

## THE HIGH COURT

[2006 No. 47 MCA]

## IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT, 2000

BETWEEN

THOMAS L. CALLAN

APPLICANT

AND

BOYLE QUARRIES LIMITED

RESPONDENT

Judgment of Mr. Justice Roderick Murphy dated the 20th day of March, 2007.

**1. Mr. Callan's case****1.1 Pleadings**

By notice of motion dated 31st May, 2006, Mr. Callan, (the applicant), sought an order restraining Boyle Quarries Limited, (the respondent) from carrying out quarrying activities close to his and his wife's residence near Boyle in County Roscommon and a further order to restore the lands to the condition they were in prior to the alleged recent intensification of use or, in any event, to restore the lands to the condition prevailing in March 2002.

The quarry was on lands owned by John Cryan.

The respondent, which was incorporated on 28th April, 2003, had acquired a licence to quarry on the lands from John Cryan. Mr. Gerry McManus is a director of the respondent company.

The application is grounded on the affidavit of Mr. Callan who describes the quarry as being a large scale quarry within 300 metres of where he lived. He says the operation of the quarry is without the benefit of planning permission and is therefore unlawful. He says the unsuitable road access to the quarry, which runs immediately adjacent to his and his wife's residential property results in very significant inconvenience and nuisance from the operation of the quarry including intolerable noise and continuing intensive heavy truck movements. Both he and his wife are retired and spend most of their days at home.

Notwithstanding the absence of planning permission the respondent was registered as a quarry on 11th October, 2004. He believed such registration did not grant an exemption to the carrying out of unauthorised development.

**1.2 Involvement of Roscommon County Council**

Mr. Callan avers that on 27th August, 2003, agents on behalf of the quarry and/or on behalf of Mr. Gerry McManus, informed Roscommon County Council of its intention "to recommence extraction via drill and blast methodology and processing via mobile crushing and screening units" in the said quarry. It was asserted that the quarrying activities would be similar to the historic quarrying activities.

On 4th September, 2003 a meeting was held between Mr. McManus and officials of the Roscommon County Council after which the respondent erected offices, toilets and a very substantial weighbridge, mobile crusher and screening plant on the site. The meeting led to further correspondence on behalf of the respondent and its agent, Quarry Plan.

Mr. Callan referred to a copy of the Planning Enforcement Report following a site inspection conducted by Caroline Menton, an Executive Engineer at Roscommon County Council on or about the 16th December, 2003. The report noted that the respondent was drawing material at the rate of six loads per hour, equating to 50 loads per day. It also noted that the access road was substandard in width being 4 to 4.5 metres in width. The report concluded that there were difficulties in deciding "whether blasting should be allowed to recommence".

**1.3 An Bord Pleanála's decision**

By letter dated 17th February, 2004 Roscommon County Council requested An Bord Pleanála to express its view on whether the proposal to recommence quarrying was development or exempted development.

At the same time the Council investigated the construction of a stock car/speeding race track at the quarry.

An Bord Pleanála's inspector's report summarised the respondent's submission that Roadstone's level of production was high as the quarry was a replacement quarry and that it could be estimated that a production level of 80,000 tonnes per annum was achieved during that time.

The inspector referred to the original complainant, a Mr. Barry, who had stated that 12 vehicles had use of the facility daily which would equate to 65,000 tonnes per annum.

By order dated 24th June, 2004, An Bord Pleanála determined that the matter by concluding:-

"The use of the land at present for the quarrying and processing of rock involves intensification of use to a degree which has resulted in the making of a material change in the use of the land relative to the use on the appointed day having regard to the proper and sustainable development of the area ... (the) change in the use of land (comes within the meaning of) development ...

The said quarrying activities including the processing, crushing, screening and drill and blast methodology extraction at Letfordspark, Boyle, Co. Roscommon is development and is not exempted development.

**1.4 Statutory declaration**

Mr. Callan furnished one of three declarations. Mr. Callan's statutory declaration dated 3rd September, 2003 is in the following terms:

"1. This declaration refers to the property at Letfordspark, Boyle, Co. Roscommon owned by John Cryan of Carrick Road, Boyle, Co. Roscommon.

2. I am aware of my own knowledge that there is a quarry on the said property owned by the said John Cryan.

3. I am also aware from my own knowledge that the said quarry has been operated and in use since the 1950s and certainly prior to 1963 and that the said quarry has been operated on a continuous basis."

Mr. Callan was, at that time, acting as solicitor for John Cryan. The statutory declaration was notwithstanding, sworn in a personal capacity.

Ms. Eileen Cryan made a statutory declaration in the same terms.

John Cryan in his statutory declaration stated that the property which contained a quarry had been owned by him and his predecessors and title for almost 100 years. This was verified by the fact that the map shows a quarry thereon. He understood that the said ordinance map was surveyed in around 1912. He said further that he was aware from his knowledge the quarry had been operated on a continuous basis since the 1950s and he could recall Roscommon County Council carrying on quarrying in the property in the 1950s. He repeated the declarations made by Ms. Cryan and by Mr. Callan.

### **1.5 Truck movements from and to quarry**

Mr. Callan averred that he had lived next to the quarry for 78 years and confirmed that the new use of the lands by the respondent since the autumn of 2003 was significantly more intense than its previous use. Prior to September 2003 the maximum number of truck movements per day was sporadic, two or three a day, not every day or even every week.

He personally monitored truck movements on certain days in February and May 2006. There were 15 to 20 per hour entering and a further 15 to 20 per hour leaving – on average one hundred fully loaded trucks left the quarry each day with a similar number returning unladen.

Roscommon County Council carried out traffic monitoring over a four day period in December 2005 which indicated average truck movements per day from the quarry to Boyle at 52 and from Boyle to the quarry at 47. The average movement of trucks per day from the quarry to Carrick on Shannon was 30 with 27 returning. This would indicate a total of 82 laden and 74 unladen. No indication was given of the capacity of the trucks.

Mr. Callan confirmed the inspector's view that the crushing, screening and processing quarry to stone was a new activity commenced by the respondent in or after autumn 2003 and that this constituted material change of use on the lands. A quarry office, toilets and large weighbridge had been installed together with mobile crushing plant, rock hammer and a screening plant.

Notwithstanding the decision of An Bord Pleanála that the activity on the site adjacent to his family home and to his wife's residential property at Letfordspark was unauthorised development, the respondent had continued its activity. No enforcement proceedings had been taken against it by Roscommon County Council.

### **1.6 Registration of quarry**

On 11th October, 2004 the respondent applied for registration of the quarry under the provisions of S. 261 of the Planning and Development Act, 2000. On 10th March, 2005 notice was given to the respondent by Roscommon County Council that the quarry had been registered. An environmental impact statement was requested.

Mr. Callan had submitted to the council on 5th April, 2005 that the registration was flawed as there was no town land called Letfordspark and later submitted that there was no such place as Lugnamuddagh. The Council, while been satisfied with regard to the first submission did not reply to the second. Further applications would appear to have been made and there was no change to the original register of quarries.

## **2. The respondent's case**

2.1 By undated affidavit, Gerry McManus, a director of the respondent, stated that the quarry was operated under licence granted by John and Clare Cryan, the owners.

The licence, dated the 8th December, 2003 granted an exclusive right to the respondent, as licensee, to enter upon the owners lands for the purpose of quarrying, crushing and processing stone and its removal for a period of 30 years from the 25th August, 2003 with the owner having the right to continue his farming contributions (sic) on the lands in Folio 4590 and 4591 County Roscommon not used by the licensee.

The licensee agreed to pay the owners of €0.40 per tonne of quarried stone removed to be reviewed after a period of five years and to comply with all reasonable requests made by the owner having regard to the protection of the owners rights or any third party rights if any in respect of the property or in respect of any adjoining premises.

The licence concluded with a statement that the owner gave no warranty that the property was legally or physically fit for the purpose specified.

2.2 Mr. McManus gave details of the history of the quarry being operated by Roadstone Limited during the 1960s and 1970s, by a Mr. Thomas Flynn in the 1980s and by a Mr. Thomas Regan and Kerrigans Quarries in the 1990s. He averred that there was an established use for quarrying for over 50 years. He had been unable to obtain documentation from Roadstone other than a letter dated July 1970 which established that rock was drawn for processing and that the rock was extracted by explosives. That letter was not exhibited. He said that the former use constituted an "extensive operation" in October, 1964.

Mr. McManus relied on the statutory declarations. He had not had an opportunity to consider the files of Roscommon County Council.

Mr. McManus said the use of intensification could not be considered in isolation from the previous use of the quarry. During the 1990s, despite the issue of a warning notice and various letters from the County Council and a wide range of objections from local people to the operation, no proceedings were taken and no steps were taken by any party in respect of its use or in respect of any works being carried out. During the 1990s complaints of a similar nature were made by adjoining residents and precisely the same allegations were made then as are now being made, that is that the use of the site was unauthorised by reason of the intensification. The applicant was aware of these complaints and, Mr. McManus avers, it would appear persuaded the planning authority that no further action was necessary in that regard. The matter was known to the applicant and to the Council since 1997.

Mr. McManus referred to the registration and to the requirement for an environmental impact statement and issues in relation to

registration. He submitted that it was appropriate to have this matter adjourned until the determination of those proceedings.

### **3. Further Affidavit of Mr. Callan**

By affidavit sworn 21st July, 2006 Mr. Callan said that he never denied, historically, quarrying had taken place on the site in question. He believed he was in a unique position, having lived nearby for 78 years, to give evidence as to whether the current level of quarrying was more intensive than the historic level.

He averred that he had given evidence of the level of activity and his averments as to the use levels remained starkly undenied by Mr. McManus in his replying affidavit. Mr. McManus did not give any evidence of truck movements prior to his recommencement of quarrying in or about August 2003.

Mr. McManus had failed to indicate how many trucks per hour or per day are now using the quarry nor what those levels had been in August 2003 when he took over.

The various averments made by Mr. McManus relating to the former use in October, 1964 and the subsequent, undated, an "extensive operation" by Roadstone had no evidential basis.

The submission of the respondent to An Bord Pleanála dated 30th March, 2004 that the historic use of the quarry between 1974 and 2000 was "up to 80,000 tonnes per annum" significantly exaggerated the historic levels of activities. The respondent had said that such level of activity represented a daily traffic of 40 loads or 80 movements. The inspector's report referred to the original complainant, a Mr. Barry, who had stated that 12 vehicles per day had used the facility, which would equate to 65,000 tonnes per annum. (No date is given for that level nor is the means of Mr. Barry's knowledge indicated.)

Mr. Callan says that the increase in use levels represented by the difference of approximately 12 vehicles (24 movements) per day to approximately 40 movements per hour was not denied by Mr. McManus. The historic use of 12 loaded vehicles might be considered as a use level involving 24 truck movements per day which sharply contrasted with the current movement of approximately 40 trucks per hour (20 loads per hour).

Mr. Callan's asserts (at para. 12 of that affidavit) that the respondent's submission to An Bord Pleanála of up to 80,000 tonnes (40 loads per day) was capable of sustaining the contention that the current level of quarrying of the council's figure of 82 loads was a very significant intensification of use.

No means of knowledge is given for the assertion that quarrying activities at present were not materially different from "the manner in which the quarry operated since 1950, 1960 right to the 1990 and the year 2000".

Only part of the Inspector's report was exhibited. The decision of An Bord Pleanála was not challenged.

Mr. Callan, having made a search on the Vehicle Registration Office of the Council identified 13 vehicles in the name of Boyle Quarries Limited (the respondents) and personally observed 11 other heavy lorries, including two registered outside the jurisdiction, entering and leaving the quarry on a regular basis. Mr. Callan says that the latter vehicles were detected by the Road Traffic Corp exceeding the statutory laden weight and the respondent was duly convicted of offences.

Mr. Callan exhibited aerial photographs taken of the quarry on 18th July, 2006 as compared to those produced on behalf of the respondent prior to its recommencement of quarrying exhibited in his affidavit of 26th May, 2006. It is averred that the quarry was now at least double that size.

### **4. Supplemental affidavit of Mr. McManus**

The supplemental affidavit of Gerry McManus dated 10th December, 2006 exhibited a handwritten note by Mr. Cryan in relation to the position in 1963. That note stated as follows:-

"John McGarry (trading as Brogan and McGarry) drew stone to his plant ... (two lorries constant 20 loads each per day to crusher) ... other lorries of stone to RCC and private customers."

Mr. McManus averred that this memorandum was relied on by C. Callan and Company, Solicitors in their letter dated 30th March, 2004 to An Bord Pleanála on behalf of their client, John Cryan. The memorandum stated:-

"The quarry has been operated to different levels of intensity with Roscommon County Council, Brogan and McGarry, Roadstone and Flynns all employing explosives and a variety of crushing and screening equipment. Whereas the remainder of the operators used mechanical methods for removing the rock from the face, prior to an element of downstream processing in the case of Queenan Brothers. The quarry reached its peak output during the occupation of Brogan and McGarry/Roadstone. Two lorries were employed on a turnaround basis, with as may each being hold the short distance to the downstream processing plant at Tawnytaskin, in addition there were lorries serving Roscommon County Council and other private customers.

The current output levels at the quarry therefore do not exceed the historical levels of activity experienced.

We can confirm that our client never considered the quarry to be abandoned, with periods of inactivity always been measured in months.

This is also the position of this firm as demonstrated by the challenge to the stance adopted by the Council in 1997/98 which resulted in the Council stating in a letter dated 7th April, 1998 that "they would have difficulty in progressing the matter any further after this stage.

It is therefore contended that the Letfordspark Quarry has remained operational, to varying degrees, throughout the preceding 50 years. The recommencement of blasting and processing of face rock is not considered to be a development and moreover constitutes exempted development, that is, development that was ongoing on and before the 1st October, 1964. We therefore respectfully respect that the inspector determines that the quarrying activities are exempted developments."

## 5. Planning permission

### 5.1 First application

In 2004 Roscommon Council refused to grant planning permission to the respondent. The application was stated to be:-

"To continue operation of quarry under s. 261(7) of the Planning and Development Act, 2000 – to include blasting, mobile crushing and screening plant, use of rock hammer, weighbridge, portocabins as office and stores, mineral stock piles, overburden storage areas; continued southerly extraction and replacement of the existing vehicular access with a new access onto the N61 and is accompanied by an environmental impact statement at Letfordspark Td, Cashelfilogue/Lugnamuddagh, Ballytrasna, Boyle, Co. Roscommon.

The reasons for the refusal were as follows:

1. The proposed development, which specifically proposes access onto the proposed Boyle by-pass is premature pending the determination by the planning authority and the road authority of a road layout for the areas.
2. The proposed method of disposal of collected rainwater/groundwater to local stream will comprise the quality of a locally important groundwater source, Rockingham Springs, in the area which is designated as begin an aquifer of extreme vulnerability. Therefore if permitted the proposed development would comprise local groundwater sources and be prejudicial to public health."

### 5.2 Second application

On 18th January, 2005 the respondent was refused permission for an industrial unit for the manufacture of pre-cast concrete at Letfordspark Td., Boyle, Co. Roscommon for the following reason:-

"Development of this kind would be premature due to the deficiency in the road network serving the proposed development in relation to capacity, with an alignment and if permitted the proposed development would be capable of endangering public safety by reason of traffic hazard and would be contrary to the proper planning and sustainable development of the area."

## 6. Decision of the Court

6.1 The onus of proof is on the applicant to advance satisfactory evidence before the court regarding his complaints. While there may be no obligation on the respondent to disprove the applicant's contentions, nonetheless where objective, credible evidence is adduced the court may have regard to the absence of available evidence of extraction either from the respondent, the operator, or by the licensor.

6.2 Intensification of use does not necessarily constitute a material change of use. *Guildford Rural District Council v. Fortescue* (1959) 2 QB 112, *Patterson v. Murphy* [1978] ILRM 85, and *Butler v. Dublin Corporation* [1999] I.R. 565.

Keane J. (as he then was), stated in the latter case at 593 that:-

"Although the expression "intensification of use" is not found in our planning code or in its English equivalent, the legislatures in both jurisdictions must have envisaged that a particular use could be so altered in character by the volume of activities or operations being carried on that the original use must be regarded as having been materially changed. One man digging up stones in a field and carrying them away in a wheelbarrow for a few hours each week may be succeeded by fleets of bulldozers, JCBs and lorries extracting and carrying away huge volumes of rock from the same site. The use in both instances may properly be described as "quarrying", but that its intensification to a particular degree may constitute a material change in the original use is, I think, not merely borne out by the authorities to which I have referred, but is consistent with the underlying policy of the Act of 1963 and the amending legislation of ensuring that significant changes in the physical characteristics of the environment are subject to planning control."

6.3 Mr. Callan is in a unique position to give evidence of the use of the quarry over his lifetime. The court, however, must assess that evidence in the light of his interest and of the representation and declarations made by him on behalf of the licensor.

Much of the evidence tendered on both sides lacks corroboration. The respondent relies to an extent on hearsay and assumption. The applicant relies on samples which may not be representative of yearly extractions.

The best evidence, that of the records of the respondent, and the calculation of the payment to the licensor is not available. Moreover, the court accepts that fluctuation in demand factors may cause peaks and valleys in volume loads from the quarry and in traffic to and from the quarry. No clear evidence was given to the capacity or axle weight of trucks. Accordingly, the court is constrained to assess whether there has been intensification and, if so, whether such intensification constitutes development on the basis of laden and unladen traffic of trucks and not of tonnage transported.

6.4 The key test is whether the use is as intensified to the extent that there has been a material change in use. Barron J. held in *Galway County Council v. Lackagh Rock Limited* [1985] 1 I.R. 120 at 127 that:-

"The importance of this principle lies not so much in the intensification of use of itself, but in the fact that such use may impose burdens on the local authority or otherwise infringe in a materially different manner upon the proper planning for the area."

The reasons for the refusal by the council of the application for continuation of the use, together with the application for a new entrance, are that it will impose burdens on the local authority and impinge in a materially different manner upon the proper planning for the area.

The determination of An Bord Pleanála dated 24th June, 2004 that the intensification of use was of such a degree which resulted in the making of a material change and, accordingly was development (and was not exempted as development) is clearly relevant. That determination was not appealed.

The exercise by the court of its power under s. 160 is discretionary (see Barrington J. in *Avenue Properties Limited v. Farrell Homes* [1982] ILRM 21 at 26 and Blayney J., for the Supreme Court, in *White v. McInerney* [1995] 1 ILRM 374 and McKechnie J. in *Leen v. Aer Rianta* [2003] 4 I.R. 394 at 410).

In the latter case McKechnie J. held:-

"In deciding whether to grant an injunction in this case, and, if so, on what terms, there are certain matters to which particular attention shall be given. These include;

- (a) the conduct, position and personal circumstances of the applicant
- (b) the question of delay and acquiescence;
- (c) the conduct, position and personal circumstances of the respondent;
- (d) the public interest, to conclude;
  - i. as part of that interest, commercial and tourist activities conducted at the airport and in the wider general area and,
  - ii. as members of the public, those who derive any employment benefit, either directly or indirectly, from the airports overall operation as well as persons in the wider community and those who avail of utilise the respondents facilities."

6.5 Two sets of photographs taken before 2004 and in 2006 show a significant topographical change to the quarry site. There was some confusion relating to these photographs attached to Andrew Scurfield's letter of 23rd October, 2003. On behalf of the respondent three reference to photographs are made.

The first refers to a photographic record of the activity taken on 31st July, 1997 and placed on the planning file but is not attached.

The second reference is to aerial photographs covering the site from 1974 to 2000 and to an attached Plan Drawing No. 2 showing the relationship between the 1912 extraction area, the 1974 extraction area (green) and the 2000 extraction area (orange). It is commented that, although the lateral increases can be illustrated, the increase in depth of working and additional benches cannot be shown.

The third reference in that letter is to Drawing No. 3 which is of the water bodies shown on the 1974 aerial photograph as a result of the lower benches once Roadstone had departed.

Unfortunately, the two photocopied drawings are Nos. 3 and 4, neither of which is coloured and both of which are dated 26/08/2003. Assuming that these are Nos. 2 and 3 respectively, they show the extent, though not the depth, of the quarry prior to August, 2003.

The second set of photographs, referred to in Mr. Callan's affidavit of 21st July, 2006, were taken at his request on 18th July, 2006. Mr. Callan says that, compared with those referred to above, the quarry is now at least double the size.

The configuration of the quarry can be described as a figure of eight together with an extensive rectangular excavation with face of some depth to the top right hand side of the figure eight as one approaches from Mr. Callan's house. The aerial photographs referred to by Mr. Scurfield show a circular configuration of about half the size of the quarry on 21st July, 2006.

The further photographs, in exhibits 27 and 33 of Mr. Callan's affidavit, taken on 29th November, 2004 show a number of trucks and trailers, the state of the roadway, the parking of equipment and lorries and the proximity to Mr. Callan's house (showing two trucks in convoy, and the railway bridge).

6.6 The environmental impact statement submitted with the planning application gives a maximum number of HGV movements in the region of 100 to 120 per day which equates with 50 to 60 loads per day. The respondent submits that, in the absence of evidence from the applicant as to the level of activity prior to the appointed day, the evidence of the respondent that no material change in use has occurred when the current operation is compared with that of the established use must be accepted by the court.

6.7 There has been a significant extension in the operation of the quarry since the respondent began as is clear from a comparison between the aerial photographs dated 26th August, 2003, Dr. Scurfield's letter to Roscommon Council dated 23d October, 2003 and the photograph of 18th July, 2006 exhibited in Mr. Callan's affidavit of 21st July, 2006. The evidence of Mr. Callan of increased activity by way of loads and movements of trucks which lead to the conclusion that there has been a further intensification of use since the decision of An Bord Pleanála which in its report dated 17th June, 2004 had already noted both these matters and concluded that the intensification constituted a material change of use.

6.8 Counsel on behalf of the respondent in his submissions to the court says that the respondent does not intend to operate the quarry at more than 50 to 60 loads per day and claims that the quarry operated, on the appointed day, a level of more than 40 loads.

Even if it were established to the satisfaction of the court that the quarry operated at a level of just 40 per day, the respondent is suggesting an increase of 50%, from the height of the extensive operation in 1964.

Mr. McManus maintains that the established use derives from the memorandum, however, the court is required to analyse the following phrase and determine its exact sense: "with as may (sic) as 20 loads per day as being an average figure", in the light of a preceding sentence which refers to the quarry reaching its peak of during the occupation of Brogan and McGarry/Roadstone.

There is no clear evidence as to the period in which these occupiers were involved in quarrying. The respondent has referred to peaks and valleys in the demand for the products of the quarry. I have no doubt the same applied to the period in respect of which the quarry was said to have reached its peak. The indication given was that at such peak there were as many (may) as 20 loads per day. There is no evidence whatsoever as to the number of lorries serving Roscommon County Council and other private customers. On the balance of probabilities it does not seem to me that these can have been significant and, in any event, are likely to have increased the loads per day beyond 20.

I think it is fair to conclude, but at its best, the output in 1963 did not exceed 20 loads per day or 40 movements. No indication is given of the size of the loads, the evidence given in relation to tonnage is not clear. It is unlikely, given the development in the size of trucks and trailers as evident from the photographs tendered in evidence, that these had greater capacity.

6.9 Mr. Callan claims movements of 15 to 20 per hour (approximately a hundred movements or 50 loads per day?) in both his affidavits. It may very well be that this is a peak figure at a time of great demand. There is no evidence that this is an average per day or for a longer period. While the court cannot accept that this represents continuous use, nonetheless even as an unrepresentative measurement it suggests a different kind and not degree of use.

In July, 2003 Advanced Crushing, on behalf of the respondent, had informed Roscommon Council that there would be 25 to 30 loads per day (3 to 4 per hour?)

In its application for registration as a quarry on 14th September, 2004 a figure of 20 to 30 loads per day with a peak of 50 was stated (2½ to 4 per hour).

An Bord Pleanála had referred to a previous complaint regarding an output of 65,000 tons per annum and accepted that this equated to 12 loads per day (1 to 2 per hour?).

No evidence was given as to the capacity of trucks being used.

The planning enforcement notice of 16th December, 2003 made a finding of intensification in respect of 6 loads per hour or 50 per day.

The letter of 23rd October, 2004 from Mr. Scurfield, Consultant Chartered Mineral Surveyor, to An Bord Pleanála said that it was considered that a production level of 80,000 tonnes per annum was achieved at Letfordspark during Roadstone's tenure, which spanned the appointed day.

Such a figure is not inconsistent with figures reported by Mr. Barry of 12 vehicles per day which conservatively equates to 65,000 tonnes per annum. It follows that an output figure of 80,000 tonnes per annum indicates less than 15 vehicle loads per day without taking into account any increased capacity per vehicle.

That report gives the following figures for Mr. McManus' operation as in excess of that output for the following six months (excluding December):-

September 2003 23,080 tonnes

October 2003 39,180 tonnes

November 2003 13,460 tonnes

January 2004 4,4020 tonnes

February 2004 4,660 tonnes

The influence of the Carrick on Shannon contract in October and during the month of November, 2007 is reflected in those figures. The letter referred to a steadily settling requirement in the region of 4,500 tonnes per month which equated to approximately 10 (12 tonne) lorry loads per day.

Mr. Scurfield says that it is necessary to have a rolling average of three years in order to establish that the quarry use is intensified.

The respondent, however, has not provided any indication of the output for the three years in which the quarry has been in operation for three years from September 1993. The court notes that the supplemental affidavit of Mr. McManus was sworn on 10th December, 2006, over three years since the respondent's operation began.

The analysis of An Bord Pleanála highlighted the respondent's claim of use on the appointed day on the basis of the quarry then being a replacement for McGarry and Roadstone of a previous quarry whose output was 80,000 tons per annum. On this assumption the maximum number of loads per day would be 16 or 2 per hour on the basis of the ratio of annual tonnage to load accepted by An Bord Pleanála.

6.9 While the court, of course, considers the fact that the respondent is conducting a business which supplies materials which are in demand, employs 20 persons and contributes indirectly to the livelihood of some 100 suppliers and subcontractors operating in a radius of 10 to 15 miles of the quarry the issue of a material change of use (and the consequential requirement for planning permission) is a matter in respect of which the public have an interest. The planning authority have not granted planning, the court must also consider the findings of the planning inspector and, the applicant and his wife's interest have got to be considered by the court.

In relation to the planning authority's attitude, the court has noted that the respondent is maintain that it has planning permission by default and, in this regard, commenced judicial review proceedings.

The court in its discretion, regards the reasons given by the planning authority as being of greater weight than the submission that the respondent has obtained a planning permission by operation of law.

The court is satisfied that the conduct of the applicant in relation to his statutory declaration and his former firm acting on behalf of the licensor of the quarry has been clearly before the court. The applicant does not deny the import of the personal statutory declaration made by him.

The court is satisfied that the applicant is entitled to maintain proceedings under s. 160 and that it is not necessary for such proceedings to be extended to plenary proceedings.

It does not seem to the court that the remedy sought is disproportionate in relation to the consequential restriction.

6.10 The court will grant the order sought in the notice of motion that is to say:-

An order restraining the respondent, its employees, servants or agents and any person having notice of the making of this order from carrying out quarrying activities at Letfordspark, and/or Lugnamuddagh or Castlefilogue, Co. Roscommon in excess of 80,000 tons per year or in excess of 16 loads per day or 2 per hour.

The court refuses an order requiring the respondent to restore the lands to the conditions they were in prior to the alleged intensification of use or, in any event, to restore the lands to the condition prevailing in March 2002.