Neutral Citation No: [2020] NIQB 1 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McC11145** ***Delivered: 06/01/2020***

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY COULTERS HILL RESIDENTS LTD
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

PLANNING APPEALS COMMISSION

_____

McCLOSKEY LJ

Preface

This judgment was promulgated in draft form, consisting of paragraphs [1] – [30] (with slightly different formatting), on 24 July 2019. As appears from the latter paragraphs the court, in substance, afforded the applicant an opportunity to reconfigure/clarify its case on the extinguishment/abandonment issue and made a case management order to this effect. A further case management order, dated 22 November 2019, became necessary. The parties' responses to both case management orders generated certain additional materials. The court then convened a further listing on 04 December 2019. The consequential additional content of this judgment is arranged at paragraphs [31] – [44] under the banner of "Addendum**".**

Introduction

[1] The applicant is a registered limited company, incorporated on 10 April 2018. The proposed respondent is the Planning Appeals Commission ("PAC"). The applicant seeks to challenge the decision of the PAC made in Appeal No. 2018/E000 on 30 October 2018. By this decision the PAC allowed in part the statutory appeal of one Ian Walsh (the "*developer*") against an enforcement notice dated 23 April 2018 issued by Ards and North Down Borough Council (the "*Council*").

The applicant

[2] The applicant is described as a registered company incorporated on 10 April 2018 and having the following stated objects:

> *"To challenge excess developments within the Ards and North Down Council area which undermines the sustainable development of the Ards and North Down area, to challenge urban sprawl, ribbon development, lack of enforcement, planning control and all rural development contrary to planning policy and public consideration".*

Affidavits have been sworn on behalf of the applicant by *inter alios o*ne Gordon Duff, who describes himself as one of eight "*shareholders/directors"* of the company. Mr Duff is a prolific personal litigant. He is the registered director of certain limited companies, all of which have the words "Rural Integrity" in their registered names, which at present have around 30 unresolved cases in the Judicial Review Court.
Mr Duff has sworn affidavits and represented the applicants at hearings in all of these cases. The vast majority of them have not progressed beyond the leave stage for the reasons given in a series of rulings and orders of the court.

[3] The PAC is the respondent in one of these cases (18/56370/1). On 27 June 2019 this court made an order dismissing that case on account of non-compliance with an order that the applicant, one of Mr Duff's companies, make security for costs in the amount of £10,000. That order is under appeal to the Court of Appeal, with a listing scheduled next term.

[4] Mr Duff has sworn two affidavits in these proceedings, which were initiated on 29 January 2019. Several further affidavits have been sworn. Each of the deponents is described as an owner or occupier of separate residential properties at Coulters Hill, Kircubbin, County Down.

The Enforcement Notice

[5] The Council's Enforcement Notice, dated 30 April 2018, identified the relevant lands as "Fishquarter Quarry located on Coulters Hill Lane between Parsonage Road and Rubane, Kircubbin…". By its terms the notice alleged that the developer had engaged in the following land use activities in breach of planning control:

> "(i) Unauthorised change in the use of the land from quarrying to a mixed use comprising processing and quarrying.)
> (ii) Unauthorised erection of an earthbund...
> (iii) Unauthorised erection of a weighbridge...
> (iv) Unauthorised erection of a Portaloo…
> (v) Unauthorised erection of a portacabin…
> (vi) Unauthorised erection of a storage container…
> (vii) Unauthorised development of an area of hard standing;
> (viii) Unauthorised use of an area of hardstanding for parking…".

[6] It is clear from the Notice, the attached plan and other evidentiary sources that the subject lands are in two parts. The greater part by far consists of a quarry. The considerably smaller part is an area within which the Council alleged that the

developer was acting in breach of planning control. In shorthand all of the allegedly unlawful activities were ancillary in some way to the primary land use of quarrying. The Notice listed eight such activities in total (reproduced above). Of these the second to eighth represented completed acts or activities, undertaken at some time in the past. The distinguishing feature of the first component of the Council's list was the allegation of a continuing unlawful activity, consisting of "*processing*". In short, the Council's case was that the developer, while lawfully operating a quarry on the land, was acting unlawfully by engaging in the processing of the quarried materials on site.

The Statutory Framework

[7] An appeal lies to the PAC against an Enforcement Notice by virtue of section 143 of the Planning Act (Northern Ireland) 2011 (the "*2011 Act*"). Section 143 provides:

> "(1) A person having an estate in the land to which an enforcement notice relates or a person to whom subsection (2) applies may, at any time before the date specified in the notice as the date on which it is to take effect, appeal to the planning appeals commission against the notice, whether or not a copy of it has been served on that person.
>
> (2) This subsection applies to a person who—
>
> (a) on the date on which the enforcement notice is issued occupies the land to which it relates by virtue of a licence; and
>
> (b) continues to occupy the land as aforesaid when the appeal is brought.
>
> (3) An appeal may be brought on any of the following grounds—
>
> (a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;
>
> (b) that those matters have not occurred;
>
> (c) that those matters (if they occurred) do not constitute a breach of planning control;
>
> (d) that, at the date when the notice was issued, no enforcement action could be taken in respect of

any breach of planning control which may be constituted by those matters;

(e) that copies of the enforcement notice were not served as required by section 138 or, as the case may be, section 139;

(f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;

(g) that any period specified in the notice in accordance with section 140(9) falls short of what should reasonably be allowed."

(4) An appeal under this section must be made by serving written notice of the appeal on the planning appeals commission before the date specified in the enforcement notice as the date on which it is to take effect and such notice must indicate the grounds of the appeal and state the facts on which it is based.

(5) Before determining an appeal under this section, the planning appeals commission must, if either—

(a) the appellant; or

(b) the council or, as the case may be, Department so desires, afford to each of them an opportunity of appearing before and being heard by the commission.

(6) Sections 41 and 45(2) shall apply, with any necessary modifications, in relation to an appeal to the planning appeals commission under this section as they apply to an application for planning permission to the council or the Department.

(7) Where an appeal is brought under this section, the enforcement notice shall be of no effect pending the final determination or the withdrawal of the appeal.

(8) Subject to subsection (9), the validity of an enforcement notice shall not, except by way of an appeal under this section, be questioned in any

proceedings whatsoever on any of the grounds on which such an appeal may be brought.

(9) Subsection (8) shall not apply to proceedings brought under section 147 against a person who—

(a) has held an estate in the land since before the enforcement notice was issued;

(b) was not served with a copy of the enforcement notice; and

(c) satisfies the court that—

(i) that person did not know and could not reasonably have been expected to know that the enforcement notice had been issued; and

(ii) that person's interests have been substantially prejudiced by the failure to serve him or her with a copy of it."

The Impugned PAC Decision

[8] The PAC produced its decision, in the customary written form, with commendable expedition, on 30 October 2018, the hearing having been conducted on 27 October 2018. This records *inter alia* that the Council was represented by senior counsel, the appellant (the developer) was represented by his solicitor and a planning consultant and, finally, that two identified persons, each described as a "*local resident*" had the status of "*third parties*".

[9] There are two noteworthy features of the opening paragraph of the decision of Commissioner Rue. First, the appeal was brought under all of the disjunctive grounds specified in s.143(3) of the 2011 Act, with the exception of (b). Second, the decision determined the appeal on grounds (c) and (d) only. Thus the appeal process is not yet completed. It will entail one further stage involving the determination of the balance of the appeal on the other grounds. A further hearing of the PAC was scheduled a couple of months ago for this purpose but adjourned in response to the intervention of these proceedings.

[10] There is a helpful annex to the decision of Commissioner Rue which, when juxtaposed with the Enforcement Notice, assists in understanding what was decided. When considered in conjunction with paragraph 19 of the text, it is clear that the Commissioner exercised his statutory powers under s.144 to amend the Enforcement Notice in certain specified respects. This enabled the Commissioner to align the Notice with the grounds of appeal and to proceed with his decision making accordingly. By the mechanism of amendment Commissioner Rue made the valuable contribution of introducing a clear definition of "*processing*" in the context under scrutiny. He stated at [14] of his decision:

> *"…processing means treating extracted minerals following their winning and working but does not include breaking solely for the purpose of allowing the raw material to be loaded on lorries for transport off the site".*

[11] In determining ground (c) of the appeal, Commissioner Rue formulated the developer's central contention at [20]:

> *"…the processing of rock within the appeal site – specifically the crushing, screening and storage of extracted rock – falls within the scope of the 1967 permission and is not a material change of use".*
>
> *"The contrary contention of the Council was that the 1967 permission authorised quarrying only ie the winning and working of minerals".*

At this juncture it is necessary to understand the Commissioner's references to the "1967 permission". This denotes a grant of planning permission issued by the Council's predecessor, Down County Council, on 19 May 1967. This consists of a formal notice and two accompanying maps (or drawings) depicting in greater or lesser detail the site in question and its surrounds. Each of these maps identifies a "proposed quarry area". Their formal title is "Proposed quarry at Fishquarter, Kircubbin." The planning applicant was one Henry Gilmore, described as a building contractor. The evidence does <u>not</u> include the application for planning permission. The formal notice states *inter alia*:

> *"…the Council at their meeting held on 19 May 1967 considered the application of Henry Gilmore to use land for quarrying purposes at Fishquarter, Kircubbin in accordance with plans submitted on 20/04/67 and their decision under the Planning Acts…."* etc, *"…is that* ***permission be granted for use of land for quarrying purposes in accordance with plans submitted on 20/04/67****."*

[My emphasis].

[12] With impeccable self-direction, Commissioner Rue noted that the construction of every planning permission is a matter of law to be determined by the relevant adjudicative agency. Next, following ***R-v-Ashford BC ex parte Shepway DC*** [1999] PNCR12, the Commissioner rehearsed accurately the principle that where there is ambiguity in the phraseology of a grant of planning permission it is permissible to consider extrinsic material, including the underlying application, for the purpose of resolving same.

[13] Commissioner Rue's next step involved consideration of the Planning (General Interim Development) Order (Northern Ireland) 1994 (The *"1994 Order").* This is a measure of subordinate legislation made by the Ministry of Health and the

local government. This established certain "classes". The fifth of these classes was "development of any description specified in Part 1 of the Schedule to this Order". Paragraph 5 of the Schedule was in these terms:

> *"The carrying out by mining undertakers, on land comprised in their undertaking, of any development required for the purposes of their undertaking, except –*
>
> *(a) The erection of buildings (not being plant or other structures or erections required for the winning, working, treatment or disposal of minerals), and the reconstruction or alteration, so as materially to affect the design or external appearance thereof of such buildings;*
>
> *(b) The formation or alteration of any means of access to a public road".*

Thus, in basic terms, quarrying had a statutory definition of the winning, working, treatment or disposal of minerals and any land activity falling within the embrace of this definition did not require planning permission. It is also appropriate to note Article 10 of the 1944 Order:

> "*Subject to the provisions of this Article and to the subsequent provisions of this Order, any person who desires to apply for permission under this Order shall apply in writing to the Interim Development Authority and shall furnish to the Authority, together with his application, a plan in triplicate sufficient to identify the land to which the application relates (hereinafter called a 'singular site plan') and* ***particulars, illustrated by plans and drawings in triplicate, sufficient to show the proposed development".***

[emphasis added]

[14] Commissioner Rue, continuing his faultless self-direction, considered it appropriate to examine the 1967 permission in the context of the statutory framework constituted by the 1944 Order. He reasoned that at the time of submission of Mr Gilmore's planning application in April 1967, the permitted development of quarrying prescribed by the Schedule to the 1944 Order had been removed in this part of County Down. (I observe that the correctness of this approach is confirmed by the very fact of Mr Gilmore's application). Next the Commissioner considered the evidence of a grant of planning permission related to quarrying activities at a relevant site ("Orlock"), noting that this contains a condition regulating the siting of, and thereby authorising, a stone crushing plant. This gave sustenance to the Commissioner's view that the phrase "*quarrying purposes*" – "*… was intended to encompass a broad range of purposes of the undertaking included the treatment (or processing) of quarry material."*

[15] The Commissioner then turned his attention to the two plans accompanying the 1967 permission noted above. He noted, correctly, that these plans were incorporated within and, therefore, formed part of the permission. The Commissioner, having highlighted certain features of these drawings and having noted Article 10 of the 1944 Order (*supra*), stated:

> "*The larger-scale plan, although hand drawn with no scale specified, identifies the application site with tolerable precision and fulfils the requirement for a site plan. It is notable that no part of the site depicted on that plan overlaps with the area hatched blue on PAC1".*

"PAC1" is the map attached to the impugned decision which, in the exercise of the relevant statutory powers, operates as a substitute for the map accompanying the Council's Enforcement Notice. Continuing, the Commissioner stated:

> "I*t must be concluded therefore that the 1967 permission applied only to the area identified on the site plan, the larger-scale map. That area includes the existing quarry void, where according to the Council processing is carried out. I saw a mobile plant and piles of graded stones in that area on the day of my site visit*."

[16] Commissioner Rue next considered the evidence of one Mr Clarke, provided via the mechanism of an affidavit (only). He was unimpressed by one particular aspect of this evidence, having regard to the evidence of a report of a planning officer's inspection in 1981 which noted that the quarry was inactive together with certain undisputed evidence in an earlier unrelated planning appeal (in 2012) that extraction had stopped in the mid-1980s.

[17] The Commissioner then examined the discrete argument that the processing or treatment of rock extracted from a quarry forms part of or is ancillary or incidental to the extraction of the rock. Having rehearsed the evidence of the developer on this issue and noting the absence of any contrary evidence from the Council, the Commissioner concluded at [39]:

> *"It is accepted that in Northern Ireland the processing of rock in a quarry is ordinarily incidental to the winning and working of the mineral at that quarry…"* (adding at [40]) *…Extraction and processing are interdependent and functionally integrated activities".*

This gave rise to the following central conclusion, at [41]:

> *"In the final analysis it is judged that the processing (as clearly defined) of rock extracted from the quarry within the quarry area shown on the site plan is a quarrying purpose approved by the 1967*

permission and/or ordinarily incidental to quarrying. The Appeal on ground (c) will succeed in respect of processing".

[18] Next the Commissioner, for the reasons given, concluded that the appeal on ground (c) in respect of the weighbridge, portaloo, portacabin, storage container and parking use must fail. The appeal on ground (d) in respect of the hardstanding area was also dismissed. The Commissioner turned finally to the appeal on ground (d) in respect of the earthbund. He concluded at [49]:

> *"The available evidence indicates that it was only in the vicinity of the weighbridge that excavated earth was pushed into an existing vegetated embankment. On the balance of probability, it is judged that what took place in 2016 did not amount to the single 'erection' of an earthbund. The appeal on ground (d) will therefore succeed in respect of the earthbund".*

The net result of Commissioner Rue's decision was this:

(a) The appeal on ground (c) succeeded in respect of the processing use.
(b) The appeal on ground (b) succeeded in respect of the earthbund.
(c) The balance of the appeal on grounds (c) and (d) failed.

Finally, having specified the corrections and amendments of the Enforcement Notice effected in the exercise of the relevant statutory powers, the decision states:

> *"The appeals on grounds (a), (f) and (g) will be considered against the notice as so corrected and varied".*

As already noted, this further stage in completing the appeal remains outstanding.

The Judicial Review Challenge

[19] My attempts to elicit from Mr Duff the central tenets of the applicant's case yielded little success. Mr Duff, in his customary thorough way, had energetically conducted the research and made the inquiries necessary to assemble a large body of documentary evidence before the court. The compilation of the documents was, however, highly unsatisfactory. Mr Duff, as is customary, clearly knew what he wanted to say and had prepared himself accordingly. However, he failed to answer directly or coherently the court's several questions, displaying a consistent aptitude for answering some phantom question which the court had not devised. Self-evidently none of this was conducive to the court's ability to get to the heart of the challenge.

[20] Notwithstanding the foregoing, Mr Duff formulated his central submission in these terms: **as there was no extant planning permission in respect of the subject**

site, the Enforcement Notice was flawed (I would add) **with the result that the developer's partially successful appeal to the PAC is set to nought**. Continuing, Mr Duff stated that the "heart" of the applicant's case is that the 1967 permission was extinguished in 1974 by legislation. If I have grasped this submission correctly, it is based on the premise - a rather important one - that the 1967 permission should be construed as authorising the land use activity of quarrying only.

[21] The applicant's central submission, as formulated immediately above, is identifiable in paragraph [6] of the Order 53 statement, in the following terms:

> *"The Enforcement Notice relies on a planning permission that has either been extinguished or (been) abandoned over a period of approximately 41 years between 1975 and 2016".*

I have identified one further significant discrete facet of the formal pleading of the applicant's case, namely the contention that the PAC –

> *"…failed to recognise that Class 13 of Schedule 1 to the Planning (General development) Order (NI) 1973, which sought to regularise quarrying permissions approved under the 1944 Order, applied in the matters central to this enforcement appeal".*

(I shall describe this further statutory measure as "*the 1973 Order*").

Conclusions

[22] It is appropriate to observe at this juncture that the applicant's case in law, properly analysed, reduces to what I have outlined above. Other pleaded grounds are plainly not viable. In this context I refer particularly to the bare assertion of disregarding specified relevant facts , which falls foul of the ***Re SOS*** principle (see [2002] NI 153 at [19]); the Article 8 ECHR ground; and the *ultra vires* contention. The only coherent and potentially viable aspects of the applicant's pleaded case are those rehearsed in [23] – [24] above, as illuminated.

[23] What emerges from the foregoing is that the key passages in the determination of Commissioner Rue are those concerning his interpretation of the 1967 permission. I have rehearsed these above. The Commissioner considered the legislative history, without error. In so doing he stated *inter alia* that the permitted development of quarrying established by the 1944 Order had "presumably" been removed in this area of County Down prior to the lodging of Mr Gilmore's planning application. This formed part of the Commissioner's rationale in the construction exercise which he carried out. The applicant has at no time been challenged or otherwise engaged with this *"presumption"*. Furthermore the Commissioner's

summation of paragraph 5 of the Schedule to the 1944 Order is impeccable: the permitted development of quarrying ("mining") included the erection of buildings required for the winning, working, treatment or disposal of minerals. Thus his starting point, a self-evidently important aspect of his analysis and conclusions, is unassailable.

[24] I return to the Commissioner's "*presumption*". This provided for him an explanation of Mr Gilmore's planning application in April 1967. This is not merely unchallenged by the applicant. It is also precisely the kind of issue belonging to the realm of the presumptive expertise of the PAC which the court should properly recognise. This is not to dilute the court's role and duty of supervisory superintendence. However, it does import a certain degree of latitude as regards the decision making of the PAC. The applicant's challenge identifies no material upon which the court can properly question, much less reject, the approach of the appointed Commissioner to this discrete issue.

[25] Given the foregoing all that remains, therefore, is the applicant's contention that the 1974 Order extinguished the 1967 permission. As already highlighted, the premise in this freestanding contention is that the 1967 permission is to be construed as authorising quarrying operations only. As I have identified no error of law, arguable or otherwise, in the Commissioner's construction of the 1967 permission this contention must fail in consequence. Furthermore, it is manifestly inconsistent with the related contention, formulated unambiguously, and in the Order 53 statement - noted above - that the 1967 permission (for quarrying only, on the Applicant's case) had been extinguished or abandoned from 1975. In presenting this argument to the court, Mr Duff did not rely on any of the provisions of the 1974 Order. Rather the cornerstone of this submission was a 1974 Ordnance Survey map and a related record, evidently contemporaneous stating:

> *"Boundary of quarry face… surveyed 1973/74 (can assume quarry was inactive at these dates?)….*
>
> *Some scrap vehicles on site. Two derelict cement huts remain. Quarrying floor flooded and dangerously deep. Inactive"*.

Mr Duff had also unearthed another piece of documentary evidence dating from 1981 apparently consistent with the record reproduced above.

[26] It is clear that none of the aforementioned evidence was available to Commissioner Rue. The court cannot overlook that the statutory planning authority which, following a lengthy investigation, initiated the enforcement action against the developer clearly did not espouse the "extinguishment or abandonment" theory. On the contrary: the Council's case was that there was a live, lawful grant of planning permission which authorised quarrying activities only and did not extend to embracing "processing" of quarried stone. The question mark in the aforementioned

record clearly casts some shadow over its meaning and reliability. Notwithstanding, I shall adopt the approach that all of the elements of this discrete category of evidence should be taken at their zenith for the applicant. This raises the question of whether the applicant's case is promoted or fortified in consequence.

[27] Mr Duff has not prayed in aid any statutory provision or legal principle in support of his "extinguishment or abandonment" argument. That, for obvious reasons, is a highly unpromising point of departure. Given the public law character of these proceedings I am prepared, albeit with some reluctance, to explore this issue further.

[28] Abandonment is a familiar concept in the world of planning law. It has been held in one of the leading cases that it denotes the cessation of a specified land use followed by a period of inert activity: ***Heartily v The minister of housing and local government*** [1969] 3 ALL ER1658, at 1661 per Widgery LJ. Where abandonment occurs, the use formerly permitted cannot be reactivated in the absence of a fresh grant of planning permission *(ibid at 1660, per Lord Denning MR).* The main inquiry for the court is whether the cessation of the relevant use was temporary in character. This is illustrated particularly by ***Wheatfield Inns* (*Belfast*) v *Croft Inns*** [1978] NI 83. It has been held that the main factors to be weighed in determining whether a cessation of a given use is temporary or permanent are (a) the physical condition of the building, (b) the period of inactivity, (c) whether there has been any other use and (d) the intentions of the property owner: ***North Avon DC -v- the Secretary of State for the Environment*** [1990] JPL 579.

[29] I have also taken cognisance of the decision of the House of Lords in ***Pioneer Aggregates (UK) v The Secretary of State for the Environment*** [1984] 2ALL ER358 which, laying emphasis on the general principle of town and country planning law that the duration of a valid planning permission is governed by the provisions of the relevant legislation and, further, enures for the benefit of the land and of all persons for the time being interested therein, held that planning permission cannot be extinguished by mere conduct. Lord Scarman, delivering a judgment with which all other members of the court concurred, stated at 362I:

> *"My Lords, on the question of abandonment I find myself in agreement with both courts below that there is no such general rule in the planning law. In certain exceptional circumstances not covered by legislation… the courts have held that a landowner by developing his land can play an important part in bringing to an end or making incapable of implementation a valid planning permission".*

And at 364F:

> *"Viewed as a question of principle, therefore, the introduction into the planning law of a doctrine of*

abandonment by election of the landowner (or occupier) cannot, in my judgment, be justified. It would lead to uncertainty and confusion in the law and there is no need for it".

Next, Lord Scarman cautioned that the decision in *Hartley* did not entail the abandonment of an extant planning permission, given that the existing use had been deliberately ended and a new use had been undertaken, the issue being purely one of facts. A material change of use having been established by the evidence, planning permission was required.

[30] Taking into account all of the foregoing, I have determined that the proper course is to defer finalising this judgment until the following steps have been completed:

(i) The applicant shall complete a schedule in two parts. Part 1 will identify the precise bundle and page reference of each piece of evidence said to advance the case regarding abandonment/extinguishment of the 1967 permission. Part 2 will contain the briefest of descriptions of each individual item of evidence thus identified. Time limit **22 August 2019**.

(ii) The Council and interested party represented in these proceedings, the PAC and the developer will have the opportunity to respond to the applicant's schedule via two mechanisms namely (a) extending their existing skeleton arguments and (b) the provision of further material evidence, by **12 September 2019** at latest.

(iv) There shall be a further case management review listing at 09.45 on 19 September 2019. Any issues to be raised at this listing will be notified by the parties to the court, in writing, as a minimum three clear days in advance.

(v) Costs are reserved.

(vi) There shall be liberty to apply.

Addendum

[31] The applicant, in response to the foregoing directions, highlighted various aspects of the documentary evidence, both pre-existing and new, before the court. This exercise had the merit of identifying the several inter-related, or alternative, submissions on behalf of the applicant, namely:

(i) The 1967 permission was confirmation of permitted development and not a free standing grant of planning permission pursuant to Articles 3 and 10 of the 1944 Order.

(ii) Based on this premise, an application for "*retention*" was necessary, such application failed and this resulted in the extinguishment of the permitted development and the closure of the quarry.

(iii) Alternatively, if the permitted development use was not extinguished, it was subsequently abandoned.

(iv) Alternatively any extant permission could not be implemented by reason of the *de facto* change of use to (initially) a lake and then a fishery and the sale by the Gilmores of various proximate parcels of land for residential development purposes.

[32] In support of these submissions the applicant drew attention to various aspects of both pre-existing and new evidence, including in particular the purchase of Fish Quarter Quarry by North Down Quarries Limited ("*NDQ*"); the lease from McMaster to NDQ whereby the latter gained access to the quarry; easements granted to NDQ; NDQ's application to retain the existing quarry; the "*quarry refusal notice*"; the closure of the quarry in 1974 or 1975 and the associated removal of quarrying equipment and infrastructure; NDQ's letter authorising the fishing club to use the quarry while retaining the right to reopen it at any time; the resale to the Gilmore family; the purchase price being approximately one third of the price per acre for the agricultural land in folio DN5881; the description of the quarry as "*worked out*"; and the evidence of the extensive duration of the quarry closure prior to its re-opening.

[33] As is clear particularly from the foregoing, the applicant is <u>now</u> seeking to make a case which differs significantly from the case made at the stage when this court promulgated its judgment in preliminary, draft form (see the Preface hereto). At [28] above, this court drew attention to certain new evidence which had plainly not formed part of the evidence available to Commissioner Rue in making the impugned decision. The adjournment of these proceedings consequential upon the deferral of the finalisation of this judgment has resulted in the generation of still further new evidence on the part of the applicant. The provision of this substantial quantity of new evidence in response to the court's case management order of 24 July 2019 stimulated a further case management direction by the court following receipt. By this mechanism both the PAC and the Council availed of the facility granted to make further written submissions to the court.

[34] By the route and in the manner described this court has become the <u>first</u> recipient of a substantial quantity of new evidence. None of this evidence was considered by the PAC in making the impugned decision. Furthermore it seems likely that none of it was considered by the public authority which made the decision underlying the PAC decision, namely the Council in issuing the enforcement notice dated 23 April 2018.

[35] In the foregoing circumstances two prominent principles of public law are engaged. The first is that this is a court of supervisory jurisdiction. The High Court exercises no original, first instance or appellate jurisdiction. Furthermore, it does not review the merits of the impugned decision of the public authority under challenge in any given case. The second principle, equally entrenched, is that judicial review is a measure of last resort. From this flows a kindred principle that alternative remedies must generally be exhausted before resort to judicial review. This was described in one of the leading authorities as a "*cardinal*" principle: *R v Epping and Harlow General Commissioners, ex parte Goldstraw* [1983] 3 All ER 257 at 262 per Sir John Donaldson MR. This was cited with approval by the Divisional Court in *Re Ballyedmond's Application* [2000] NI 174 at 577. The court also endorsed the principle that where there is a failure to exhaust an alternative remedy, this must be justified by "*special circumstances*".

[36] I consider it highly unlikely that this court of supervisory jurisdiction, if persuaded to grant leave to apply for judicial review, would, in the event of finding a ground or grounds of challenge established, grant the applicant a discretionary remedy based on new evidence available only to this court and not the respondent PAC (or the Council). The PAC is a judicialised body. It is trite that judicialised bodies decide cases on the basis of the evidence presented to them. I do not exclude that there may be – and indeed may have been – cases in which the High Court in the exercise of its supervisory judicial review jurisdiction may be – or may have been – persuaded to conduct the exercise of identifying a legal deficiency in the decision of the judicialised body in question through the prism of leaving out of account some material fact or consideration. However, given the conduct and history of these proceedings, coupled with the protracted underlying history, I consider that this is not such a case. This is so not least because of the intrinsic undesirability of this supervisory court, as a "first receiver", conducting an exercise of evaluating significant new evidence as a means of determining whether it should interfere with the decision of the judicialised body under challenge. In this respect the differences between the forum, procedures and powers of the PAC and those of this court of supervisory superintendence are striking. The supervisory jurisdiction of this court should generally not be invoked in this way.

[37] One further and logical consequence of the foregoing analysis is that given the Applicant's heavy reliance on evidence not available to the PAC, I consider that no arguable case that the PAC erred in law has been established.

[38] The inter-related principles of judicial review as a remedy of last resort and the exhaustion of alternative remedies also arise. The well-established principles of legal certainty and the finality of litigation (*interest rei publicae ut sit finis litium*) explain in part why this is so. It is not the function or duty of our legal system to devise a mechanism whereby the applicant, in fulfilment of its stated objects (noted in [2] above, can maintain or extend or renew its objections to the activities on the subject site outlined in [5] above. Notwithstanding it is clear that, as a minimum, the applicant has at its disposal the facility of assembling all evidence now available and,

based thereon, inviting the Council to issue a fresh enforcement notice in specified terms. This course has not been pursued. In this respect the written communication from the applicant to the court, dated 28 November 2019, is of special note:

> "……. *The Applicant has served a PAP letter on the* [Council] *on 14 November* [2019] …. [and] …. *is preparing to submit a new application for leave to review the Council for lack of enforcement.*"

[39] This court, in furtherance of the overriding objective, would caution the applicant to ensure that before issuing any judicial review challenge against the Council of the kind mooted it must first present its case for enforcement action in comprehensive terms, supported by the totality of all available material evidence, as indicated above.

[40] Finally I consider that this court must take into account that these proceedings, which have become protracted (now approaching their first anniversary) notwithstanding robust case management, have had the undesirable effect of postponing and delaying the completion of the underlying PAC process: see [9] above. This furthers no identifiable public interest.

Omnibus Conclusion

[41] Giving effect to the principles which I have highlighted and the foregoing reasoning I conclude that this application for leave to apply for judicial review must be dismissed.

[42] The applicant urged the court not to determine this leave application until (a) it had first determined its application for a protected costs order and (b) the Court of Appeal had given judgment in the case of *Rural Integrity (NI) Limited v PAC*, noted in [3] above. The effect of the court's decision in the present case is that there is no question of the applicant recovering costs from the respondent PAC. Furthermore, I propose to give effect to the general principle that an applicant should not be liable for the costs of a proposed respondent in the event of a decision refusing leave to apply for judicial review. While this court has emphasised on many occasions that this is a general – not inflexible – rule I consider that it should apply in this instance. It follows that the applicant's urgings are of no moment.

[43] I refer to [2] above: Mr Duff and all fellow directors involved in the companies concerned should take careful note that there is no guarantee that the court will adopt this costs disposal mechanism in other cases.

[44] Thus the order of this court will have two components. First, leave to apply for judicial review is refused. Second, there shall be no order as to costs *inter-partes*.