browne, 2021) §6-19 et seq.

fair that such a person be afforded an opportunity to have his or her say—by way of an appeal to An Bord Pleanála—where the development as granted by the planning authority differs materially from the development as set out in the initial application."

80. As has been seen, there are in effect three cumulative criteria which an applicant for leave to appeal under s.37(6) must satisfy:

- that the relevant lands adjoin each other;
- that the development which it has been decided to permit differs materially, by reason of planning conditions, from that for which permission was sought; and
- that such conditions will materially affect the aspiring appellant's enjoyment of his/her land or reduce its value.

81. The purpose of the latter two criteria is easily understood as that identified by Browne in terms of material fairness. Indeed, if s.37(6) imposed merely these two criteria, it would be comprehensible. The purpose of the superimposition of the first criterion – that the lands adjoin - is less easily discerned, save that it must be to further restrict the possibility of appeal in addition to the restrictions imposed by the second and third criteria. However, it is clearly predictable that the unfairness of an unexpected planning decision may befall a non-adjoining landowner who satisfies only the second and third criteria. Why should (s)he be deprived of an appeal to the Commission merely as his/her lands are not adjoining? Indeed, it is easy to envisage circumstances in which a non-adjoining owner's lands and home (separated, for example, only by a third party's domestic avenue) could be appreciably closer to the substantive development and (for example) potential pollutant sources, than the lands and home of an adjoining owner. Perhaps it was thought that adjoining landowners are more likely to satisfy the second and third criteria or that unfairness to adjoining landowners is likely to be greater. But that hardly seems a reason to exclude non-adjoining landowners who satisfy the second and third criteria which are, be it remembered, contingent on materiality. In that light, the reference by Haughton J in Gleann Fia to the legislative intent behind either s.37(6) or s.37(1)(a), *"whatever that may be"*[107] is understandable. Perhaps the purpose of the first criterion – that the lands adjoin – has less to do with fairness than with a general view that appeals to the Commission by non-participants before the planning authority should be minimised. Nonetheless, even on that basis and given the second and third criteria, the first criterion seems a blunt instrument at appreciable expense in terms of unfairness to those materially adversely affected by a decision to grant planning permission in unexpected form.

82. As has been noted, s.34(4)(a) PDA 2000 permits the imposition of conditions *"for regulating the development or use of any land which adjoins, abuts or is adjacent to the land to be developed and which is under the control of the applicant"* where such condition is *"expedient for the purposes of or in connection with the development"*. That is clearly a wide power. Counsel for Breedon agreed that, at least as a general proposition, it is not impossible that effecting such a condition could adversely affect the amenities of the occupier of lands adjoining the lands to which such a condition relates – even though such occupier's lands did not adjoin the developer's "red line" lands. And, of course, the prospect of such a condition may not

[107] §74.

have been apparent in the planning process and so the occupier in question may have had no reason to make a submission in that process.

83. I enquired of counsel for Breedon where the justice was of excluding such an unexpectedly and adversely affected non-adjoining occupier from the benefit of s.37(6) - the entitlement to seek leave to appeal to the Commission - on the basis that his/her lands did not adjoin the red line. Counsel's answers were, with respect, unconvincing.

- He first suggested that such a condition would require an amendment of the red line and further information processes (presumably including readvertising) in the planning application. But, on being asked, he provided no authority for such a requirement. Nor do I consider the proposition correct.

- Second, he resorted to an argument that, rather than make s.37(6) unworkable by rendering uncertain the concept of *"land adjoining land in respect of which a decision to grant permission has been made",* it was better to accept that no statutory provision is perfect and that any resulting injustice is one up with which non-adjoining landowners must put. He adds that the decision to grant or refuse leave to appeal is made ex-parte and so should be made on clear and highly predictable criteria – i.e. by reference to the red line.

84. The second argument is unattractive. Given the terms of s.37(6) PDA 2000, the premise of the argument is that the unexpected planning condition will materially affect the nearby occupier's enjoyment of his/her land or reduce its value. If it doesn't, the application for leave to appeal will fail anyway. If it does, there would seem to be little argument from the justice of the case in favour of excluding the possibility of leave to appeal. I take counsel's point that the decision is made ex parte, but do not think it outweighs the considerations just described.

85. Counsel's second argument also prompts inquiry as to his underlying justification for it: that the Commission's position would render s.37(6) "unworkable" by rendering uncertain the concept of *"land adjoining land in respect of which a decision to grant permission has been made".* Of course, "workability" is important in statutory interpretation.[108] It is also a matter of degree and the bar is high. What the legislature deems necessary or appropriate, even though burdensome, should not too readily be deemed unworkable – despite the seduction of taking what may seem a "practical" view. Courts must be careful not to tread on the legislature's patch. Inconvenience, a degree of uncertainty or the need to make nuanced judgements on the facts of particular cases do not ordinarily amount to unworkability.

[108] See for example, SWI, IFI, Sweetman & Ors v ALAB et al [2024] IEHC 421 §1381 (iv); Waltham Abbey Residents Association & Pembroke Road Association v An Bord Pleanála and Derryroe [2022] IESC 30; [2022] 2 I.L.R.M. 417 §43.

S.37(6)(a) – "land in respect of which a decision to grant permission has been made"

86. In arguing that it suffices, for the purposes of the S.37(6)(a) requirement that Mr Payne's lands adjoin lands "*in respect of which*" the Council Decision to grant permission was made, the Commission and Mr Payne cite **Diamrem**[109] and cases cited therein. In Diamrem, Woulfe J cites **Donnelly** and **Albon**[110] for the view, which he applies to the statutory provision he was considering, that the phrase "*in respect of*" is *"invariably given a very wide meaning"*. Albon in turn cites an earlier case in which Mann CJ said that *"The words "in respect of" are difficult to definition, but they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to which the words refer".*[111]

87. Breedon, arguing for the literal, narrower, interpretation adopted in Gleann Fia, cites **Geologistics**.[112] In that case, as Breedon observes, the authorities interpreting the phrase "*in respect of*" canvassed by the Court of Appeal included those relied on for a narrower interpretation[113] as well as those supporting a wider one. I have considered those relied on for a narrower interpretation and find that neither much assists Breedon save to show that, in particular contexts, a narrower interpretation may be required. So, too, the Court of Appeal in Geologistics found little assistance in the authorities interpreting the phrase as *"they simply demonstrate that the proper construction of the words will depend on their context."* And, in the event, the Court of Appeal, on the issue before them, adopted the wider, not the narrower, interpretation.

88. Breedon discounts the result in Geologistics as explicable by the Court of Appeal's anxiety to fully protect employers who were compulsory obliged to insure their employees as to legal costs where their insurer had failed and they called on the relevant compensation scheme. It may be explicable on that basis but I do not think that undermines the usual width of the phrase "*in respect of*" – just as likely the phrase was chosen for its very width. Indeed, Geologistics can be viewed as interpretation to achieve a just interpretation. Also, as I observed at trial, well-known phrases in some degree create context as well as being affected by it - the phrase "have regard to" is an example. Where such phrases are generally understood in a particular sense, the legislature may be thought aware of that sense in choosing to use them. In my view while context is always important, the legislature, ceteris paribus, can be expected to use the words "in respect of" for the very reason that it intends a broad meaning.

89. I should mention that O'Regan J considered Diamrem in a case of **Kelly.**[114] Interpreting the phrase "*in respect of*", in the larger phrase "*permission was granted in respect of the quarry*" in s.261A(1)(c) PDA 2000, was the "*central issue*". She reviewed authorities on the criticality of context to statutory interpretation – **An**

[109] Diamrem v Cliffs of Moher Visitor's Centre [2023] IECA 235.
[110] Donnelly v Vivier & Co. Ltd [2022] IECA 104; Albon v Naza Motor Trading [2007] 1 WLR 2489.
[111] Trustees Executors and Agency Co. Ltd v Reilly [1941] VLR 110.
[112] R (Geologistics Ltd) v Financial Services Compensation Scheme [2004] 1 All ER (Comm) 943; also, Ntzegkoutanis v Kimionis [2023] EWCA Civ 1480, [2024] 2 All ER (Comm) 760.
[113] British and Commonwealth Holdings plc v Barclays Bank plc [1996] 1 All ER 381, [1996] 1 WLR 1, and Rexodan International Ltd v Commercial Union Assurance Co plc [1999] Lloyd's Rep IR 495, [1997] All ER (D) 61.
[114] Kelly v An Bord Pleanála [2024] IEHC 468.

Taisce[115] and **Heather Hill**.[116] She noted that in the former McKechnie J had emphasised the exceptional purpose of the statutory scheme for control of quarries with which she was concerned. She distinguished Diamrem as a case not concerned with a need to interpret the words "*in respect of*" having regard to European Law - in particular **Case-215/06**[117] in which the State had been found in breach of the EIA Directive and to which, inter alia, the substitute consent regime and s.261A were a response. O'Regan J therefore, in a quite particular context, took an untypically narrow view of the meaning of the phrase.

90. It bears noting that some of the cases interpreting the phrase "*in respect of*" are as to contractual rather than statutory interpretation – though I don't think anything decisive turns on that. However, returning to Diamrem and while acknowledging the importance of context, I accept that, usually, the phrase "*in respect of*", is of wide import.

91. It is impossible lawfully to ignore or fail to effect the criterion imposed by the word "adjoin", so clearly imposed by the legislator. I also think that there is a very considerable argument that an XJS interpreter – a careful, intelligent, informed layperson, would consider that the words "*land in respect of which a decision to grant permission has been made"* refer to the lands bounded by the red line to which, at least ordinarily, permitted development is confined. No doubt, on any view, the question of identifying the "*land in respect of which a decision to grant permission has been made"* will ordinarily, as it was in **Gleann Fia**, be answered by identifying the "red line". That answer certainly has the very considerable virtues of simplicity, clarity, certainty, predictability and (generally) easy applicability to the facts of a case. True, it has been suggested that for every complex problem there is an answer that is clear, simple and wrong. But as O'Donnell J said, albeit in a quite different context, in **Quinn v PwC**,[118] *"there are many areas where it is more important that the law be clear rather than clever"*.

S.37(6)(d)(i) – Permitted development differs materially from that proposed and so differs due to planning conditions

92. This criterion requires

- First, the identification of difference between the proposed and the permitted development.
- Second, that such difference derives specifically from one or more planning conditions.
- Third, that the difference is "material". Assessment of materiality requires the exercise of evaluative judgement – at least in other than clear cases. However, contextually, the "materiality" in question would not seem to be materiality of difference in general planning terms or by mere comparison of the

[115] An Taisce v An Bord Pleanála & Ors. [2021] 1 IR 119. O'Regan J also considered Shillelagh Quarries v An Bord Pleanála [2019] IEHC 479 and JJ Flood & Sons v An Bord Pleanála & Ors. [2020] IEHC 195.
[116] Heather Hill Management Company CLG & Anor. v An Bord Pleanála & Ors. [2022] IESC 43.
[117] Commission v Ireland (Case-215/06).
[118] Quinn Insurance Ltd v Price Waterhouse Coopers [2021] IESC 15 (Supreme Court, 22 March 2021).

proposed and the permitted development. Reading s.37(6) as a whole - s.37(6)(d)(ii) in particular - the "materiality" in question is the materiality of effect on the intending appellant's enjoyment of his/her land, or on their value.

S.37(6)(D)(II) – ADVERSE EFFECT ON ENJOYMENT OR VALUE OF LAND

93. In my view, interpreting **s.37(6)(d)(ii)**, contextually and purposively (the purpose being to allow, as a matter of privileged exception in the cause of fairness, an appeal to the Commission), it can be read as *"materially <u>and adversely</u> affect the applicant's enjoyment of the land …".*

94. In, in effect, interpolating the words "*and adversely*", I bear in mind **McGrath**[119] and **SWI**[120] to the effect that only in rare or limited circumstances and with great caution may words or phrases be considered implied in a statute and then solely for the purpose of making them effective to achieve their objective, if

- the "*objective"* of the statutory provision is reliably discernible.
- the additional word or phrase is necessary to effecting that objective.
- the additional word or phrase is itself reliably discernible.

95. That said, I do so for the following reasons:

- I do so first in light of the phrase "*reduce the value of the land*" – clearly envisaging an adverse effect. I accept that one instance does not establish a category for the purpose of the ejusdem generis principle (**Chain Wen Wei**[121]) but I do not think that consideration prevents at least some weight being given to this this factor in a contextual interpretation.

- As the word "enjoyment" connotes a positive phenomenon, it is not difficult to infer that the effect contemplated is likely to be negative.

- I can see no sensible purpose in allowing an applicant the privilege exceptionally to appeal in order to complain of a permitted development enhancing enjoyment of his/her land or its value. Indeed the postulate, if not absurd, is close to it.

- On the other side of that coin, depriving an adjoining landowner of an appeal to enable him/her to complain of a permitted development enhancing enjoyment of his/her land, or its value, involves no element of the unfairness which s.37(6) is generally purposed to address.

96. That interpretation may leave room for evaluative judgement by the Commission whether, in a particular case, an effect is adverse – but that can be left to the Commission.

[119] McGrath v McDermott [1988] IR 258 at §276.
[120] SWI, IFI, Sweetman & Ors v ALAB et al [2024] IEHC 421.
[121] Chain Wen Wei v Minister for Justice & Commissioner of An Garda Siochana [2024] IESC 58, [2024] 12 JIC 1903 (O'Donnell CJ).

PLANNING UNIT & BLUE LINE LANDS

97. The purposive argument has a further aspect. As, it is said, illuminating the phrase *"land in respect of which a decision to grant permission has been made"* in s.37(6) PDA 2000, the Commission seeks to deploy the concept of the "planning unit". It seeks to identify the Blue-Line Lands as the relevant planning unit and so identify Mr Payne's lands as "*land adjoining land in respect of which a decision to grant permission has been made"* for purposes of s.37(6) PDA 2000. It relies on the Parent Permission as establishing and identifying (by its red line) the relevant planning unit and on the Breedon's TPA Report and EIAR as they describe the Proposed Development in terms I have set out above.

98. The planning unit is a concept deployed in determining material changes in use.[122] It was deployed by the High Court as to works in **Lowe and Signways**[123] in which **McCracken J**, in the Supreme Court**,** considered it "unreal" to look at an advertising hoarding on a gable wall as a structure in isolation from the rest of the building. In cases such as in **Redmond**,[124] the concept of the planning unit has also been deployed in interpreting the physical extent of the effect of markings on development plan maps.

99. In **Redmond**, Simons J cited **Burdle**,[125] a case of enforcement proceedings as to a change of use and established use rights. The issue was whether the change of use of a building in a scrap metal and car breaker's yard, from which yard salvaged vehicle parts were sold, from an office for the yard to a shop for sale of new vehicle parts and camping equipment. A question arose whether the relevant planning unit was the building or the yard on which it sat. The headnote states that, although parts of a single unit of occupation could be considered as separate planning units, the test was whether there were two or more physically separated and distinct areas used for substantially different and unrelated purposes. However Bridge J stated as follows:

> *"What, then, are the appropriate criteria to determine the planning unit which should be considered in deciding whether there has been a material change of use? Without presuming to propound exhaustive tests apt to cover every situation, it may be helpful to sketch out some broad categories of distinction."*

100. The decision in Burdle is clearly in terms which require an appreciation of the "*facts on the ground*" – the particular circumstances - and the application of principles rather than precise rules. In other words, an evaluative judgement. Burdle states:

> *"First, whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered.*
>
> *…..*

[122] Simons on Planning Law, 3rd Ed'n, (Browne) §2.66.
[123] Dublin City Council, v Arnold Lowe and Signways, [2004] IESC 106, [2004] 4 IR 259. The Supreme Court refers, in upholding the judgment of McKechnie J, to his deployment of the concept.
[124] Redmond v An Bord Pleanála [2020] IEHC 151.
[125] Burdle v Secretary of State for the Environment [1972] 1 W.L.R. 1207.

secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separate and physically distinct areas of land.

Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit."

"To decide which of these three categories apply to the circumstances of any particular case at any given time may be difficult. Like the question of material change of use, it must be a question of fact and degree. There may indeed be an almost imperceptible change from one category to another. Thus, for example, activities initially incidental to the main use of an area of land may grow in scale to a point where they convert the single use to a composite use and produce a material change of use of the whole. Again, activities once properly regarded as incidental to another use or as part of a composite use may be so intensified in scale and physically concentrated in a recognisably separate area that they produce a new planning unit the use of which is materially changed.

It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally."

"I do not think it is possible on the factual and evidential material which is before this court for us to say that that was by any means an inevitable conclusion at which the Secretary of State was bound to arrive, and that being so I do not think it would be appropriate for us to usurp his function of deciding the question, what is the appropriate planning unit here to be considered as a matter of fact and degree?"

It will be seen that in Burdle the identification of the planning unit was considered a matter of fact and degree for the administrative decision-maker to decide. It will also be seen that while land ownership was not emphasised in identifying the planning unit, the "unit of occupation" was.

101. In Redmond, Simons J was not required to formally identify a planning unit. He deployed the concept by analogy to ascertaining, on an XJS interpretation of a development plan map as if by an intelligent, informed, lay reader, the physical extent of the lands to which an "INST" mark (denoting institutional lands) on the map applied. He made a similar decision in **Clonres**.[126] In **Churchfields**[127] Farrell J applied Redmond to a similar question of the physical extent of the effect of an INST marking on a development plan map.

[126] Clonres CLG v An Bord Pleanála [2021] IEHC 303 (High Court (Judicial Review), Humphreys J, 7 May 2021) §31 & 32.
[127] Churchfields Management Company v An Bord Pleanála & Winterbrook [2025] IEHC 495.

102. The Commission cites **McCaffrey**,[128] in which an issue arose whether substitute consent was required as to all (as the Commission said – considering it a single entity) or part only (as McCaffrey said) of three parts of a quarry. Part A was no longer quarried and had been allowed to flood. Part B was an active quarry on which, also, there was a processing area and a concrete batching plant. Ready mix concrete and raw aggregate were produced. Part C was agricultural land which McCaffrey wished to quarry. The Commission's inspector had noted that all parts of the quarry were owned and operated by the same entity, it was registered as a single site, it was given a registration number as one site and its operations are inextricably linked. McCaffrey argued that each part was a separate planning unit. Gearty J disagreed – observing, inter alia, that McCaffrey's was "not an accurate description" and that *"it is not appropriate or effective to refer to a quarry, which is operated as one entity, as three different sites when implementing environmental protection measures."* While identification of a planning unit is fact-sensitive, I agree that **McCaffrey**, by analogy, significantly assists the Commission in identifying the planning unit in this case.

103. The Commission essentially identified the site outlined in red in the Original Site Layout Plan and in blue in the Planning Application as the relevant planning unit – i.e. the Blue-Line Lands. They say Breedon hardly argued otherwise. I consider that the account of the Planning Application documents set out above amply confirms that the Proposed Development on the Red-Line Lands and the quarrying and cement manufacture operations which surround it on the Blue-Line Lands (which include the Red-Line Lands) are highly symbiotic. They will in reality and in function together form part of a single enterprise. The very purpose of the Proposed Development is to supply raw material to the cement plant. The overall purpose of the entire enterprise is to make cement using raw material quarried on-site. In terms of raw material and manufacture, this is, from a planning point of view, a single "vertically integrated" business. Further, the Proposed Development is clearly dependent on, and will be unable to operate without, the mitigation measures identified in the EIAR as relating to the greater quarry. Further again, and inasmuch as the Proposed Development consists of the deepening of an existing area of permitted quarry, the Planning Application can sensibly be viewed in a functional sense as one to amend the Parent Permission for that area of quarry. As has been seen, Breedon state the purpose of the Proposed Development as *"to provide space on the periphery of the main quarry so as to enable efficient working on the main floor and enable boundary perimeter access routes to the permitted main quarry. Activities in the application area will be a continuance of those that have already taken place within the application area and those currently being carried out at the main limestone quarry …"* As counsel for the Commission put it: "*What they want to do in the red zone has a described purpose as being, not just to get at the limestone, …. it is also to enable efficient working on the main floor and enable boundary perimeter access routes to the permitted main quarry. It has a very specific integrated strategy to enable what Breedon want to do, legitimately, with the overall site*".[129] The Commission says it is incongruous of Breedon to insist on its red line now when its application extolled, for example, the virtues of the integrated water management system for the entire quarry in serving the Permitted Development.[130] The Permitted Development will, it says, both be integrated with the overall operation and will benefit from the mitigation measures supplied by the overall operation. In short, the Commission says, the Proposed Development makes planning, functional and operational sense only when considered as part of the greater whole operated and occupied by Breedon a single unit of occupation. In that sense, the entire enterprise is a single integrated operation.

[128] Patrick McCaffrey & Sons v An Bord Pleanála [2024] IEHC 315.
[129] Transcript 14:43.
[130] Transcript 14:47.

104. I find that the planning unit consists of the Blue-Line lands. Even if I am wrong in considering that conclusion inevitable on any sensible view of the evidence, it is certainly a conclusion the Commission was entitled to reach.

105. I should enter one caveat: counsel for the Commission suggested in passing,[131] and I suggested agreement, that the necessary red line in a planning application amending a parent permission is the same red line as in the parent permission. On reflection, I would prefer to leave that question to a case in which it was fully argued, as I have my doubts.

Significance of Identification of Planning Unit

106. However, having identified the Blue Line Lands as the planning unit, the question remains whether that assists the Commission as to the interpretation of s.37(6) PDA 2000 and its application to the facts of this case. There is no evidence that the Commission, in making the Impugned Decision, deployed or even considered the concept of the "Planning Unit". If they did, they did not say so. It is difficult to avoid at least some impression that its deployment now is an attempt to retrofit a rationale to the Impugned Decision.

107. That said, and viewing the matter purposively, the Commission's argument is not (unlike Mr Payne's), formally, that s.37(6) PDA 2000 generally and in every case equates the phrase "*land in respect of which a decision to grant permission has been made*" with what I may call red line lands plus blue line lands, as the identification thereof is required by the PDR 2001. Rather, the Commission's argument is that the phrase refers to the planning unit which red line lands comprise or, if greater, of which red line lands form part. That the planning unit in the present case coincides (though arguably not entirely) with the Blue Line Lands is in truth (and as counsel for the Commission said[132]) a coincidence – although not a surprising one as that may often, depending on circumstance, prove to be the case. Indeed counsel agreed that, had Mr Payne's lands adjoined the southern boundary of the undeveloped southern salient of the Blue Line Lands, its argument upholding leave to appeal would have been more difficult.

108. However, that coincidence should not obscure the Commission's true argument – that in s.37(6) PDA 2000 the phrase "*land in respect of which a decision to grant permission has been made*" equates to the planning unit which red line lands comprise or, if greater, of which red line lands form part. It will be seen that this argument increases, as compared to an argument formally based on the "blue line", the potential for uncertainty or unpredictability in the operation of s.37(6). Whereas a blue line is readily identifiable, the identification of a planning unit may be a fact-sensitive and nuanced exercise of evaluative planning judgement. Again, the issue would seem to be the proper balance between fairness in the individual case and predictability in the operation of s.37(6). True, the planning unit is reasonably easily identifiable in this case. True, it may be less so in other cases - in some cases, no doubt, difficult and nuanced to identify. But

[131] Transcript 14:55.
[132] Transcript 14:25 et seq; 14:58.

even if so, I confess to doubting that that consideration would render a purposive interpretation of s.37(6) unworkable.

109. As I have said and as Haughton J observes in Gleann Fia, the purpose of the requirement that the intending appellant occupy adjoining lands is not entirely clear. If fairness to those unexpectedly affected by development is the purpose, the criterion seems unnecessary given the other criteria of s.37(6). And the "adjoin" criterion seems somewhat random in its inclusion and exclusion of landowners one of whom, though not adjoining, may be closer to and more affected by a permitted development than a strictly adjoining landowner. Yet the Oireachtas has prescribed the "adjoin" criterion. It cannot be ignored. Purposively, it may represent a simple desire and fairly crude means to minimise leave to appeal by reference to the broad idea that, in general, those with adjoining lands are more likely than others to be affected by a development. However, from the point of view of fairness, the Commission's own argument for reliance on the planning unit was not flawless. As counsel for the Commission observed, Breedon's cement plant, part of the planning unit, is far closer to the Payne lands than are the Red Line Lands of the quarry to be deepened. The asserted implication seemed to be that this enhanced the Commission's argument as to fairness to Mr Payne and others in similar positions. The argument has attractions. No doubt, the identification of a planning unit may include consideration of the environmental effects of development within it. To the extent it coincides with occupation and control (as it often will) it may also bear on the practicalities of, as Gearty J observed in McCaffrey, the appropriateness and effectiveness of environmental protection measures as to development "operated as one entity". On the other hand, Mr Payne does not (at least in these proceedings) complain of any effects on his well due to the cement plant. His fears (at least in these proceedings) relate to the prospect of deeper quarrying in the Red Line Lands – which are, as the Commission observes, quite a bit further from his well than is the cement plant.

Significance of Blue Line Lands

110. Counsel for Mr Payne proposed[133] that the identification of the relevant lands and the ascertainment whether they adjoin is a matter of judgement in each case. More specifically he says that in s.37(6) the phrase "*land in respect of which a decision to grant permission has been made*" includes lands within the blue line in respect of which planning conditions have been imposed pursuant to the power created by s.34(4)(a) PDA 2000.[134] While at first attractive, the difficulty with that, as a general proposition, is that it would incorporate the entire of a large body of blue line lands by reason of a condition relating only to a small part of them. I was also unconvinced by his general argument[135] that where the particulars of a planning application include identification of blue line lands, and the resultant permission contains the usual Condition 1 requiring development in accordance with the plans and particulars that, ipso facto, puts the blue line lands within the phrase "*land in respect of which a decision to grant permission has been made*". He was perhaps more persuasive in the argument for such effect where, as here, the Permitted Development is dependent on services and facilities on the Blue Line lands - the surplus water disposal, the haul road, the

[133] Transcript 15:48 et seq.
[134] "a) conditions for regulating the development or use of any land which adjoins, abuts or is adjacent to the land to be developed and which is under the control of the applicant …."
[135] Transcript 15:50.

access into the quarry, the reorganisation of the quarry floor, access to the deepened area. On the other hand, no development is an island (or perhaps most are not): that a development will depend in at least some degree – for example, for access and other services – on lands surrounding it is commonplace.

WORKABILITY OF S.37(6) & A PURPOSIVE VIEW

111. Having attempted to consider both sides of the argument, in the end, I confess to doubting that the workability of s.37(6) requires a rigid and invariable insistence on the answer given in Gleann Fia – that an aspirant appellant's lands must contiguously adjoin the red line lands. That answer seems to me to be at appreciable potential cost of unfairness to those affected by permitted developments unpredictably different from those proposed, yet whose lands are not precisely contiguous to the red line.

112. Purposively interpreting s.37(6) as, overall, designed to mitigate unfairness brought about by a decision to permit an unheralded form of development, and were the issue res integra, I would be inclined, in construing s.37(6) as a whole, to construe each of the word *"adjoining"* and the words *"land adjoining land in respect of which a decision to grant permission has been made"* purposively as allowing some flexibility to meet, in the circumstances of a case, the justice of that case. Further, inasmuch as s.37(6) contemplates planning conditions altering the development proposed, it is notable that amongst the possible such conditions are conditions imposed under **s.34(4)(a) PDA 2000** "*regulating the development or use of any land which adjoins, abuts or is adjacent to the land to be developed and which is under the control of the applicant*" – in other words, blue-line lands. Given the integration of Breedon's operation, including its water management, it seems likely that Condition 3 in the present case is such a condition. More generally, such an approach seems well-suited to a situation in which a proposed development within red-line lands is, as here, to be part of and dependent on an integrated use of the blue line lands which constitute the relevant planning unit. Here, the Development will in reality be the continuation of quarrying on the Red-Line Lands which quarrying is already part of and dependent on the integrated use of the Blue Line Lands. The purposive argument seems stronger again having regard to the identification of the planning unit and regarding the Council's Decision as in substance intending amendment of the Parent Permission governing the entire Blue Line Lands, including the Red Line Lands.

113. Were the interpretation of s.37(6) res integra, I would favour a purposive interpretation of s.37(6) in favour of aspiring appellants, along lines canvassed above. There is no denying, however, that such a purposive approach would be at appreciable cost both to the literal meaning of s.37(6) and in terms of the certainty and predictability of operation of s.37(6). I confess to considering that, as to the latter at least, the cost may be borne given the limitations imposed by the criteria set out in s.37(6)(d). It cannot be positively said, however, that a literal approach to the section is erroneous. Accordingly, whether the issue is res integra requires consideration of the decision in **Gleann Fia.**

INTERPRETATION OF S.37(6) - CASELAW

MACMAHON (2010) & GLEANN FIA (2019)

114. Breedon says I am bound by Gleann Fia in its adoption of a literal interpretation of s.37(6) PDA 2000.

115. As to the first criterion of s.37(6) – that as to "adjoining" land - Gleann Fia and **MacMahon**[136] arguably differ. **Browne**[137] describes Gleann Fia as a challenge to a Commission decision allowing leave to appeal on the basis that the lands of the applicants to appeal were not "adjoining" the land in respect of which the decision to grant permission was made. He says Haughton J interpreted the term "adjoining", strictly and on its plain and ordinary meaning, as referring only to lands contiguous to - directly adjoining - the "red line" development lands – i.e. the lands identified in the planning application by a red line bounding the lands to which development will be confined. He contrasts MacMahon as a case in which Charleton J. held that a narrow agricultural lane between the respective lands did not render them non-adjoining within the meaning of s.37(6) PDA 2000.

116. **MacMahon** is the earlier case. A developer sought judicial review of the Board's decision on appeal refusing permission. The appellants to the Board had relied, as entitling them to appeal, on their status as observers to the planning authority and the planning authority's formal written acknowledgment of that status. The developer said that

- The acknowledgment erred as the appellants' observations to the planning authority had been late.
- The planning authority had, after deciding to grant permission, (and, I infer, having realised its error in issuing the written acknowledgment) written to the (then-intending) appellants advising that their observations had been late and that, as adjoining landowners, they might appeal under s.37(6) PDA 2000.
- Therefore the appellants had, in law, been non-participants before the planning authority and so had not been entitled to appeal to the Board.
- The Board should have interrogated the validity of the planning authority's acknowledgment in interrogating the validity of the appeal and should have invalidated the appeal accordingly.

Charleton J dismissed the judicial review on the basis that Board had no power to interrogate the validity of the formal written acknowledgment.[138]

117. It seems to me to follow from that basis of dismissal that no question truly arose in MacMahon whether, if non-participants before the planning authority, the appellants could, alternatively, have relied on s.37(6) to validate their appeal. Indeed, it is not apparent that appellants had applied to the Board under s.37(6) for leave to appeal. But Charleton J did address the question whether the relevant lands were adjoining within the meaning of s.37(6). I think it fair to say that, understandably as it was obiter, Charleton J dealt summarily and in merely conclusionary terms with that question. MacMahon was not a reasoned

[136] MacMahon v An Bord Pleanála [2010] IEHC 431.
[137] §6.24.
[138] §15. Though the judgment canvasses an argument that he application for leave to seek judicial review had been late it is not clear that this argument informed the decision of Charleton J.

judgment on the point - as the speculation on which I will now embark illustrates. One may speculate from the limited information to hand that Charleton J may have considered separation of the lands by the agricultural lane de minimis. Or he may have considered that the lane was either the property of one or other of the protagonists or that each owned it to the mid-line of the lane. On any such view, the lands were contiguous - though unless the appellant owned the entire lane, it seems unlikely that his lands were contiguous to the red line. But, as I assume there would have been no dispute had that been so, it does follow that Charleton J did allow, at least in some degree, that adjoining lands within the meaning of s.37(6) need not be contiguous. That, at least, seems to me consistent with, and a good example of, the limited flexibility attributable to s.37(6) on the purposive view I have suggested above.

118. MacMahon was not, as far as is apparent, cited to the court in Gleann Fia. Gleann Fia, by contrast, was a reasoned judgment addressing very directly the meaning of the word "adjoining" in s.37(6). Gleann Fia sued to quash the Board's decision to grant leave to the notice parties, non-participants in the planning process before Cork County Council, to appeal that Council's decision to grant Gleann Fia permission to build houses. Haughton J described the case as concerning the correct interpretation and application of s.37(6). He accepted that it was arguable that the development which the Council had decided to permit would affect the notice parties' enjoyment of their lands and/or devalue them. But he quashed the Board's decision on three bases:

- The notice parties' lands did not adjoin the development site and the Board had not given reasons for concluding that they did.
- The development which the Council had decided to permit did not materially differ from that for which the planning application had been made.
- The notice parties had been late in seeking leave to appeal.

Gleann Fia – "adjoin land in respect of which a decision to grant permission has been made"

119. As to the facts in that case, the judgment records that Gleann Fia's "red-line site" lay south of the Shournagh river. The village of Tower lies north of the river. The existing vehicular bridge over the river to Tower was unsafe for pedestrians. Gleann Fia's planning application envisaged and illustrated, outside the "red-line site", pedestrian connectivity between the red-line site and Tower via, for about 300m, a public footpath along the Kerry Pike Road to the existing bridge and a "possible" new pedestrian/cycle bridge over the river (parallel to and northeast of the existing bridge). The envisaged arrangements north-east of the bridge appear to have been complex. The notice parties' lands lay just north of the river - bounded on the west by the Kerry Pike Road, and on the south by the mid–stream line of the river. They were 238 metres as the crow flies, or 311 metres by the Kerry Pike Road, from Gleann Fia's red line site. (The distances in the present case are far greater). In Gleann Fia and in the view of Haughton J, those distances put *"beyond dispute… that the Notice Parties' land cannot be said to be next to or adjoined with or in contact with the applicant's 'red line' development lands"*.[139]

[139] §59.

120. Their detail aside, the envisaged arrangements at and north-east of the postulated new bridge included use of the proposed pedestrian/cycle bridge, a disused railway line and a footpath – all part-owned - on an "ad medium filum" basis,[140] by the notice parties. Put simply, the arrangements for pedestrian access to Tower envisaged in the planning application for outside the red line site included use of lands owned by the notice parties. These arrangements appear to have conflicted with the notice parties' intentions to build on their lands – as they told the Board in seeking leave to appeal.[141]

121. Gleann Fia's planning application did not seek permission for those pedestrian connectivity works – the works for which permission was sought were confined to its own red-line site. Rather, Gleann Fia and the Council appear to have agreed (the Council perhaps considering that dangerous pedestrian access to Tower from south of the river was a general problem rather than specific to Gleann Fia's site) that the Council would, by planning condition (#35), levy a special development contribution[142] to pay for the Council's construction of the pedestrian/cycle bridge – the Council dealing with "*any third-party ownership issues*".[143]

122. It is clear that the protagonists in Gleann Fia argued in detail and cited authority for, respectively, a narrower literal, and a wider purposive, interpretation of the phrase "*interest in land adjoining land in respect of which a decision to grant permission has been made*" in s.37(6).[144] Inter alia, the Board argued the unfairness of narrower literal interpretation – inter alia by reference to constitutional considerations of, it seems, property rights and fair procedures. However Haughton J emphasised the literal - plain and ordinary - meaning of the words of the section. He explicitly accepted authority – **Cronin**[145] and **McTigue Quarries**[146] - that *"the court should "bear in mind the overall framework and scheme of the 2000 Act", and the "context of the provision in question within that framework".* But he considered that

> *"the broader purposive approach advocated by counsel for the Board in my view only becomes relevant if the provision is capable of more than one meaning, or the literal interpretation would clearly frustrate the purpose of the legislation".*

123. I confess to considering that this last observation may need revisiting in light of recent decisions on statutory interpretation which came after Gleann Fia. At risk of over-simplification, it may be useful to identify three broad approaches to statutory interpretation: first, simply literal – i.e. the natural, plain and ordinary meaning of the words; second, text in context; third purposive. **Heather Hill**[147] identifies the first as the first, most important port of call (the "predominant factor"[148]) but the second as the next and necessary port of call, in which the various canons, maxims, principles and rules of interpretation may assist. Murray J said that, while "*The words of the section are the first port of call in its interpretation*", *"the court must*

[140] "up to the middle line". This refers to the common law presumption that title to lands bordering a public road or a non-tidal river/stream, extends to the centre line of that road or waterway.
[141] See Gleann Fia judgment §23 & 24 & 38.
[142] See s.48(2)(c) PDA 2000.
[143] See Gleann Fia judgment §22 & 27 – 29 & 35.
[144] See Gleann Fia judgment §43 et seq.
[145] Michael Cronin (Readymix) Limited v An Bord Pleanála [2017] 2 I.R. 658.
[146] An Taisce v McTigue Quarries Limited [2018] I.E.S.C. 54.
[147] Heather Hill Management Company CLG & Anor. v An Bord Pleanála & Ors. [2022] IESC 43.
[148] A, B & C (a minor) v Minister for Foreign Affairs & Irish Human Rights and Equality Commission [2023] IESC 10 [2023] 1 I.L.R.M. 335.

construe those words having regard to the context of the section, of the Act in which the section appears, the pre-existing relevant legal framework and the object of the legislation insofar as discernible"[149] However, the onus is on those contending that a statutory provision does not bear its plain meaning to so establish – **Chain Wen Wei**.[150] That case and recently, **Pat O'Donnell & Co**,[151] in reciting the approval in Heather Hill of the four essential points made by McKechnie J in **Brown**[152] might be read as suggesting, in the fourth point, that, as Haughton J considered, only where the literal and text in context approaches yield ambiguity does purposive interpretation intrude. However **A, B & C (A Minor)** [153] clarifies that ambiguity is not a prerequisite to purposive interpretation - that Heather Hill "*put beyond doubt that language, context and purpose are potentially in play in every exercise in statutory interpretation, none ever operating to the complete exclusion of the other"* - context and purpose *"always being potentially relevant to elucidating, expanding, contracting or contextualising the apparent meaning"* words. Purpose is described as *"the discernible objective of the statute".*[154] **Friends of the Irish Environment**[155] emphasised

> *"beyond doubt that language, context and purpose are potentially in play in every exercise in statutory interpretation, none ever operating to the complete exclusion of the other. The starting point in the construction of a statute is the language used in the provision under consideration, but the words used in the provision must still be construed having regard to the relationship of the section to the statute as a whole, the place of the statute in the legal context in which it was enacted, and the connection between those words, the whole Act, that context, and the discernible objective of the statute".*[156]

124. That purposive interpretation may always be at least potentially in play has the considerable added advantage of reducing the risk of different approaches to interpreting purely domestic legislation, domestic legislation implementing EU Legislation and EU legislation – as to the latter of which purposive interpretation is weighty.

125. All that said, Heather Hill and A, B & C (A Minor) envisage purposive interpretation where the statute's purpose is "discernible". Haughton J accepted Gleann Fia's argument that where several policies or intentions may underpin a provision, the court should not look beyond its wording as reinforcing his *"view that s.37(6) should be given a literal interpretation, and should not be broadly construed in a manner that might undermine the policy or legislative intent behind either s.37(6) or s.37(1)(a), whatever that may be."*[157] So, in A, B & C terms and at least in some respects, Haughton J may not have considered the objective of the statute reliably discernible.

[149] Heather Hill v An Bord Pleanála [2022] IESC 43, §214, (Murray J.).
[150] Chain Wen Wei v Minister for Justice & Commissioner of An Garda Siochana [2024] IESC 58, [2024] 12 JIC 1903 (O'Donnell CJ).
[151] Pat O'Donnell & Co v Dublin City Council & Uniphar [2026] IESC 36.
[152] The People (DPP) v Brown [2019] 2 IR 1.
[153] A, B & C (a minor) v Minister for Foreign Affairs & Irish Human Rights and Equality Commission [2023] IESC 10 [2023] 1 I.L.R.M. 335.
[154] Emphases added.
[155] Friends of the Irish Environment CLG v The Legal Aid Board [2023] IECA 19 (Murray J.)
[156] §40.
[157] Emphasis added.

126. In any event, given its explicit predominance in statutory interpretation, care must be taken to avoid too-ready displacement of literal, plain and ordinary meaning. It should hardly be a surprise if, after all, many statutes mean simply what their words appear to plainly say. Preference for literal meaning is not, per se, a sign of failure of proper interpretation.

127. Haughton J elaborated his reasons. He cited, with due caution, dictionary definitions of "adjoin":

- Oxford[158] "v. [often as adj. *adjoining*] be next to and joined with. - Origin C19: from O[ld] Fr[ench] *ajoindre*, from Latin *adjungere*, from *ad*—'to' + *jungere* 'to join'."
- Chambers[159] "to join on: to lie next to, to be in contact".

128. I readily accept that these definitions convey the plain, ordinary, literal meaning of "adjoin" as requiring contiguity – a common boundary. I interpose here reference to **Casey v Bioatlantis**[160] which Breedon cites. It was not a case on s.37(6) but on **s.225 PDA 2000**[161] which required planning permission from for development on the foreshore adjoining the functional area of the planning authority. Mr Casey, arguing that kelp harvesting needed planning permission, argued for an interpretation of "adjoin" that did not require contiguity or a common boundary but had the sense of "neighbouring". The High Court had held that "*adjoin means connected*". The Court of Appeal agreed - holding that "*the word 'adjoin' in s. 225 bears its ordinary meaning of 'connected to', 'touch' or 'share a border with*'".[162] While meaning in a particular instance is contextual, Casey is at least authority for the ordinary meaning of the word.

129. Returning to Gleann Fia, Haughton J noted that the legislature "*advisedly used only one word, namely "adjoining", in s.37(6)(a) in reference to the development land and the land of the 'would-be' appellant."*[163] It could instead have used but did not use, words such as "near to", "in the vicinity of", or "affected by". He considered that they and a wider interpretation of "*adjoining*" would yield very wide scope for different interpretation (and, for that matter application to facts) and an uncertainty that "*cannot have been intended by the Oireachtas*." That is a very definite observation by Haughton J.

130. The Board in Gleann Fia had a second argument for a broad purposive interpretation of the phrase "*in respect of which a decision to grant permission has been made*" – emphasising the words "in respect of which" as having the "*potential to encompass a broader class of lands than just the development site or the lands in respect of which permission has been granted*". On that basis, it argued, the phrase included the land on which it was proposed to build the pedestrian bridge and walkways which *"is on/adjoins the notice parties' lands".* Again, Haughton J preferred what he considered to be the plain and ordinary meaning of the words and noted that the decision to grant permission did not permit or require the construction of the pedestrian bridge and walkways.

[158] Concise Oxford Dictionary (10th Edition Revised).
[159] The Chambers Dictionary (13th Edition 2014).
[160] Casey v Bioatlantis Aquamarine Limited [2022] IECA 222.
[161] Since repealed.
[162] §84.
[163] §60.

131. Haughton J cited Finlay J in **KSK**[164] for the proposition *"as a matter of general construction, where a restriction is being imposed upon the exercise of a right in a statute such as this sub-section involves, that it is desirable to the extent of being almost imperative that it should be capable of being construed and should be construed in a clear and definite fashion."* S.37(1)(a), of course, is the rule against appeal by non-participants to which s.37(6) provides limited exceptions. Haughton considered that s.37(1)(a) and s.37(6)(a) are capable of being and should be construed in a clear and definite fashion.[165] It is clear[166] that the clear and definite construction he favoured was that the lands of the applicant for leave to appeal must adjoin – be contiguous to – the red line lands.

132. Notably, Haughton J doubted the premise of a purpose of s.37(6) favouring a wider interpretation.[167] He canvassed a variety of possible contrary purposes which the Oireachtas might have had in mind, and concluded that where several possible legislative policies, purposes or intentions may have underpinned a statutory provision or statutory exception, it is not for the court to look beyond its wording. S.37(6) "*should be given a literal interpretation, and should not be broadly construed in a manner that <u>might</u> undermine the policy or legislative intent behind either s.37(6) or s.37(1)(a), <u>whatever that may be</u>."*[168]

133. On this issue, Haughton J concluded that

> *"In my judgment there was no basis in fact or in law upon which the Board could have treated the Notice Parties' lands as "adjoining". The Notice Parties simply could not satisfy the first criterion, and therefore the Board's decision is based on errors of law and fact."*[169]
>
> *"Accordingly on this ground alone the Board's decision to grant Leave to Appeal must be quashed."*[170]

134. Ultimately, it is clear to me that Gleann Fia is an argued, considered, clear and authoritative judgment on a matter of statutory interpretation. It holds that s.37(6) PDA 2000 requires that the lands of an applicant for leave to appeal must adjoin – be contiguous to – the red line lands. And in that respect, it contrasts markedly with what was all but an aside in MacMahon. Haughton J held in the clearest and most general terms that

> *"…. the plain and ordinary meaning of the words, "a person who has an interest in land adjoining land in respect of which a decision to grant permission has been made" <u>can only be</u> that they refer to an interest in land that is <u>contiguous or directly adjoining</u> the land in respect of which the development works to which the grant of permission has been made are to be carried out i.e. <u>the "red line" development lands</u>."*[171]

[164] K.S.K. Enterprises Ltd v An Bord Pleanála [1994] I.R. 128.
[165] §72.
[166] §59 et seq.
[167] §73.
[168] Latter emphasis added.
[169] §76.
[170] §78.
[171] Emphases added.

135. Put simply, Gleann Fia is authority that the phrase *"land in respect of which a decision to grant permission was made"* refers only to red line lands.

Gleann Fia – Board's Arguments Rejected & Haughton J's Interpretive Approach

136. It is important to emphasise that the interpretation of s.37(6) - whether it should be narrowly or widely interpreted - was the central issue in Gleann Fia and was fully argued. Breedon, indeed, submits that the Commission's present arguments "reek" of its arguments rejected in Gleann Fia. In Gleann Fia, the Board, in arguing for a broad interpretation, as it does in this case, did so, inter alia, on the purposive basis that s.37(6) was intended to

- *"protect the property rights and associated fair procedures rights of persons whose lands/interests in lands may be adversely affected by the relevant decision …"*

- *"plug a potential gap, namely that when amendments to developments during the decision-making process mean that a decision to grant permission is likely to affect someone adversely and/or to a greater extent than was apparent at the beginning, when public notice was given, that person should be afforded the opportunity to be heard."*

137. Haughton J rejected these arguments. He rejected also arguments that:

- The Oireachtas could have provided that an applicant for leave must have an interest in land "*adjoining the site of the permitted development*" but instead provided that he or she must have an interest in "*land adjoining land in respect of which a decision to grant permission has been made*."

- The phrase "*in respect of which a decision to grant permission has been made"* arguably encompasses, or has the potential to encompass, a broader class of lands than just the development site or the lands in respect of which permission has been granted.

- The term "adjoining" can be given a broad interpretation so as to encompass any lands that are adjacent to, near or in the vicinity of lands in respect of which a decision to grant permission has been made and that are likely to be affected by that permission.

- *"the narrower, formulistic construction contended for by the Applicant can result in unfair and potentially unconstitutional consequences and would do so in this case*."

138. In other words, Haughton J in Gleann Fia did consider and rejected broadly the contextual arguments and the purposive arguments which, for various reasons – albeit in light of a factual matrix not apparent to Haughton J - I have indicated above some disposition to accept were the matter res integra.

Gleann Fia – Material Changes due to Conditions - s.37(6)(d)(i).

139. Having found against the Board as to the "adjoining" issue, Haughton J nonetheless went on to consider the criterion set by s.37(6)(d)(i) - that the applicant for leave to appeal show that "*the development in respect of which a decision to grant permission has been made will differ materially from the development as set out in the application for permission by reason of conditions imposed by the planning authority to which the grant is subject*".[172]

140. Haughton J noted that the Board, in granting leave to appeal, did not describe the material differences that gave rise to its decision. He described this as an "absence of reasoning". He concluded that the Board's decision on this criterion was not factually substantiated and was wrong in law. Comparing the relevant drawings, he said: *"there is no difference whatsoever in relation to the development within the "red line" site."* Any differences as to the pedestrian bridge and footpath link crossing the notice parties' lands were minor, insignificant and immaterial. The permission did not permit or require the pedestrian bridge and footpath – which were more at concept than at design stage. These were not developments in respect of which the applicants ever applied for planning permission, they fall outside the "red line" site, and plainly concern the possible development of third-party lands.[173]

> *"Fundamentally …. the nature and extent of the works comprised in "the development" as originally applied for do not differ materially from the works in respect of which the decision to grant permission was made. In particular, objective comparison by an intelligent and informed layperson or a developer of the plans and particulars originally lodged with the application with the revised plans and particulars accompanying the further information (which are listed in Condition 1), would not perceive any material difference in the development works permitted in the "red line" site."*[174]

141. Further, Condition 35, requiring payment of a contribution to the Council, as to the cost of the pedestrian bridge and amenity walk links did not touch on or affect any "red line" works. Such a condition could objectively have been anticipated by an intelligent and informed layperson or a developer or their agent on reading the planning application.[175] Haughton J's point was that, accordingly, its imposition did not render the permitted development different from that proposed.

142. So, as to the criterion set by s.37(6)(d)(i) – that the permitted development differs materially from that proposed and so differs due to planning conditions - Haughton J concluded:

> *"there was no factual basis upon which it could have concluded that Condition 1 and/or Condition 35 caused the permission granted by the Council to differ materially from that for which the applicants applied initially. As a matter of law neither condition made any difference at all to the development "works" within the "red line" site. Further no intelligent well-informed layperson or developer would*

[172] §79 et seq.
[173] §86 - §88 & §80.
[174] §85.
[175] §89 & §90.

objectively consider that there was any material difference between the initial application and that in respect of which a decision to grant permission was made, by reason of either of these conditions. On this ground also the Board's decision to grant leave to appeal should be quashed."[176]

143. Given the findings I have already made – that Condition 3 in this case did not create a relevant difference between the Proposed Development and the Permitted Development - Haughton J's reasoning in this respect applies in the present case also.

Gleann Fia – Effect on Enjoyment or Value of Land - s.37(6)(d)(ii).

144. In Gleann Fia Haughton J[177] stated that,

- The Board's decision to allow an appeal did not elucidate how the Board considered that the notice parties' enjoyment of their land would be materially affected by either planning condition in question, or how the conditions, individually or together, would reduce the value of their land.

- S.37(6)(d)(ii) does not refer to "development" as the cause of such effects. It focuses on "conditions". But the conditions must be interpreted in context – which includes the proposed development.

- Conditions as to works inside the "red line" will not materially affect the notice parties' enjoyment of their land (at some distance from the red line area[178]). The conditions in question did not involve doing works and so would not of themselves materially affect the notice parties' enjoyment of their land.

- However, the conditions could possibly reduce the value of the notice parties' land – by raising the prospect of works more or less incompatible with the notice parties' residential development intentions for those lands. For that reason were failure of the s.37(6)(d)(ii) criterion the only ground for seeking judicial review, Haughton J would have refused *certiorari* of the decision to grant leave to appeal.

145. Finally, as he quashed the Board's decision for the other reasons described above, Haughton J considered it unnecessary to decide the challenge based on want of reasons. But he drew attention to the observations he had made in that regard as assisting the Board in future.

MOREHART (2025)

146. In **Morehart**[179] Farrell J refused to quash the Board's refusal to allow Mr Morehart to appeal a decision to permit industrial development on what, it was agreed, were lands adjoining Mr Morehart's. So the question whether the relevant lands adjoined did not arise in that case.

[176] §99.
[177] §100 et seq.
[178] My observation.
[179] Morehart v An Bord Pleanála & Abbott [2025] IEHC 418.

147. Mr Morehart argued that Condition 4 of the planning authority's decision had caused the development permitted to differ materially from that set out in the permission application. Condition 4 required pre-commencement agreement with the planning authority of an asbestos survey and removal plan, a soil excavation and hazardous/contaminated waste soil management plan, a contingency/remedial plan to deal with incidents or occurrences which might cause polluting discharge to waters and a construction project management plan and required that the development be effected in accordance therewith. Mr Morehart argued that these plans would require works not heralded in the application documents and that they implied that the council had identified a real risk of pollution, not addressed in the application documents. Farrell J disagreed. She concluded that the applicant's complaints "*... as to the impact of the proposed development on his lands relate exclusively, or almost exclusively, to the development itself and not any variations to the development required by the conditions.*" [180]

148. Farrell J cited Haughton J's rejection, in Gleann Fia, of a broad interpretation of s.37(6) or s.37(1)(a) PDA 2000 in favour of a literal interpretation.

149. As to whether the permitted development differed from that for which permission had been sought, Farrell J held that the Board must

- construe the planning documents on an XJS basis.[181]
- engage with the original planning application and compare the development applied for (including reasonably anticipatable conditions) with the development granted by the council.
- focus on differences in the "*development works permitted in the 'red line' site*" arising from the conditions imposed by the council.

She held that consideration of the materiality of any such difference necessarily involves the exercise of planning judgement - judicially reviewable as to merit only for irrationality.

150. Farrell J noted that in Gleann Fia, Haughton J held that

- there was no factual basis on which the Board could have concluded other than that neither of the conditions in question made "*any difference at all to the development 'works' within the 'red line' site.*"[182]
- those conditions, at least in general terms, "*could 'objectively' have been anticipated by an intelligent and informed layperson or a developer or their agent on reading the planning application.*"[183]

151. Of some relevance to the present case, she found

- no evidence that the Council had identified a real risk of pollution not addressed in the application documents. In other words, she declined to infer such recognition from the imposition of Condition 4.

[180] Farrell J §177.
[181] Re XJS Investments Limited [1986] IR 750.
[182] Farrell J §29.
[183] Farrell J §45.

Mr Payne makes a similar argument here – that Condition 3 recognises a risk to wells not apparent in the planning application. Like Farrell J I respectfully reject that argument.

- that Condition 4 regulated the implementation of the Proposed Development as permitted and "*to protect the environment and ensure orderly development*". Condition 3 is similar as to environmental protection.

- As such "*it could reasonably have been anticipated*" as envisaged by Haughton J in Gleann Fia. In my view Condition 3, or something like it, was similarly predictable on reading the planning application - not least given the treatment of wells in the EIAR and the long history of well monitoring on foot of the Parent Permission.

- So, *"the Board was entitled to find that Condition 4 did not materially alter the development".* I consider that the present case falls in the Gleann Fia category – there was no basis for a finding that Condition 3 did materially alter the development.

GROUND 2 – DEVELOPMENT DIFFERS MATERIALLY DUE TO CONDITION 3 & MATERIALLY AFFECTS ENJOYMENT AND/OR VALUE OF PAYNE LANDS?

152. It is convenient to decide Ground 2 first.

PLEADINGS & BREEDON'S POSITION

153. Ground 2 asserts that ***"the Board misconstrued s.37(6)(d)(i) and (ii) PDA 2000 as to the criteria applicable to the granting of leave to appeal to"*** Mr Payne.[184]

154. The pleaded particulars of Ground 2, and Breedon's permissible submissions thereon, include the following:

a. Condition 3 is the basis of the Impugned Decision. They recite the text of Condition 3 and of the Impugned Decision's stated reason why the Permitted Development will differ materially, due to Condition 3, from that proposed in the Planning Application.

b. Condition 3 is, *inter alia*, a pre-commencement condition which requires Breedon to outline on a contingency basis and to the Council's satisfaction, its remedial action proposals in the hypothetical event of impact to monitored private wells indicated in EIAR Table 8.12. Table 8.12 does not list Mr Payne's well – as Mr Payne's leave to appeal applications[185] acknowledged.

[184] Text amended without altering meaning.
[185] Dated 22 November 2022 §8 and 11 March 2024, §8.12.

c. As the Development relates to deepening a pre-existing quarry area and Condition 3 requires remedial action proposals in the event of impact to wells indicated in EIAR Table 8.12. The Commission erred in fact and in law in deciding that the Permitted Development materially differed, due to Condition 3, from that proposed in the Planning Application.

d. Condition 3 does not alter the Development proposed in the Planning Application – the Permitted Development is the same development. The impacts to which Condition 3 is directed are not impacts caused or required by Condition 3. They are impacts from the development proposed in the Planning application.

e. Where the Commission stated its reason for considering that the Permitted Development materially differed, due to Condition 3, from that proposed in the Planning Application as being that "*it is not clear what the extent and scope of any remedial actions that will be required in the event that the quarry activities impact existing wells"*, and where Condition 3 does not refer to Mr Payne's well, Condition 3 has no bearing, let alone material effect, on Mr Payne's enjoyment of his lands or on their value.

f. The Commission's finding of lack of clarity as to what may occur on lands other than Mr Payne's does not satisfy the statutory test of s.37(6)(d)(i) and (ii) PDA 2000.

g. The Commission does not, even in its Statement of Opposition, explain how, by Condition 3, the Permitted Development differs at all, still less materially, from the development proposed in the Planning Application.

h. Accordingly, the Commission misconstrued the requirements of s.37(6)(d)(i) and (ii) PDA 2000 in as to the criteria applicable to the granting of leave to appeal to Mr Payne. So the Commission's decision is invalid.

COMMISSION'S POSITION

155. The Commission asserts that

a. Gleann Fia holds that the irrationality standard of review as to merit applies. Yet Ground 2 does not plead irrationality and Breedon has not engaged with Mr Payne's evidence to the Commission.

b. There was a clear evidence base for the Commission to find, on the basis of a correct understanding of Condition 3, that Mr Payne had satisfied s.37(6)(d).

c. In s.37(6)(d), the word "*materially*" invokes difference in planning and environmental terms.

d. The EIAR[186] positively anticipated no effects on the wells examined - so it anticipated no remedial works.

e. Condition 3 envisages potential further development works - remedial actions/works - if quarrying impacts local wells. Those actions/works were not proposed in the planning application. Their prospect arose first in Condition 3.

f. Mr Payne indisputably has a well local to the Development. Condition 3 does not protect it. It is omitted from the scope of Condition 3 and of the remedial works/actions it envisages. Thus, from Mr Payne's perspective, it is difficult to see how it would not be considered material to him and the use of his land. If his well is impacted by quarrying, the failure to include Mr Payne's land in any remedial works/actions would self-evidently materially affect his enjoyment of his land.

MR PAYNE'S POSITION

156. Mr Payne's position is that

a. The scheme of the PDA 2000, as relevant, is that the Council may modify a proposed development by planning condition only where it considers the proposal made unacceptable and that it requires non-trivial or non-insubstantial modification.

b. Conditions which envisage or anticipate that additional works may need to be done in law and in fact materially alter the proposed development. Any remedial works required by Condition 3 are likely to significantly change the development.

c. As I understand Mr Payne's argument, Condition 3 requires pre-commencement agreement of contingent remedial works which,
- should they be required, will be deemed permitted by the planning permission and so be part of the development authorised by it.
- were not proposed in the planning application.
- therefore render the Permitted Development materially different from that proposed in the planning application.

d. Mr Payne is particularly affected in the enjoyment and value of his land by issues arising from Condition 3 as his well has already been severely compromised by Breedon's quarrying and failed remediation. Breedon could not but have been aware of the history and yet pointedly excluded Mr. Payne's well from consideration in its planning application. There is at least an unexplained and very significant gap in Breedon's analysis. That omission may have affected the Council Decision.

e. Mr Payne's application for leave to appeal was made on the basis that
- The issues of groundwater and protection of local wells is an important planning consideration.

[186] Chapter 8.

- The Development involves a significant deepening, below the water table, of an existing quarry - which would inevitably result in the drawdown of groundwater. Yet the planning application did not envisage effect in the vicinity.
- The Council was not satisfied, given the nature of the Proposed Development, that it posed no substantial risk to local wells. That is why it imposed Condition 3.

f. Given the significance of the issue to which Condition 3 relates and the evidence before them, the Commission as an expert body was entitled to make the planning judgement that Condition 3 rendered the Permitted Development materially different to that set out in the Planning Application, such as to materially affect his enjoyment of his land and/or reduce its value.

g. Condition 3 envisages increased risk of further damage to groundwater and local wells due to the Permitted Development's deepening of the quarry - which will further devalue Mr Payne's land within the meaning of s.37(6)(d)(ii). As I understand the submission, it is that both the fact of Condition 3 – the risk it recognises – and Mr Payne's exclusion from its remedial works devalue his lands.

h. Condition 3 is non-contingent in that it imposes a pre-commencement requirement to agree details of remedial actions which will take the form of works and so will constitute development within the meaning of the PDA 2000.

GROUND 2 - DISCUSSION & DECISION

History of Dispute & its Omission from EIAR

157. Mr Payne's position on Ground 2 emphasises his allegation of long-standing history of adverse effect on his well, family and farm and that the EIAR ignored that history. Mr Payne calls this, perhaps with good reason, at least an unexplained and very significant gap in Breedon's analysis and in the information it was obliged to place before the Commisision to inform a comprehensive EIA. I have already noted that the Council's EIA consisted of essentially accepting the EIAR and I do not consider that the imposition of Condition 3 upsets that view. But I have already explained why that gap is irrelevant to this case. Put simply, any such gap was apparent on Breedon's Planning Application and was not created or rendered first apparent by Condition 3.

Mr Payne as a Non-Participant before the Council

158. Counsel for the Commission says it is "*fundamentally wrong ……. to say that section 37(6) involves some degree of participation in the first instance*" as s.37(6) explicitly addresses the position of the person who did not participate - "*that's the whole point. So the observer who looks in, like Mr. Payne, sees the application that says there is no effect on wells and then the planning authority comes out and says well*

actually there might be, and in that event you have to agree a schedule of remedial measures …"[187] It is indeed a premise and a salient point of s.37(6) that it addresses the position of persons who did not in fact participate before the planning authority. But it is not the whole point. S.37(6) does not address such persons generally – the general effect of s.37(1)91)(a) is that they may not appeal to the Commission. Rather s.37(6) creates a specific and limited exception for a particular cohort of such non-participants who,

- first, did inspect, or had opportunity to inspect and are assumed to have inspected the planning application and have reasonably been reassured thereby and so did not participate,
  and,
- second, later find that reassurance undermined by an unexpected alteration of the development by a planning condition.

159. Mr Payne fails on both counts. As to the first and on the facts and history of this case, there is no reality whatsoever to imagining Mr Payne considering the EIAR and accepting its conclusion of no effect on wells and so deciding not to participate before the Council. Indeed, that he would have done so is the basis of his complaint about the site notices. There can be no doubt that what troubles him now would have troubled him then on his inspection of what he considers a deeply flawed EIAR: the EIAR had not considered his well and what he considers the history of the effect of Breedon's quarrying on his well. True, the EIAR asserted that there would be no effect on wells. But there was never any prospect that Mr Payne would have accepted that assertion or that he would have been lulled thereby into non-participation before the Council. As an inference the Commission in effect invites me to draw, it is incredible.

Condition 3 – Implications for Acceptability of Proposed Development

160. As noted above, there is no suggestion that Condition 3 is invalid. Breedon accepts it. The Commission and Mr Payne rely on it. Mr Payne, however, asserts that the Council may modify a proposed development by planning condition only where it considers the proposed development unacceptable, such that it requires non-trivial or non-insubstantial modification. Mr Payne cites no authority and I am unaware of any. In any event, Mr Payne argues on this basis that Condition 3 implies that the Council considered the development proposed in Breedon's Planning Application unacceptable, such that Condition 3 is viewed as materially altering it within the meaning of S.36(7). In my view, the proposition that the Council may modify a proposed development by planning condition only where it considers the proposed development unacceptable such that it requires non-trivial or non-insubstantial modification, is a proposition unnecessarily restrictive of the power to impose conditions and, indeed, of the power of a planning authority to secure desirable or necessary improvements to a proposed development within the scope of its evaluative planning judgement. While there is a view that conditions may only be imposed where "necessary", this does not seem to be a rigorous requirement. I confess to wondering if it remains useful. I

[187] Transcript 15:30.

do not see that Mr Payne's citation of a **Bord na Móna** case assists him in this regard.[188] **Browne**[189] cites **Pyx Granite, Newbury DC, Hanrahan** and **Quinlan**[190] for the propositions that, once precise, enforceable, reasonable and imposed for a planning purpose and non-ulterior purpose, and as long as they fairly and reasonably relate to the development permitted, planning authorities have, within those limits, wide powers to impose such conditions as they think fit[191] – one might suggest, as they reasonably think desirable for reasons of proper planning and sustainable development. For these reasons and for reasons elaborated below, I reject Mr Payne's assertion that Condition 3 implies that the Council considered the development proposed in Breedon's Planning Application unacceptable.

161. Further, Mr Payne's submission errs in viewing the Council's Decision narrowly through the lens of his particular dispute. The Council's overall view of the acceptability of the development proposed in Breedon's Planning Application was doubtless multifactorial. While conditions can be used to render unacceptable development proposals acceptable,[192] that is far from their only – or even usual - use. There is also in Mr Payne's argument some degree of fallacious reasoning along the lines of – conditions can modify developments: there is a condition; therefore the development is modified.

Application of S.37(6)(d) to Condition 3 – Adverse Effect on Enjoyment and Valuation

162. Of some note, neither the Commission nor Mr Payne challenges s.37(6)(d) PDA 2000 as exceeding the scope to impose criteria for access to justice allowed to Member States by Aarhus Article 9[193] or suggest that s.37(6)(d) is substantively affected by what I will call the "Aarhus Interpretive Obligation" – the obligation deriving, via EU law, from the Aarhus Convention, to interpret domestic law, as far as possible, consistently with Aarhus objectives.

163. As has been seen, I interpret s.37(7)(d)(ii) as limited to <u>adverse</u> effects on adjoining lands. In my view, even if Condition 3 is considered to alter the Proposed Development, that alteration will not adversely affect Mr Payne's lands. Or at very least it cannot be said that Mr Payne has proffered any evidence to show that it will. If wells, including his, are adversely affected, it will be by the Proposed Development – i.e. that proposed in the Planning Application – specifically by quarrying and pumping out the resulting void, thus lowering the water table. Condition 3 does not alter that position. It responds to it. And it does so by contemplating contingent works which may never be done and which will only be done if and after adverse effect has already occurred. And if done, those works will be remedial. Even if they do not remediate Mr Payne's well, I have seen no basis for considering that they will adversely affect it.

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[188] His submissions cited Bord na Mona v An Bord Pleanála as a case in which an inappropriate condition rendered the decision void and the overall decision was quashed by order of the Supreme Court. He did not give a citation. I presume the reference is to the High Court decision of Keane J (as he then was) in Bord na Móna v An Bord Pleanála & Galway County Council, [1985] IR 205.
[189] Simons, Planning Law 3rd Ed'n, (Browne 2021) §4-228 et seq.
[190] Pyx Granite Co Ltd v Minister for Housing and Local Government [1958] 1 Q.B. 554. Newbury District Council v Secretary of State for the Environment, [1981] A.C. 578 at 599. Hanrahan Farms v EPA [2012] 3 I.R. 417. Quinlan v An Bord Pleanála [2009] IEHC 228.
[191] This observation relates to the general power to impose planning conditions – not to the limits on particular types of condition imposed by s.34(4) PDA 2000 – see Browne §4-255 et seq.
[192] Browne §4-228.
[193] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Done at Aarhus, Denmark, on 25 June 1998.

164. Further, as considered important in both Gleann Fia and Morehart, Condition 3 or something like it was eminently foreseeable to anyone considering the Planning Application documents and the development they proposed against the possibility that permission would be granted. Indeed, the absence in the Council's Decision of a precautionary condition of some kind, addressing the contingency of adverse effect on wells would have been surprising even though the Planning Application anticipated no adverse effect on wells. That is so not least in the context of the monthly well level monitoring regime required by the Parent Permission, ongoing for about 25 years and which continues to be required by the Parent Permission.[194] It is described in the EIAR – which confirms that such monitoring will continue.[195] That monitoring is very obviously a response to the generally recognised risk that pumping out quarries can lower water tables. The EIAR also describes reductions in levels of certain local wells[196] – though not necessarily by reason of Breedon's quarrying. The purpose of the long-term monitoring is clearly to discern any adverse effect on well levels by the quarrying. However small the EIAR considered that risk to be, the obvious next question is what to do if the monitoring shows the effects for monitoring had been required for many years. Condition 3 addresses that obvious question. In this context, I reject Mr Payne's assertion that Condition 3, in making precautionary provision for an unlikely contingency, shows that the Council considered the development proposed in Breedon's planning application unacceptable.

165. In discerning whether the Permitted Development differed in any relevant respect, by reason of Condition 3, from that for which Breedon sought permission, it seems to me useful to consider what would have been the position had Condition 3 not been imposed. Undoubtedly, in that event, and in terms of the case made by Mr Payne to the Commission when seeking leave to appeal, the Permitted Development would not have differed from that for which Breedon had sought permission. In that case, clearly, no appeal by Mr Payne would have been possible as s.37(6)(d)(i) could not have applied. Yet, in this exercise, I think the underlying premise which Mr Payne says prompted the imposition of Condition 3 must be assumed. On that – Mr Payne's – assumption and without Condition 3, the Proposed Development for which Breedon sought permission implies an unquantified risk of adverse effect on local wells. That is the essential risk of adverse effect of which Mr Payne seeks to complain by way of appeal to the Commission and that risk is clearly not brought about by Condition 3. Nor was Condition 3 unanticipated or unexpected in the sense canvassed in Gleann Fia and Morehart.

166. Even if one takes the view, which I confess I do not though all parties do, that Condition 3 does not protect Mr Payne's well in addition to the 17 Wells it refers to, it is clear that, assuming the Proposed Development for which Breedon sought permission, the imposition of Condition 3 did not put Mr Payne's well at new risk or increase any risk to it. It would be at that same risk had Condition 3 not been imposed. Any possibility of adverse effect on Mr Payne's well is a function of the quarrying for which Breedon sought permission. It is not the result of the imposition of Condition 3. There is no evidence, reason to believe or even suggestion that remedial works, if any, effected on foot of Condition 3 may adversely affect Mr Payne's well.

[194] EIAR §8.4.6.4. Historic Groundwater Levels.
[195] EIAR §8.7.7 p8-93.
[196] EIAR Chapter 8 Appendix 8D, Off-Site Groundwater Level Trends.

167. While I need not so conclude for purposes of my decision, I think I may observe that, as such works will be by way of remedial response to groundwater level and well-level reduction, it seems appreciably more likely that any effect on Mr Payne's well will be beneficial as compared to any effect of the Proposed Development for which Breedon sought permission. However, as I take the view that the monitoring of levels in the 17 Wells is indicative only, any effect on Mr Payne's well will be remediable under Condition 3 and he can call on Breedon accordingly.

168. As to land devaluation and as I have said, I ignore for present purposes my view, contrary to that of the parties, that Mr Payne can call on Breedon pursuant to Condition 3 to remediate his well if needs be – my view that Condition 3 is not confined to the remediation of the 17 Wells listed in EIAR table 8.12. I see in theory, the Commission's argument,[197] put to me as common sense and as the inference of counsel on an asserted "near first principle"[198] of valuation, that both the fact of Condition 3 – any risk to wells it implicitly recognises – and Mr Payne's exclusion from its remedial works, devalue his lands in comparison to those on which the 17 Wells lie. But there was no evidence to that effect before the Commission or before me. Land valuation is a matter of expert, varying and highly multifactorial opinion. I assume for argument's sake, without necessarily being so persuaded, that one might overlook that lack of evidence and infer devaluation on a common-sense basis. But in the particular context, common-sense suggests here something quite different. It suggests, whoever has had the right of the dispute, that Mr Payne's lands have already and drastically been devalued by the long years of dispute, a proliferation of legal proceedings and, as Mr Payne has it, preceding and apart from the Permitted Development, Breedon's quarrying and other activities, their failed remediation of his destroyed well, their destruction of his herd and their effective and forced eviction of his family to preserve their health. On any common-sense view any, if any, incremental devaluation due to Condition 3 cannot be inferred, absent evidence, to be material.

169. In short therefore, I see no basis for any finding of adverse effect of Condition 3 on the enjoyment or value of Mr Payne's lands.

170. On any view, I have thought it proper to address the issues canvassed just above as they were the subject of submissions and, indeed, of pleaded particulars. However, Breedon's core plea on Ground 2 is of misconstruction of s.37(6). But its particulars and arguments were of misconstruction of the Development and error of fact and law as to the effect of Condition 3 on the Development and thereby on Mr Payne's enjoyment of his lands and the value thereof. Breedon's unstated premise may be that the Commission's misconstruction of the Development and of the effect of Condition 3 of implies misconstruction of s.37(6). Perhaps this pleading approach was an attempt to avoid having to plead irrationality – a difficult plea to bring home and to the absence of which plea in Ground 2 the Commission points.

171. Counsel for Breedon argued that "*Ground 2 is based on an error of law and not an irrationality finding*" and cites Gleann Fia §84. It is rarely, if ever, sufficient merely to assert or plead "error of law"

[197] See, for example, counsel for the Commission, Transcript 15:32 et seq.
[198] Transcript 15:35.

without more. It is necessary to identify and plead not merely the relevant facts but the specific legal nature of the alleged error of law. Gleann Fia §84 held that the Board's decision on the s.37(6)(d)(i) criterion of material alteration of the development by condition was "*wrong in law*" as "*not factually substantiated*". Haughton J explained that *"Fundamentally this was because the nature and extent of the works comprised in "the development" as originally applied for do not differ materially from the works in respect of which the decision to grant permission was made."*

172. As I have said on other occasions, the pleading system in the Planning and Environment Court requires identification first of a core ground on which relief is sought and thereafter the provision of particulars of that core ground. It is at very least highly desirable that the Core Ground identify fully, if in general terms, the specific legal error or errors relied upon. Save that the categories of legal error are not strictly closed, the law of judicial review has identified many such errors of law by a familiar taxonomy: for example, irrationality, failure to give reasons, failure to have regard to relevant considerations, regard to irrelevant considerations, misconstruction and/or misapplication of a statutory provision, breach of a statutory provision, regard to relevant considerations, error of fact. This taxonomy should be deployed in pleading a core ground. New core grounds should not be introduced in particulars. Here the core plea was, and was only, of misconstruction of a statutory provision. Irrationality was not pleaded in the core ground. Nor was error of fact. Error of fact was added to the pleading mix only in the particulars. Indeed the remainder of the particulars are more characteristic of such a plea – as to the application of s.37(6)(d) to the facts - than of misconstruction of s.37(6)(d).

173. I have considered the Commission's Statement of Opposition to Ground 2 as reflecting its understanding of Ground 2. While it pleads the absence of a plea against it of irrationality, the Commission's pleas do engage with not merely the construction of s.37(6)(d) but its application to the facts of the case – which it characterised as a matter of evaluative planning judgement such that its conclusion was open to it. Fairness being the ultimate touchstone of the application of the strict rules of pleading in judicial review, and not without appreciable hesitation, I have concluded that the pleading lines between Breedon and the Commission were acceptably clearly drawn in terms of an allegation of error of fact. In substance, the pleadings and submissions mutually engaged on that basis. Similar observations can be made as to Mr Payne's position. Accordingly I think it proper to inquire whether as distinct from irrationality, the Commission erred as to fact.

174. The law of error of fact was considered in **Grassridge**.[199] It

- noted the importance of not allowing the doctrine to degenerate into impermissible review of the merits of an Impugned Decision – even where the court thinks the decision "clearly wrong" on those merits.[200]

- cited Barr J in **Baile Eamoinn**,[201] as holding that error of fact so material as to amount to an error of law must have the following elements:

[199] Grassridge v Dún Laoghaire Rathdown County Council [2024] IEHC 669.
[200] As Humphreys J put it, strikingly, in Holohan v An Bord Pleanála [2017] IEHC 268 citing Chief Constable of North Wales Police v Evans [1982] 1 WLR 1155. Cited to this effect in Fernleigh v ABP & Ironborn [2023] IEHC 525 and in SWI, IFI, Sweetman & Ors v ALAB et al [2024] IEHC 421 §16.
[201] Baile Eamoinn Teoranta v An Bord Pleanála [2020] IEHC 642.

(I) a mistake as to a fact existing at the time of the impugned decision.
(II) that the fact is uncontentious and objectively verifiable.
(III) that the mistake occurred other than by the fault of the claimant or his advisers.
(IV) that the mistake played a material part in the decision maker's reasoning.

I should add my view that by "uncontentious" Barr J meant objectively uncontentious. Merely unreasonably disputing a fact will not avoid a finding of mistake of fact.

175. It will be appreciated that a mistake as to an uncontentious and objectively verifiable fact will in many instances correspond to, or at least approach irrationality (though not always, as, for example, it may flow from a gap in the evidence before the decision-maker when the evidence included evidence supportive of the decision made). That is so for the very reason that the fact is uncontentious and objectively verifiable. That should not be surprising, as a high bar is appropriate.

176. The first task, therefore, is to identify the "fact" as to which there was, allegedly, a mistake. Here the fact alleged by Breedon is that Condition 3 did not alter the Proposed Development and the alleged error lay in the Commission's concluding that it did. I accept that in many instances that will be a matter of judgement for the decision-maker – as will, all the more so, the materiality of the alteration. However, for the reasons I have set out above, I think this case falls on the Gleann Fia side of the line as one in which the nature and extent of the works comprised in the Proposed Development originally applied for do not differ materially from the works in respect of which the decision to grant permission was made – the Permitted Development - insofar as such works are capable of adverse effect on Mr Payne's enjoyment of his lands or on the value thereof. I consider that the four **Baile Eamoinn** requirements are satisfied.

177. It follows that the criterion of s.37(6)(d)(i) that by reason of a planning condition[202] the development in respect of which a decision to grant permission has been made will differ materially from the development as set out in the application for permission was not satisfied in this case. Accordingly, I will quash the Impugned Decision on Ground 2.

GROUND 1: PAYNE LANDS "ADJOINING" LAND *"IN RESPECT OF WHICH"* A DECISION TO GRANT PERMISSION HAS BEEN MADE?

178. As has been seen, s.37(6)(a) PDA 2000 requires that an applicant for leave to appeal must have an interest in land "*adjoining"* land *"in respect of which"* a decision to grant permission has been made. Ground 1 alleges that the Commission misapplied s.37(6)(a) as Mr Payne's lands do not adjoin the land in respect of which the Council Decision to grant permission was made.

[202] Emphasis added.

BREEDON'S POSITION

179. Citing **Gleann Fia**, Breedon asserts that the Impugned Decision is invalid as Mr Payne does not have an interest in lands "*adjoining"* the Red Line Lands in respect of which the Council Decision to grant permission was made. There is 630 metres between their closest points.

COMMISSION'S & MR PAYNE'S POSITION

180. The Commission and Mr Payne assert that

a. They do not contend that Mr Payne's lands adjoin the Red Line Lands. They argue for a wider meaning than adopted in Gleann Fia, of the phrase *"land in respect of which a decision to grant permission has been made"* as potentially referring in particular cases to greater lands than are enclosed by the red line.

b. S.37(6)(a) requires that the Commission be satisfied that Mr Payne owns land which adjoin lands "*in respect of which*" the Council Decision to grant permission was made. Given the width of the phrase "*in respect of which*" and on the facts of this case, the lands "*in respect of which*" the Council Decision to grant permission was made include the Blue-Line Lands, identified as the relevant planning unit. Mr Payne's lands adjoin the Blue-Line Lands and so s.37(6)(a) is satisfied as to the criterion that the relevant lands adjoin. As to the meaning of the phrase "*in respect of which*", they cite **Diamrem**[203] and cases cited therein.

c. On the facts of this case, distinguishing it from Gleann Fia, the Planning Application documents and the permission which the Council decided to grant (including its Conditions) rely extensively on the functional integration of the Proposed Development on the Red-Line Lands with the permitted development of the Blue-Line Lands. Indeed, Breedon's Planning Application positively
- justified itself on the basis of the need for the deeper excavation to provide material for onsite operations on the Blue-Line Lands, including the cement plant.
- explained the proposed water management for the Proposed Development on the Red-Line Lands as part and parcel with the overall Blue-Line Lands site water management.[204]

d. So, the Proposed Development is far removed from the position in Gleann Fia as it
- concerns the overall quarrying and cement production operations and has no function or purpose other than as part and parcel of the overall activity on the "*overall limestone quarry*" or "*subject site*" as it is referred to by Breedon.
- is part and parcel of the overall, coherently regulated activities of the Blue-Line Lands which, as Breedon says, are operated and regulated as a whole.

[203] Diamrem v Cliffs of Moher Visitor's Centre [2023] IECA 235.
[204] e.g. EIAR §8.1.

e. Their submissions do not imply that anyone in the vicinity or claiming to be within the scope of an EIA can qualify. They assert only the core point that where – as here –
- such a single overall activity as Breedon's is in issue,
- the Proposed Development for which permission is sought is fully linked with, connected to and justified by that overall activity –

a landowner adjoining overall activity, even where his/her land does not adjoin the red-line area of the proposed development, can fall within s.37(6)(a) as having an interest in land "*adjoining"* land in respect of which the decision to grant permission has been made.

181. They submit that s.37(6) provides a limited right of participation which cannot be ousted by the developer's convenience in drawing its red-line in the context of what is obviously a single operating activity where – as Breedon says – all activities on the greater site are "*complimentary"* to each other.[205]

182. They submit that Gleann Fia is distinguishable as

a. The very purpose of the Planning Application is to provide limestone to continue the operation of the permitted cement plant.

b. The Red-Line Lands are within – are a subset of - Breedon's activity area - the wider Blue-Line Lands.

c. The Proposed Development which the Council decided to permit is integrated with and will avail of measures and facilities in the wider Blue-Line Lands.

d. The relevant "Planning Unit" comprises the wider Blue-Line Lands – including the Red-Line Lands. See Redmond[206] and Burdle.[207]

e. Gleann Fia did not:
- concern an EIA project or, for the purposes of s.37(6), a consideration of the lands "*in respect of which a decision to grant permission has been made*" by reference to the EIA or the development consent issued;
- consider the different approach adopted in **MacMahon**;[208]
- consider the case law confirming the broad interpretation of the phrase "*in respect of which*" cited in **Diamrem**.

[205] EIAR §8.4.2.
[206] Redmond v An Bord Pleanála [2020] IEHC 151.
[207] Burdle v Secretary of State for the Environment [1972] 3 All ER 240, [1972] 1 WLR 1207, 70 LGR 511, 24 P & CR 174, 136 JP 720, 116 Sol Jo 507, 223 EG 1597.
[208] MacMahon v An Bord Pleanála [2010] IEHC 431.

WORLDPORT & "DISTINGUISHING" GLEANN FIA

183. **Worldport**[209] was not mentioned at trial. It featured briefly in written submissions that if Gleann Fia is not distinguishable and supports a general principle that only land directly adjoining a red-line boundary can qualify under s.37(6), then it ought not be followed. In Worldport, Clarke J in the High Court rebuffed submissions that he should treat another, then-recent, High Court decision as wrongly decided. He did so *"in the absence of a definitive ruling from the Supreme Court on this matter".* He held that

- A judge of first instance ought usually to follow the decision of another judge of the same court unless there are substantial reasons for believing that the earlier judgment was wrong.

- Amongst the circumstances in which it may be appropriate to take a different view would be where the earlier judgment was
  - clearly not based on a review of significant relevant authority.
  - clearly erroneous, or
  - delivered a sufficiently lengthy period in the past that the relevant jurisprudence might be said to have advanced in the interim.

- Otherwise, the virtue of consistency requires that a High Court judge should not second guess a recent High Court determination clearly arrived at after a thorough review of all of the relevant authorities and which formed a judgment as between evenly balanced arguments.

- If, each time such a point were to arise again, a judge were free to take his or her own view of a point already decided, the resultant uncertainty would be disproportionate to any advantage of reconsidering the matter.

184. Worldport has since been understood as both stating the general principle that High Court judges ought to follow the earlier decisions of other High Court judges and as identifying the basis for departures from that principle. Indeed the word "Worldport" has become the shorthand for the basis for such departures.

185. As I say, I was not urged at trial to make a Worldport departure from the interpretation of s.37(6) in **Gleann Fia** as requiring that, to qualify for leave to appeal to the Commission, Mr Payne's lands must adjoin the Red Line Lands – which they do not. I am very far from suggesting I would have done so if asked. **Gleann Fia** was a considered decision on foot of careful argument in which the interpretation of s.36(7) was central to the case. Gleann Fia is not nearly so far in the past that its age would justify revisitation. It has been applied as recently as Morehart. While, for reasons I have stated and were the matter res integra, I might well have taken a different, purposive, view of the interpretation of s.37(6), it certainly cannot be said that Gleann Fia is clearly wrong. No doubt it was for these reasons that I was not urged to make a Worldport departure from Gleann Fia. Rather, as has been seen, I have been asked to distinguish it.

[209] Re Worldport Ireland, [2005] IEHC 189, [2005] 9 I.C.L.M.D. 13.

186. I was asked to "distinguish" Gleann Fia by reference to the facts of this case. As counsel for the Commission put it: "What I say about Gleann Fia is I don't think it actually binds and if it does, I think it's wrong to use."[210] The difficulty with the request that I "distinguish" Gleann Fia on the facts is that in reality it is a disguised request not to distinguish it, but to overrule it. It is a request that by reference to facts which, it is said, differ from those at issue in Gleann Fia, I reject the interpretation of s.37(6) in Gleann Fia and adopt a different interpretation. This is not a case of distinguishing a judgment as to the common law by reference to distinguishing facts taking the case outside, or requiring adjustment of, a common law principle laid down in the earlier case. Nor is it a case of facts which, arguably, take the case outside s.37(6) – all agree that s.37(6) was Mr Payne's only possible route to appeal. Gleann Fia is clear that an aspirant appellant's lands must adjoin – be contiguous to – the "red line" development site. Overruling Gleann Fia is the only sensible reason for the citation of Diamrem as to the width of the meaning of the phrase "in relation to" – a width for which the Board's argument was rejected in Gleann Fia. In effect, the Commission and Mr Payne say, correctly, that no blue line lands were at issue in Gleann Fia and the red-line lands in Gleann Fia were not integrated in a larger planning unit - such that the Gleann Fia interpretation of s.37(6) should not apply here. But there is only one correct interpretation of s.37(6). So, that seems to me an argument for reinterpreting s.37(6) – an argument for overruling - not merely for distinguishing - Gleann Fia.

187. As was said in **Bissett**[211] *"the construction of a statute … must be uniform, and cannot vary in its interpretation"*. An authoritative judgment of the Superior Courts as to the meaning of a statutory provision is law unless and until overruled and it applies to all circumstances which come within the scope of that provision. Indeed, that is why a court is not required merely to give a statute meaning according as it prefers one party's argument as to its interpretation over another's. It must, of its autonomous duty, try to give a statute its correct and only meaning. Of course, the application of a statutory provision, thus interpreted, to different facts will often produce different outcomes. But that is a different matter. And the prospect of such application – for example of an absurd outcome - may influence its interpretation. But, that said, "*Any given statute only has one meaning – the correct meaning*." – **Dowling**.[212]

188. I return to the argument that the Proposed Development which the Council decided to permit is integrated with and seeks to avail of measures and facilities in the wider Blue-Line Lands, such that, it is said, interpretation of the Proposed Development requires one to consider the blue-line development. The point bears some comment – not least as it is beguiling. It seems to me entirely commonplace that development permitted inside the red-line will avail or rely of measures and facilities outside the red line - whether or not on lands owned by the planning applicant. If accepted, the argument would in effect overrule Gleann Fia.

189. I add that in this case such reliance was not at all unexpected on the issuing of the Council's Decision – it was built in to and obvious from the Planning Application from the start. Such reliance was not an alteration of the Proposed Development – much less an alteration by Condition 3. So, remembering the particular unfairness – unexpectedness - s.37(6) is designed to address, the argument on the justice of the case is, if anything, weaker here.

[210] Transcript 15:27 et seq.
[211] Bissett v Thomas Heiton and Co. [1930] IR 17.
[212] Dowling v An Bord Pleanála & Cushla Quarries [2024] IEHC 249.

GROUND 1 – PROVISIONAL DECISION

190. Gleann Fia is a clear decision that the only and correct meaning of s.37(6) is that an aspirant appellant's lands must adjoin – be contiguous to – the "red line" development site. It has the considerable virtues of clarity, simplicity, predictability and ease of application. I cannot say Gleann Fia is clearly wrong. Unless and until it is overruled, I am bound on the Worldport principle to apply Gleann Fia. Mr Payne's lands do not adjoin the Red Line Lands. So and with, I confess, misgivings though appreciating the weight of the view taken by Haughton J in Gleann Fia, to this point in the reasoning I would consider myself obliged to uphold Ground 1 and quash the Impugned Decision. However that is not the end of the matter.

INTERPRETATION OF S.37(6) - AARHUS

191. The Commission made an unpleaded argument that Gleann Fia did not consider the possibility of effect on the interpretation of s.37(6) PDA 2000 of Article 9(3) of the Aarhus Convention[213] as to access to justice, as explained in **Slovak Brown Bear #1**,[214] **North East Pylon**[215] and **Heather Hill**.[216] The Commission says that Article 9(3) requires an interpretation of s.36(7) allowing expansive access to an administrative procedure before the Commission.

AARHUS ARTICLES 6 & 9 & EIA DIRECTIVE ARTICLE 11

192. Aarhus Article 6, headed "Public Participation In Decisions On Specific Activities", requires[217] provision in national law for public participation in decisions whether to permit certain proposed activities – i.e. public participation in development consent procedures (including EIA[218]). Aarhus Article 9, headed "Access to Justice", requires provision in national law for review of such development consent decisions. Notably, as observed in **Jennings**[219] when Aarhus Article 9 contemplates "*national law*" and *"national law relating to the environment"* these international law concepts include EU law. See also **Conway v Ireland***[220]* and **Enniskerry/PEM**[221] citing the Aarhus Compliance Committee view[222] that *"'national law' relating to the environment includes EU law applicable within EU member states"*. I need not describe here the EU law routes by which Aarhus has, in effect, found its way into Irish law.

[213] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Done at Aarhus, Denmark, on 25 June 1998.
[214] Lesoochranárske zoskupenie v Ministerstvo životného prostredia Slovenskej republiky (2010), Case C-240/09, [2011] E.C.R. I-01255, [2012] 2 QB 202 (Slovak Brown Bear #1 or LZ#1).
[215] Case C-470/16, North East Pylon Pressure Campaign & Sheehy v An Bord Pleanála; judgment 15 March 2018.
[216] Heather Hill Management Company v An Bord Pleanála and Burkeway Homes, [2022] IESC 43, [2022] 2 I.L.R.M. 313.
[217] Ignoring for present purposes its status as an international law convention lacing direct effect in Irish law.
[218] Technically, EIA is distinct from, precedes and informs development consent. But it does not seem to be doubted that Article 6 applies to EIA.
[219] Jennings v An Bord Pleanála, [2022] IEHC 249, [2022] 5 JIC 0302.
[220] [2017] IESC 13, [2017] 1 I.R. 53, citing the Aarhus Compliance Committee - Whilst this is not a court, its decisions "deserve respect on issues relating to standards of public participation": per Lord Carnwath JSC in Walton v Scottish Ministers [2013] PTSR 51, §100.
[221] Enniskerry Alliance v An Bord Pleanála [2022] IEHC 6.
[222] Aarhus Implementation Guide p198 – citing Compliance Committee communication ACCC/C/2006/18 (Denmark),

193. Article 9 requires provision for review of such development consent decisions in terms which differ according to whether the person seeking review is a member of "the public concerned" (Article 9(2)) or "the public" (Article 9(3)). Aarhus Article 2 defines these classes as follows:

> *"4. "The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;*
>
> *5. "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."*

194. Aarhus "*explicitly distinguishes between the 'public' in general and the 'public concerned' by an act or transaction*." The latter *"are part of the circle, which it is for Member States to determine reasonably and in accordance with the objective of giving the public concerned wide access to justice, of persons affected or likely to be affected by the envisaged act or transaction."* [223] So, the "*public concerned*" is a subset of the "*public*". A member of the former is, ipso facto, a member of the latter but the converse is not necessarily the case.

195. Aarhus Article 9(3), on which the Commission specifically relies, requires parties (including Ireland and the EU) to the Aarhus Convention to

> *"ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."*

It will be seen that Article 9(3) is not limited to the public concerned. It avails the public generally.

196. Aarhus Article 9(2) provides,

> *"2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned*
> *(a) Having a sufficient interest*
> *or, alternatively,*
> *(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,*

[223] LB, Stichting Varkens in Nood & Ors v College van burgemeester en wethouders van de gemeente Echt-Susteren v Sebava BV (Case C-826/18); EU:C:2021:7; [2021] P.T.S.R. 735. §36.

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6
and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.
What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention.
To this end, the interest of any non-governmental organization meeting the requirements referred to in
article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.
The provisions of this paragraph 2 shall not exclude the possibility of preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law."

197. What was Article 10a of the 1985 EIA Directive [224] and is now Article 11 of the 2011 EIA Directive[225] echoed and effected specifically Aarhus Article 9(2) in EIA law as follows:

"1. *Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:*
(a) having a sufficient interest,
or alternatively,
(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,
have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.

3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

[224] Article 10a of Directive 85/337.
[225] Article 11 of Directive 2011/92/EU as amended by Directive 2014/52/EU.

4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

5. In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures."

COMMISSION SUBMISSIONS

198. The Commission did not plead the Aarhus Interpretive Obligation in its Statement of Opposition. The point made its appearance first, and only briefly, in its written submissions, as follows:

a. Gleann Fia did not consider whether the Aarhus Interpretive Obligation required a wider than literal interpretation of s.37(6).

b. The Permitted Development was subjected to the Council's EIA. Mr Payne, potentially affected by the Permitted Development , is in Aarhus terms a member of the "public concerned" as he says that the EIA (based on Breedon's EIAR) was inadequate in law as it did not consider the possibility of impacts on his well. We need not decide if he is right: what matters now is to identify the case he wishes to make and his right of access to an administrative procedure before the Commission to make it.

c. **Slovak Brown Bear (Case C-240/09, LZ 1**[226]) articulates the Aarhus Interpretive Obligation. It obliges national courts to ensure effective judicial protection in the fields covered by EU environmental law (including EIA), by interpreting national law in a way which, to the fullest extent possible, is consistent with Aarhus objectives. **Case C-263/08 Djurgården**[227] holds that national rules must ensure wide access to justice – including access to administrative review by the Commission.

d. In applying s.37(6), where (as here)
- the permitted development is part-and-parcel of a wider activity,
- EIA has included examining its potential effects on water supply to local wells off-site,
- those effects are examined in the EIA by examining the whole wider activity (and not simply the "red-line" development),
- a person alleges a likely significant effect of the permitted development on his local well water supply.

then all the lands on which whole wider activity takes place should be regarded as being the lands *"in respect of which a decision to grant permission was made"* within the meaning of s.37(6), such that s.37(6) avails a landowner whose lands adjoin those lands.

[226] §50.
[227] Djurgarden-Lilla Vartans Miljoskyddsforening v Stockholms Kommun genom dess Marknamnd (C-263/08) EU:C:2009:631, [2009] E.C.R. I-9967, [2009] 10 WLUK 382, [2010] 1 C.M.L.R. 36 [2010] Env L.R. 29. §45.

e. In the foregoing factual context, the Commission did not err in concluding that Mr Payne's land adjoins land "*in respect of which a decision to grant permission has been made*" for the purposes of s.37(6)(a) PDA 2000.

f. This is not an argument for a general principle that those "*in the vicinity*" should qualify. It is specific to the unique facts of this case and to the nature and extent of Breedon's activities.

199. Even the Commission's written submissions did not specify upon which sub-article - 9(2) or 9(3) - of Aarhus Article 9 it relied. They did invoke **Slovak Brown Bear**[228]- which was concerned only with Article 9(3). However, the written submissions identified Mr Payne as a member of "the public concerned" – an Article 9(2) concept. Article 9(3) refers to the "public". That the former is a subset of the latter is apparent from **Distressed Pigs (Case C-826/18)**[229]. At trial, however, the Commission pinned its colours to Article 9(3).[230]

200. Orally, the Commission submitted that,

- For this case it had distilled the issue "*down to something quite simple*" – what the CJEU said in Slovak Brown Bear (which concerned Article 9(3) Aarhus).[231]

- Within the meaning of Article 9(3), Mr. Payne seeks, by seeking leave to appeal, to access an administrative procedure before the Commission to challenge acts and omissions by a public authority (i.e. the Council's Decision) that contravene provisions of national environmental law. He wants to make an EIA point – to say the EIA was bad as it ignored his well while considering many other local wells and did so against a background of dispute as to alleged effect of Breedon's existing quarrying on that well.[232] As to the EIAR, counsel put it pithily as if in Mr Payne's mouth: you didn't include my well and you know about it because you dug it for me.[233]

BREEDON SUBMISSIONS

201. Breedon's submissions on the Aarhus Interpretive Obligation were oral only and very brief.[234] In the circumstances, that is no criticism. Counsel for Breedon said that

- Mr Payne must be presumed to have had lawful opportunity to participate in the planning and EIA process before the Council.

[228] §50.
[229] LB, Stichting Varkens in Nood & Ors v College van burgemeester en wethouders van de gemeente Echt-Susteren v Sebava BV (Distressed Pigs) (Case C-826/18); EU:C:2021:7; [2021] P.T.S.R. 735. The report omits "Stichting Varkens in Nood" from the title. However, the case is often cited by that name so I have added it for clarity. For the same reason I have added the words "Distressed Pigs".
[230] E.g. Transcript 15:18.
[231] Transcript 15:14.
[232] Transcript 15:20 & 15:27.
[233] Transcript 15:23.
[234] Transcript 16:00.

- As to the interpretation of s.36(7) in Gleann Fia and as to its operation on Mr Payne's position, no inconsistency with, incompatibility of or unfriendliness to EU law or Aarhus has been identified such as would require reinterpretation and reapplication to the facts of s.36(7) in light of the Aarhus Interpretive Obligation.

AARHUS POINT - DISCUSSION

Unpleaded & Not Simple

202. I confess to the view that the submission that, as relevant here, Article 9(3) Aarhus and the Aarhus Interpretive Obligation had been distilled by the Commission "*down to something quite simple*" is illusory. The Commission did not plead the Aarhus Interpretive Obligation in its Statement of Opposition. No doubt as a result, it did not feature in Breedon's written submissions. The point made its appearance first in the Commission's written submissions, after Breedon had made its written submissions. The undesirable result was that argument at trial on the point was, in my view, underdeveloped rather than simple. In truth, the application of Aarhus in this case, to overturn established authority – Gleann Fia – as to the meaning of a statutory provision is no small matter. And it is complex not simple. Though Breedon did not take a pleading point, it bears observing that this case illustrates the wisdom of the general principle that, in judicial review, complex EU law points must be pleaded with particular clarity.

Some Cases

Djurgården-Lilla (2009) - Cited by the Commission

203. **Djurgården**[235] considered what was then Article 10a of the 1985 EIA Directive as to access to justice and is now Article 11 of the 2011 EIA Directive. The case concerned a telecoms cable tunnel project of the Stockholm municipal council. The Stockholm Regional Authority, in EIA, found that it would have significant effects on the environment. The development consent process was separate to the EIA process and was before a district court - the Environmental Chamber of the Stockholm Court of First Instance. Djurgården, a small local environmental NGO, made submissions to that court objecting to the project. The court granted development consent. Djurgården appealed to the Environmental Appeal Chamber of the Svea Court of Appeal. It rejected the appeal as Swedish law prevented small environmental protection NGOs from appealing a district court development consent. Djurgården appealed that finding to the Swedish Supreme Court,[236] which referred questions to the CJEU.

204. The CJEU held that,

[235] §45.
[236] Högsta Domstolen.

- The Art.10a right of access to a review did not depend on whether the decision was made by an administrative body or by a court.

- Participation in the decision-making procedure established by art.6(4) of the EIA Directive has no effect the conditions for access to Art.10a review. (Art.6(4) required that the public concerned be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2). Art 2(2) refers to both EIA and development consent procedures.) Members of the public concerned, within the meaning of Art.1(2) and 10a, must have access to a review procedure to challenge a development consent regardless of the role they might have played in the development consent procedure.[237]

- Art.10a left it to member states to decide the rules governing the right of appeal. But such rules must, first, ensure wide access to justice and, second, render effective the Directive's provisions on judicial remedies. Such rules must not nullify EU Law that parties with a sufficient interest to challenge a project, and those whose rights it impaired, are entitled to sue before the competent courts.

- The EIA Directive does not permit limitation of access to review procedures on the ground that the persons concerned have already been able to express their views in the participatory phase of the decision-making procedure established by Art.6(4). Such opportunities do not justify very restrictive conditions on the availability of judicial remedies against the decision adopted at the end of that procedure.

- Members of the "public concerned" within the meaning of arts 1(2) and 10a of the EIA Directive must have access to a review procedure to challenge a development consent decision by a body attached to a court of law of a Member State, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views.

Slovak Brown Bear (2010) - Cited by the Commission

205. As to the facts of **Slovak Brown Bear #1 (Case C-240/09 LZ 1**[238]), LZ was an environmental protection NGO. It sought and was refused participation in administrative proceedings in the Ministry of the Environment in which hunting associations sought Habitats Directive derogations to allow brown bear hunting. Relying, it seems, on Aarhus Article 9, LZ made and lost, for want of standing as a party in the administrative proceedings, an administrative appeal internal to the Ministry. It lost a court action impugning both the initial refusal and the decision in the administrative appeal. It appealed to the Supreme Court - which referred questions to the CJEU.

206. The CJEU (Grand Chamber) ruled that Aarhus Article 9(3) lacks direct effect in EU law. That deprives it of direct effect in Irish Law. Nonetheless, the CJEU stated what I have described as the Aarhus Interpretive

[237] §32 – 39.
[238] Lesoochranárske zoskupenie VLK.

Obligation – a decision of which Murray J later said (in **Heather Hill**[239]) that it "may not have been predicted".

207. The CJEU held that while Member States lay down the detailed procedural rules[240] governing actions for safeguarding individuals' EU law rights, those rules must not make it in practice impossible or excessively difficult to exercise EU Law rights (principle of effectiveness). So, national courts concerned with effective judicial protection of EU environmental law rights must, to the fullest extent possible, interpret national procedural rules, as to the conditions to be met in order to bring administrative or judicial proceedings, in accordance with the objectives of Article 9(3) and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.

208. I confess that I have found it difficult to reliably discern whether, in Slovak Brown Bear, the Article 9(3) right of access to justice invoked was to access to the earlier administrative appeal process or to the subsequent judicial process or to. It seems the latter but, as is apparent from its terms, Article 9(3) applies to both administrative proceedings and judicial proceedings.

Gruber (2015) - Grace & Sweetman (2017)

209. **Gruber**[241] was a case in which the government of the Austrian province of Carinthia declared in 2010 that no EIA was needed of a retail park proposal for land adjoining Ms Gruber's. In Irish terms, I will call this the EIA Screening decision. In 2012, an administrative tribunal – the "UVK[242] - which was bound by the EIA Screening decision, gave development consent to the project. Ms Gruber, as in general she was entitled to do, sought judicial review annulling the development consent. However, her specific ground for doing so was that the EIA Screening decision had been unlawful. Austrian law denied her standing to directly seek judicial review of the EIA Screening decision. The referring court asked the CJEU whether Article 11 of the 2011 EIA Directive precluded national laws from depriving neighbours bound by an EIA screening decision from seeking judicial review of it.

210. The CJEU's decision proceeded from Article 9(2) Aarhus, via Article 11 of the EIA Directive. The CJEU noted that Ms Gruber was a 'neighbour' - an Austrian law concept which includes those to whom the construction, continued existence or operation of a facility might pose a risk or cause a nuisance or whose property or other rights *in rem* might be put at risk. While it was for the Member State to discern in a particular case, it appeared to the CJEU that 'neighbours' may be part of the 'public concerned' within the meaning of Article 1(2) of the EIA Directive. However not all members of the 'public concerned' must be entitled to an Article 11 review - only those are entitled who have a sufficient interest or, which is the

[239] Heather Hill v An Bord Pleanála & Burkeway Homes [2022] IESC 43, [2024] 2 IR 222 §50.
[240] In the absence of EU rules governing the matter.
[241] Gruber v Unabhängiger Verwaltungssenat fur Karnten: C-570/13; ECLI:ECLI:EU:C:2015:231, [2015] All ER (D) 118 (Apr)
[242] Unabhängiger Verwaltungssenat fur Karnten.

equivalent, maintain the impairment of a right, depending on which of those conditions is adopted in the national legislation. Members of the public concerned who satisfy national criteria as to 'sufficient interest' or 'impairment of a right' must be able to bring an action against an EIA Screening decision. That does not limit the right of the Member State to determine what constitutes, as a matter of national law, a 'sufficient interest' or 'impairment of a right', even with respect to individuals who are part of the 'public concerned', including neighbours for whom, in principle, it must be possible to bring an action. But such determinations must be consistent with the objective of giving the public concerned wide access to justice. The CJEU considered that Austian Law prevented a large number of members of the public concerned, in particular, 'neighbours' who may meet the conditions of Article 11(1) of the EIA Directive, from bringing an action against an EIA Screening decision. This "near general exclusion" was incompatible with the EIA Directive objective of giving the public concerned wide access to justice.

211. In **Grace & Sweetman**,[243] the Supreme Court considered Gruber in concluding that standing to sue, for Article 11 purposes involves the application of national standing rules as to the terms of which a Member State has a material margin of appreciation. But that margin is subject to the important caveat that those rules must be consistent with the "wide access to justice" requirement of Article 11. In the environmental field, due to the nature of environmental challenge, a wide number of persons may have standing and there may be difficulty in defining the boundary between those who have standing and those who do not. But generally, standing in environmental cases involved a broad assessment of whether the legitimate and established amenity or other interests of the challenger could be said to be subject to potential interference or prejudice having regard to the scale and nature of the proposed development and the proximity or contact of the challenger to or with the area potentially impacted by the development in question. The Court held[244] that there is no general preclusion of standing in the absence of prior participation or an appropriate explanation for not having participated and broad general principle favoured standing in those such as persons living in the immediate vicinity of and subject to being potentially adversely affected or prejudiced by a proposed development. The Supreme Court said:

> *"The case law to date would seem to suggest, therefore, that a reasonably liberal approach is taken to the sort of interest which must be potentially affected in order to confer standing in environmental cases. Persons clearly can have an interest by virtue of proximity to the proposed development. The degree of proximity required may well depend on the scale and nature of the development in question. For example, a large-scale development having the potential to impact on the amenity of persons within a wide catchment area might well be said to have the potential to have an adverse impact on the legitimate interests of persons living, or perhaps working, in, or otherwise having regular contact with, a significant geographical area. A minor domestic development might well only have an impact on a much more restricted area."*

212. This reference to degree of proximity seems to regard physical contiguity to the development site as unnecessary. This passage suggests that flexibility is needed and can be accommodated without rendering the rules unworkable. So too the court's observation that

[243] Grace & Sweetman v An Bord Pleanála [2017] IESC 10, [2020] 3 IR 286.
[244] Contra Lancefort Ltd. v An Bord Pleanála (No 2) [1999] 2 IR 270.

> *"standing in environmental cases involves a broad assessment of whether the legitimate and established amenity or other interests of the challenger can be said to be subject to potential interference or prejudice having regard to the scale and nature of the proposed development and the proximity or contact of the challenger to or with the area potentially impacted by the development in question."*

213. It does seem to me that Mr Payne falls well within the foregoing standing criteria.

Kingston (2017)

214. Notably, however, writing 7 years after Slovak Brown Bear and citing it in other respects, **Kingston et al**[245] said the following of Aarhus Article 9(3):

> *"Article 9(3) does not impose an absolute obligation to ensure access to justice in such cases,*[246] *but only in so far as a claim meets the criteria, if any, laid down in national law. The effect is that the obligations provided by Article 9(3) are relatively minimal (namely, ensuring some*[247] *access to administrative or judicial procedures) and does not in itself require contracting parties to amend their national law criteria governing access to justice in environmental matters."*

215. However, as will be seen, later CJEU caselaw takes a more robust attitude to the requirements of Aarhus Article 9(3).

216. Also, it will be remembered for present purposes that Art 10a (now Art. 11) of the EIA Directive carried Aarhus Article 9(2) into effect in favour of the public concerned – essentially, those effected by an administrative decision. The emphasis on wide access to justice in under Aarhus Article 9(2) is readily understandable. However in the present case, the Commission did not invoke Aarhus Article 9(2) – it invoked Aarhus Article 9(3).

Heather Hill (2022) - Cited by the Commission

217. **Heather Hill**[248] concerned the "NPE"[249] principle of Aarhus Article 9(4). Murray J noted that the finding in Slovak Brown Bear that Aarhus Article 9(3) was not directly effective "*was not the end of the matter*". He observed that the CJEU in that case had also held that *"The principle of effectiveness of national procedural remedies dictated that national courts were required, as regards a species protected by the Habitats Directive, to interpret the national procedural rules "in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention"* – what I have called the

[245] Kingston, Heyvaert, Čavoški, European Environmental Law (Cambridge University Press, 2017) at pp 232–233.
[246] As relevant here, acts and omissions by public authorities which breach national environmental law.
[247] Emphasis in original.
[248] Heather Hill v An Bord Pleanála & Burkeway Homes [2022] IESC 43, [2024] 2 IR 222.
[249] "not prohibitively expensive" Article 9(4) provides, in part: "… the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. ….."

Aarhus Interpretive Obligation. Murray J cites **Kingston et al**[250] as considering the effect of Slovak Brown Bear to be the adoption of a "*strong version of the duty of consistent interpretation*" which *"effectively obliges national courts … to achieve via interpretative means the aims of this aspect of the Aarhus Convention in the absence of applicable EU legislation on access to justice, unless this would require a contra legem interpretation of national law."* He further cites **Kingston et al** as follows:

> *"Moreover, while the Slovak Brown Bear case itself involved a question of standing of environmental NGOs, its implications are far broader, extending to any national procedural rule which is open to interpretation in conformity with Article 9(3), as long as the case at hand falls within the scope of EU law. This would include, for instance, rules in relation to costs, where such rules make access to environmental justice impossible or excessively difficult."*

Not least given its source in the principle of effectiveness, this observation extends, not just to costs rules, but to any national rules which "*make access to environmental justice impossible or excessively difficult.*" Yet, as I have observed, **Kingston et al** were simultaneously of the view that the obligations imposed by Aarhus Article 9(3) are "*relatively minimal*".

Plopeanu & Ionescu (2024) & other Cases - Comparison of Aarhus Articles 9(2) and 9(3) & Prior Participation

218. **Plopeanu & Ionescu**[251] compared Aarhus Articles 9(2) and 9(3). The CJEU recorded that

- Article 9(2) provides for a right of action in favour of a limited group of persons - members of the "public concerned" who meet certain conditions and is limited to actions against measures falling within the scope of Article 6 – i.e. development consents (including EIA).

- Article 9(3) is broader in scope. It covers a wider category of measures and decisions and is addressed to members of the 'public' in general. On the other hand, it confers a greater discretion on Member States to set criteria for determining, among all members of the public, who actually has the right to sue. Member States can set in national law criteria as to the determination of those persons entitled to sue. However, Article 9(3) right would be deprived of all useful effect if certain categories of members of the public were denied any right to sue. For these propositions the CJEU cites **Distressed Pigs (Case C-826/18)**,[252] which in turn cites, inter alia, **Wasserleitungsverband Nördliches Burgenland (C-197/18)**.[253]

219. In the latter case, the CJEU stated that

[250] Kingston, Heyvaert, Čavoški, European Environmental Law (Cambridge University Press, 2017) at pp 232–233.
[251] Societatea Civilă Profesională de Avocaţi Plopeanu & Ionescu, EU:C:2024:13, [2024] Env L.R. 26, (C-252/22).
[252] LB, Stichting Varkens in Nood & Ors v College van burgemeester en wethouders van de gemeente Echt-Susteren v Sebava BV (Distressed Pigs) (Case C-826/18); EU:C:2021:7; [2021] P.T.S.R. 735. The report omits "Stichting Varkens in Nood" from the title. However, the case is often cited by that name so I have added it for clarity. For the same reason I have added the words "Distressed Pigs".
[253] Wasserleitungsverband Nördliches Burgenland (C-197/18), EU:C:2019:824 [2020] Env L.R. 24 (2019) §34. See also Distressed Pigs §50.

> *"The right to bring proceedings set out in art.9(3) of the Aarhus Convention would be deprived of all useful effect, and even of its very substance, if it had to be conceded that, by imposing those conditions, certain categories of "members of the public", a fortiori "the public concerned", such as environmental organisations that satisfy the requirements laid down in art.2(5) of the Aarhus Convention, were to be denied of any right to bring proceedings."*[254]

While this passage refers to environmental NGOs, it does so in virtue of their status as part of the public concerned – a status held by Mr Payne. By the words "a fortiori" the passage emphasises the limits on Member States' discretion to limit the Article 9(3) rights of action of, specifically, members of the public concerned. So even though Article 9(3) rights of action are for "the public", membership of "the public concerned" is relevant to the acceptability of limits on access to that right of action.

220. Notably also, **Sobotta**[255] cites Sharpston AG,[256] for the view that all actions brought under Article 11 of the EIA Directive or Aarhus Article 9(2) could also be considered actions under Aarhus Article 9(3) because it applies in addition to and without prejudice to Article 9(2).

221. This passage in **Wasserleitungsverband Nördliches Burgenland** in turn cites **Protect Natur**.[257] **Sobotta** noted that **Protect Natur**[258] allows that, under Aarhus Article 9(3), Member States can make prior participation in the administrative procedure a precondition to judicial review (as long as the intending litigant had had opportunity of such participation). As has been seen, Mr Payne did not participate before the Council and it must be assumed in these proceedings that he had opportunity to do so.

222. The Commission in the present case argues that while prior participation preconditions to access to justice (such as that imposed by s.37(1) PDA 2000) were Aarhus-compliant, exceptions to such preconditions also had to be Aarhus-complaint. But if prior participation preconditions pass Article 9(3) muster it would seem to follow logically, at least generally, that relaxations of such conditions expanding access to justice – as by s.36(7) – must also pass muster. In a variation on the argument, if I understood it correctly, the Commission argues that the Aarhus-compliance of a prior participation precondition must be considered as a package including its exceptions. The problem with this is that it assumes that the CJEU has qualified the Aarhus-compliance of prior participation preconditions as to Article 9(3). I am unaware that it has.

223. However even allowing by way of exception that an unexpected alteration of a proposed development by an administrative decision might affect the lawfulness of applying a prior participation condition to access to justice, in the present case

- the EIAR defects of which Mr Payne primarily complains – that it ignored his well - were apparent in the procedure before the Council.

[254] Citing judgment of 20 December 2017, Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation (C-664/15) EU:C:2017:987 at [46].
[255] Sobotta: New Cases on Article 9 of the Aarhus Convention. Journal For European Environmental & Planning Law 15 (2018) 241-258. Christoph Sobotta was, at the time, attached to the Chambers of Advocate General Kokott of the CJEU.
[256] Opinion of Advocate General Sharpston in Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation (C-664/15, eu:c:2017:760, para. 40).
[257] Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation (C-664/15) EU:C:2017:987. §46.
[258] §68 et seq.

- Mr Payne did not participate before the Council and it must be assumed in these proceedings that he had opportunity to do so.

Accordingly Breedon may have the better of this argument.

WHERE DOES THE COMMISSION FIT IN AARHUS? & WHY THIS CASELAW?

224. One may ask however, why, as to an issue of access to an appeal to the Commission, caselaw considered above relates, not to access to such as appeals to the Commission, but to access to - standing in - judicial review? That is because the Commission, in relying on the access to justice provisions of Article 9(3) Aarhus, in effect seeks to characterise appeal to it as access to justice and to import into the law as to the right to appeal to it, the law as to standing in judicial review.

225. The question thus arises from the Commission's invocation of Aarhus Article 9(3) whether access to an appeal to the Commission is an access to justice issue at all? Such an issue could arise in the immediate sense of whether the Commission itself dispenses justice and/or at a remove to the extent that participation before the Commission is a precondition to judicial review. The idea that the Commission dispenses justice is, at least conventionally, surprising and may set constitutional alarm bells tinkling. But the fact in this case is that the Commission, invoking Aarhus Article 9(3), has raised s.37(6) as an access to justice issue.

226. At this point it bears observing that the "access to justice" is a pillar of Aarhus required by Aarhus Article 9 and, by Aarhus Articles 1 and 3, is distinct from the public participation in decision-making pillar to which Aarhus Article 6 applies. But the access to justice required by Aarhus Article 9(3) explicitly may take the form of administrative, as opposed to judicial, procedure. It will be also seen that the access to justice required by Aarhus Article 9(2) may be provided by a court or by "*another independent and impartial body established by law".* The differences of language used, as between Article 9(2) and 9(3), in describing what I might neutrally call "non-court" bodies and procedures, may bear exploration. It may also be that Aarhus seeks to cater for varied constitutional structures of state parties as to their distribution of the administration of justice as between judicial and administrative bodies. In any event, the Commission's invoking Aarhus Article 9(3) as applicable to s.37(6) seems to raise the question: where does the Commission fit in the Aarhus architecture?

227. The Commission conducts de novo appeals of development consent decisions. But it does so in a somewhat different legal framework to that applicable to the administrative decision at first instance – notably as to material contravention of development plans. It considers the administrative decision at first instance as to technical merit and it also considers the legality of the grant or refusal of development consent – in the latter sense in that it must act in accordance with law.

228. In Aarhus Article 9(2) terms, arguably one could view the Commission as

- "*another independent and impartial body established by law"* - such that its decision satisfies the requirement of access to justice.
  or
- "*a preliminary review procedure before an administrative authority".* Presumably on that view appeal to the Commission is not a species of, but rather is a precursor, to access to justice. However, if so and inasmuch as "*exhaustion of administrative review procedures prior to recourse to judicial review"* is generally required by Irish law, it may follow that barriers to such a preliminary review procedure before the Commission can be no higher than might permissibly restrict standing in judicial review. On that view also, one may ask where appeal to the Commission stands with respect to Article 9(3), which does not appear to contemplate a preliminary review procedure?

229. In Aarhus Article 9(3) terms, one could arguably view the Commission as providing access to justice by way of an "administrative" procedure to challenge acts and omissions by public authorities – in this case, to challenge the Council Decision. And presumably it would be incongruous to see the Commission as providing access to justice for Article 9(3) purposes but not for Article 9(2) purposes.

230. Alternatively of course, and perhaps more conventionally in the Irish Constitutional order, one could view the Commission as not at all providing access to justice – restricting that role to the Courts. But, if so, why did the Commission invoke Aarhus Article 9(3) in these proceedings, which concern access to the Commission, not to the court? If the argument is that the Commission is the obligatory waystation to access to justice in the court, it was not made. But assuming the Commission does not provide access to justice for purposes of Aarhus Article 9(3), where does it sit in the Aarhus architecture? Arguably, though a second instance decision, it is a development consent decision within Article 6. But, if so, Article 9 may not apply to it as participation in an environmental decision-making procedure under Article 6 is separate from and has a different purpose than the exercise of a legal review - **Djurgården-Lilla**[259] and **Distressed Pigs**.[260]

GROUND 1 - CONCLUSIONS

231. I would favour a less strict view and more purposive interpretation of the word "adjoining" as used in s.37(6) – indeed I consider the word "neighbouring" used in BioAtlantis attractive from that point of view. However, the Aarhus argument apart, I consider myself bound by the literal and ordinary view of the word, as requiring contiguity, taken in Gleann Fia. And Gleann Fia is clear that such contiguity must be with the red line lands. I see no basis either for distinguishing Gleann Fia by reference to the present facts or for departing from it on a Worldport basis. But for the Aarhus argument, I would quash the Impugned Decision on Ground 1 – holding that Mr Payne's lands are not contiguous to the Red Line Lands.

[259] Djurgården-Lilla Värtans Miljöskyddsförening, C–263/08, EU:C:2009:631, §38.
[260] LB, Stichting Varkens in Nood & Ors v College van burgemeester en wethouders van de gemeente Echt-Susteren v Sebava BV (Distressed Pigs) (Case C-826/18); EU:C:2021:7; [2021] P.T.S.R. 735, §53.

232. In passing I should address a suggestion that Gleann Fia's insistence on contiguity to the red line puts developers at an unfair advantage – allowing contrivance on their part. That incorrectly views the matter with hindsight through the lens of this dispute. True, developers can choose their red lines. But thereupon they may propose development only within them and are bound to develop only within them – which is no small limitation. It seems to me unlikely that developers in any appreciable numbers, as a matter of foresight and contrivance, would pick their red lines specifically to avoid the unlikely cumulative prospect that

(a) a neighbour would not participate in the planning process and

(b) the planning authority would - unexpectedly - impose a condition altering the development such as to adversely affect that neighbour's enjoyment of his land and/or land and

(c) that neighbour would make a s.36(7) application for leave to appeal to the Commission.

While of course such contrivance is not impossible, I cannot see that, viewed generally, the extent of any such mischief could justify an interpretation of the concept of land adjoining land in respect of which a decision to grant permission has been made other than that which would in any event apply.

233. It is the Aarhus argument which gives me pause.

234. For what it is worth, as Mr Payne's concern is with the adequacy of the EIA of the Permitted Development as it, he says, is likely to affect his water supply, I hold that his complaint arises in a field covered by EU Environmental Law and that, in Aarhus terms, he is member of the public concerned.

235. I incline to the view that, as a non-participant before the Council, and even if appeal to the Commission raises any access to justice issues, Mr Payne falls foul of the entitlement of the State, even by reference to Aarhus Article 9(3), to impose prior participation conditions which he does not satisfy. For the purposes of these proceedings, it must be taken that Mr Payne had, but did not avail of, access to an administrative procedure before the Council. Any defect in site notices or the like is not for litigation in these proceedings. If prior participation conditions are valid, it is difficult to see that Mr Payne can complain that they are insufficiently relaxed by s.37(6). In that regard and as to prior participation, I have already found for purposes of Ground 2, that any threat to Mr Payne's well, if the Permitted Development poses one, was apparent from the Planning Application. As I have said also, Breedon did not formally take a pleading point to exclude the Aarhus point and I do not formally decide that it would have succeeded.

236. I am not convinced that the Commission's Aarhus argument can be confined to the supposedly unique facts of this case. Its attempt to so confine it savours of an attempt, as to the width of implications of their argument, not to frighten the judicial horses – and, for that matter, of an attempt to avoid emboldening a large cohort of potential non-contiguous landowners seeking to avail of s.37(6). The facts and circumstances of this case may be unusual, but, viewed at the proper level of generality, I see nothing unique about them. I have no evidence or, for that matter, reason to believe, that planning permission applications to develop part only of a planning unit, such part being identified by the regulatory red line, and to do so in a manner integrated with the use of the rest of the planning unit are rare – much less that this one is unique. Nor do I think adverse effects on, or reasonable apprehensions of such effects by, non-

contiguous landowners are at all rare. Confining the Commission's arguments in that way also seems illusory given its reliance on Article 9(3) which avails the "public" – not just the "public concerned".

237. As I have said, for reasons I hope to have demonstrated in the foregoing by, I admit, having asked more questions than provided answers, I consider that the Aarhus argument was far from simple and was underdeveloped. While, in light of the foregoing essay into the issue, my course savours somewhat of the Grand Old Duke of York, I have come to the view that, where I have been able to determine the proceedings on Ground 2, I should refrain from determining the question whether the Aarhus Interpretive Obligation requires, and on that basis Worldport permits, that Gleann Fia be overturned and a purposive interpretation of s.37(6) (which I have confessed to preferring) be adopted. I consider that a decision in that regard is best left to a case in which the issue has been fully pleaded, been the subject of written submissions by all parties and fully argued.

238. Accordingly, I consider it unnecessary and imprudent to decide Ground 1 – whether Mr Payne's lands adjoin the land in respect of which the Council Decision to grant permission has been made.

GROUND 3 – REASONS & RATIONALITY

239. Given my decision on Ground 2, and like Haughton J in Gleann Fia, I do not consider it necessary to decide Ground 3 as to the adequacy of the Commission's stated reasons for the Impugned Decision. However, some comment may assist.

240. To recollect, the only substantive content of the Commission's given reason of 16 February 2024 was that

> "*The Bord noted by reason of Condition No. 3 …. the development will differ materially from the development as set out in the application as it is not clear what the extent and scope of any remedial actions that will be required in the event that the quarry activities impact existing wells and will materially affect the Applicant's enjoyment of the land adjoining the land in respect of which it has been decided to grant permission."*[261]

241. It is unclear why the Commission did not seek to clarify that which it considered unclear. Given Condition 3 was a pre-commencement condition and Breedon had started quarrying in April 2023, one must presume that the agreement contemplated by Condition 3 would have come to hand if sought prior to the making of the Impugned Decision in February 2024. The Commission may not have known that Breedon had commenced quarrying but could have adverted to the possibility and made a precautionary inquiry. Of course, as it is not before me, I do not know what clarification, if any, the Condition 3 Agreement would have

[261] Sic. See Transcript 15:38 et seq.

provided. Perhaps little. And it is also strange that Mr Payne's appeal of March 2024, on foot of the Impugned Decision, did not advert to the Condition 3 Agreement.

242. Also, like Haughton J, I respectfully draw attention to certain matters which may assist the Commission in making future such decisions. Without attempting to be exhaustive, they are:

a. The context that s.37(6) requires that an applicant for leave to appeal to the Commission "show" that the criteria of s.36(d) are satisfied. As the presumption is against leave, that is a positive obligation on an applicant for leave and is not satisfied where merely it is not clear that the criteria have not been satisfied.

b. The necessity to give reasons for a decision such as the Impugned Decision.

c. The general requirement in law that reasons be "*clear*" and "*cogent*" (which is to say, "persuasive" in the sense of capable of persuading) and "*intelligible"/"comprehensible*".[262] That would seem to require specific identification of

- the respect(s) in which the permitted development differs from that for which permission was sought.
- the means whereby one or more a planning conditions have caused that difference.
- why that difference is material in terms of effect on the enjoyment of and/or value of the adjoining lands of the applicant for leave to appeal.

d. The observation that the necessity for clear and cogent reasons serves not merely to inform others of those reasons: it promotes substantively good decision-making. Having to explain to others and foreseeing scrutiny of that explanation prompts explanation to oneself. As Fordham J (of particular eminence in judicial review) has said in **Badger Trust**[263] providing reasons "*promotes discipline*" – by which he meant, inter alia, discipline of thought in making decisions. Similarly, in **Foran**,[264] it was said that an important function of the duty to give reasons is to impose "*a very desirable discipline*" so as to "*concentrate the decision-maker's mind on the right question*".[265]

e. The nuanced decision in **Crekav**[266] to the effect that

- There is no formal requirement to give reasons for making, on remittal, the opposite decision to a decision quashed in judicial review – that it to say, a specific reason for the change of mind/ inconsistency.

[262] Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7 §272, citing Mulholland and Kinsella v An Bord Pleanála and others. [2005] IEHC 306, Grealish v An Bord Pleanála [2007] 2 IR 536; Harten v An Bord Pleanála [2018] IEHC 40; Westminster City Council v Great Portland Estates [1985] AC 661; Eco Advocacy CLG v An Bord Pleanála (C-721/21), [2024] Env L.R. 8 (2023) EU:C:2023:477 (Kokott AG); SWI, IFI, Sweetman & Ors v ALAB [2024] IEHC 421 §978. More recently, Foran v An Coimisiún Pleanála & Glenveagh [2026] IEHC 23.
[263] R.(Badger Trust) v Natural England, [2025] EWHC 2761 (Admin) [2026] A.C.D. 4, [2025] Costs L.R. 1751.
[264] Foran v An Coimisiún Pleanála & Glenveagh [2026] IEHC 23.
[265] R(Matson) v City of London [1979] 1 WLR 765; R(Dawson) v London Borough of Newham 26 HLR 747 – both cited in Fordham, Judicial Review Handbook, 6th Ed'n §62.1.8.
[266] Crekav Trading GP Ltd v An Bord Pleanála, [2020] IEHC 400, [2020] 7 JIC 3108. §114, §166 & §126.

- That does not obviate the general duty to give cogent reasons for the substance of the remitted decision – just as for any decision. In that respect, the reality of the circumstances may be that the original decision, the reasons for it, the circumstances in which it was challenged and came to be quashed are relevant to the factual context within which the Commission considers the remitted application and to the adequacy of the reasons it gives for its remitted decision. That may be especially so where the materials before the Commission when it made its remitted decision were precisely those before it when it made its quashed decision.

CONCLUSION

243. The Impugned Decision will be quashed on Ground 2 only, for mistake of fact in that Condition 3 did not materially alter the Development such as to adversely affect Mr Payne's enjoyment of his lands or their value.

244. For reasons I have given, I refrain from decision of Grounds 1 and 3.

245. I confess to no great enthusiasm for what I consider the legally correct outcome here. Breedon's failure to explain why it omitted Mr Payne's well from the EIAR does not impress. But whatever unfairness to Mr Payne there may be in that or in the allegedly defective site notices, they do not seem to me to be the types of unfairness to which s.36(7) is addressed.

246. I will hear the parties as to remittal. Provisionally, it seems that Breedon should have its costs against the Commission. The case will be listed for final orders on 12 October 2026.



David Holland
31/7/26