Neutral Citation Number: [2010] IEHC 404

THE HIGH COURT

2008 20 MCA

BETWEEN

JONATHAN PIERSON, JOHN A. WOODS, GLENN WHITE, DESMOND WOODS, KEVIN GREENE AND JOAN COYLE

APPLICANTS

AND

KEEGAN QUARRIES LIMITED

RESPONDENT

JUDGMENT of Ms. Justice Irvine delivered on the 7th day of October, 2010

Introduction

1. The applicants in these proceedings are all residents of Bellewstown, Drogheda, Co. Meath. The respondent is operating a quarry on certain lands contained in folio 24022F of the County of Meath. On the 27th April, 2005, the respondent's predecessor applied to have the quarry registered pursuant to s. 261 of the Planning and Development Act 2000 (hereinafter "the Act") and its registration was confirmed on the 14th October, 2005, subject to some 23 conditions later imposed by the local authority by a decision made on the 23rd April, 2007.

2. Notwithstanding the registration of the respondent's quarry, the applicants contend that the use by the respondent of these lands as a quarry amounts to unauthorised development. They deny that the lands in question were ever used as a quarry prior to 1964 and that if they were, their present use as a quarry is unauthorised by reason of intensification. The applicants contend that the operation of the quarry is having a profound and detrimental effect on their lives and the lives of those living within the local community. They complain that massive earthworks have destroyed their landscape: that vast numbers of large commercial trucks using narrow country roads have created hazardous conditions for road users. They complain of noise and dust pollution and the loss of enjoyment of their homes and gardens. They also maintain that the respondent, apart from operating an unauthorised quarry, has been and continues to be in breach of a number of the conditions imposed by the local authority at the time it registered the quarry.

3. The applicants seek orders pursuant to s. 160 of the Act, *inter alia*, restraining the respondent from continuing to use the aforementioned land as a quarry and directing it to restore it to its previous condition.

4. The respondent maintains that its use of the quarry is not unauthorised as the relevant land was used as a quarry prior to 1964. Alternatively, it contends that the lands have been used as a quarry on a continuous basis since late 1985, and that in 1995, quarrying work of a commercial nature was commenced thereon by a Mr. John Gallagher. Further, in the alternative, the respondent maintains that if the quarry constitutes unauthorised development, it has, at a minimum, been in operation as such for more than seven years prior to the institution of the present proceedings, and that accordingly the applicant's claim for relief is time barred by reason of the provisions of s. 160(6)(a)(i) of the Planning and Development Act 2000. Finally, even if the use of the lands as a quarry is unauthorised and the applicant's claim is not time barred, the respondent submits that the court should not exercise its discretion in the applicant's favour for a range of reasons, which will be referred to later in this judgment.

5. In reply, the applicants maintain that their right to an injunction is not statute barred. In this regard, they maintain that the use of the lands by Mr. John Gallagher for a brief period of time in 1996 was subsequently abandoned. They further contend that any unauthorised use of the lands, whether immune from suit or otherwise, was abandoned and/or extinguished by reason of an application for a waste management permit in March, 2002 and an application for planning permission for a land recovery operation in December, 2002.

Court proceedings

6. By letter dated the 17th January, 2008, the applicants' solicitors, McGarr and Company, threatened proceedings pursuant to s. 160 of the Act. By letter dated the 24th January, 2008, the respondent denied that it was engaged in any unauthorised development. The present proceedings were commenced on the 11th February, 2008, and were referred to plenary hearing by order of this Court dated the 1st May, 2008. The hearing commenced before this Court in December, 2009, at which stage a point of law was raised by the respondent which was tried as a preliminary issue. The court gave its decision on that issue on the 8th December, 2009, when it concluded that the applicants were entitled to maintain the present proceedings utilising the provisions of s. 160 of the Act, notwithstanding the fact that they did not seek to challenge, by way of judicial review, the decision of the local authority to register the respondent's lands as a quarry. On the 14th October, 2005, and/or its decision dated the 23rd April, 2007, to impose conditions on its operation.

History of ownership and the location of the quarry

7. The decision of this Court is one which is based principally on the use of the relevant lands over the last sixty years or so. Accordingly, I will briefly refer to the history of the ownership of the lands, which are not disputed. The respondent's lands comprise approximately 12 hectares. The precise holding is shown on the map attached to the contract for the purchase of those lands by the respondent dated the 24th January, 2007. The respondent's lands were originally part of an estate comprising 368 acres owned by the Boylan family. That estate was later purchased by a Mr. Raymond Coyle in 1975. He farmed the area and some time in 1976 he decided to cut down most of the trees in a wooded area of 3.028 acres. That area is also clearly seen on the map appended to the aforementioned contract for sale. Mr. Coyle subsequently disposed of this estate in a lottery which he held in 1982, at which stage a Mr. Austin Lawlor became the owner of the lands. He in turn sold them to a Mr. Michael McGuinness and his brothers in 1985. Later in 2002, the farm became the sole property of Mr. McGuinness. Finally, he sold 12.2 hectares of his lands to the respondent, which includes the area now operated as a quarry in February 2007.

8. The parties presented a substantial body of evidence to the court regarding the use of the aforementioned lands over the past 60 years . By agreement the court received into evidence a substantial number of photographs and ordinance survey maps. These have been of particular assistance in providing objective and independent evidence upon which the court has been able to rely with some

degree of confidence. I will now briefly refer to a number of physical landmarks material to the court's decision.

9. The main street in Bellewstown runs west to east on the maps and photographs produced to the court. The Mullagh Road runs in a northerly direction from the Main Street. The respondent's quarry is to be found to the east of the Mullagh Road. To the west of the roadway, but further from Bellewstown, is another quarry which will be referred to in this judgment as the Kilsaran Quarry. That quarry has been in operation for many years and was owned by Mr. John Gallagher from 1982 to 2006. Whilst that quarry has been registered under s. 261 of the Act, it is not operating subject to conditions imposed by the local authority, but is subject to the terms of a settlement entered into as a result of High Court proceedings instituted against its owners by the applicants in the within proceedings. Approximately 100m or 150m north of the entrance to the respondent's lands is a significant bend in the Mullagh Road. The road swings momentarily in a westerly direction prior to travelling north again with almost immediate effect. On the eastern side of this bend there are two agricultural buildings which were referred to in evidence as "the chicken houses". Of additional significance as a landmark, is the position of a laneway to the west of the Mullagh Road called Ruddy's Lane. That laneway can be seen on various maps and photographs and it is to be found north of the Kilsaran Quarry and it joins the Mullagh Road somewhat north of the present entrance to the respondent's quarry. Finally, there are various outcrops of rock which emerge from the lands in the photographs relevant to this claim. There is one such small outcrop of land in the field immediately north of Ruddy's Lane.

10. A pictorial history of the area in dispute is to be found in the series of photographs and maps which have been produced to the court. I will not deal with these in any great detail at this juncture. However, the photographs are of relevance given that at the heart of the respondent's defence to these proceedings is the assertion that prior to 1964, quarrying took place on a rock face within the wooded area to which I have already referred. That wooded area is shown in many of the maps and photographs which have been introduced into evidence commencing with the 1958 ordinance survey map. For the sake of clarity this wooded area is shown within the "quarry area" in exhibit 45A and is the area to be seen immediately south of the word "Hilltown" where it appears on that map.

11. A natural rock face existed in that area and can be seen in an overhead ordinance survey photograph of the 11th July, 1999. Starting at the bottom of that photograph, the Kilsaran Quarry is shown to the west side of the Mullagh Road. Halfway up the photograph is the entrance to the Kilsaran Quarry and directly opposite that entrance is the entrance to the respondent's quarry. A diagonal path extends in a north easterly direction towards what appears, in this poor photograph, to be an area of uneven ground. This area in turn runs up to a rock face which can be clearly seen by the change of colour in the photograph. Also seen in the photograph immediately north of the Kilsaran Quarry is Ruddy's Lane. North of that again is the bend in the roadway to which I have already referred.

12. A photograph dated the 27th November, 2009, shows the most recent state of affairs in relation to the respondent's quarry. Unlike the other photographs, the photographer in this instance was taking the photograph looking in a westerly direction. If the photograph is viewed from the southerly perspective, the landmarks earlier referred to can be seen, namely, the entrance to the Kilsaran Quarry, Ruddy's Lane, the bend in the roadway and the chicken houses. It is to be noted that the northern aspect of the quarry has now extended significantly beyond the bend in the roadway seen in the photograph dated the 11th July, 1999, and is parallel to the second or third chimney breast on the chicken houses.

13. It is the development of the aforementioned lands in the manner depicted in these photographs which the applicants contend amounts to unauthorised development.

The legal issues

14. There are three issues for the court to determine in this case and they are:-

(i) Whether the present use of the lands by the respondent amounts to unauthorised development;

(ii) If the use of the lands is unauthorised, whether the plaintiff's claim is time barred by reason of the provisions of s. 160(6)(a)(i) of the Act that being the section which provides that any application for an injunction in respect of unauthorised development must be brought within a period of seven years from the date of the commencement of the development;

(iii) If the use of the lands is unauthorised and the plaintiffs are not time barred, whether the court should exercise its discretion in the plaintiff's favour.

Planning history

15. In circumstances where the respondent seeks to rely upon the provisions of s. 160(6)(a)(i) of the Act to defeat the applicant's claim, it is necessary to consider in some depth the documented use of the lands, not only over the seven-year period prior to the institution of these proceedings on the 17th January, 2008, but from the time when the respondent maintains these lands were first used for significant quarrying activities, namely, 1986.

16. A number of applications were made to Meath County Council regarding the use of the lands which are now being used as a quarry, and which are relevant to these proceedings. I will, accordingly, set out this planning history over the relevant period.

17. On the 20th March, 2002, Mr. McGuinness applied for a permit under the Waste Management (Permit) Regulations 1998. That application was prepared by Frank Burke and Associates, Consulting Engineers. The nature of the facility was stated to be "the recovery of land for agricultural purposes". The location for the landfill was stated to be "the location of disused quarry workings" and the purpose of the application was "to improve the agricultural potential of the subject area".

18. The application stated that it was proposed to fill the subject area which was designated on the site location map attached to the application within a period of one to three years, that the total amount of waste required would be 15,000 tonnes, and that it was "proposed to progressively cover the deposited material with other inert material in layers and finally covering the total area with topsoil".

19. On the 19th November, 2002, the local authority granted Mr. McGuinness the relevant waste management permit subject to a number of conditions. Thereafter, on the 16th December, 2002, he made an application for planning permission in respect of the same area to which the waste management permit applied for a development to "consist of a land recovery operation wherein inert soil and topsoil would be imported and spread onsite with a consequential benefit for agricultural activity on lands at Hilltown, Bellewstown". Planning permission was granted on the 25th June, 2003, and was subject to thirteen conditions.

20. On the 27th April, 2005, Mr. McGuinness applied to register approximately five hectares of land, including the lands referred to in the last two preceding paragraphs, as a quarry, pursuant to the provisions of s. 261 of the Act. This was the last day for compliance with that section, which was commenced on the 28th April, 2004. For this purpose, he maintained that the quarry had been in operation prior to the 1st October, 1964.

21. On the 13th October, 2005, Meath County Council gave notice that it had registered a number of quarries, including that of Mr. McGuinness, and he was notified of this fact on the 14th October, 2005. Notice of the registration of Mr. McGuinness's quarry was advertised in the Meath Chronicle on the 22nd October, 2005, as required by s. 261(4)(a) of the Act. The notice advised that no application for planning permission was being sought by the local authority in respect of the quarry and it proposed imposing conditions on its operation. The notice invited submissions or observations regarding the continued operation of the quarry within four weeks.

22. By letter dated the 15th December, 2006, the planning authority notified Mr. McGuinness of its intention to impose certain specified conditions on the operation of the quarry. The quarry was then purchased by the respondent on the 7th February 2007 with the benefit of the aforementioned letter. By subsequent order of the county manager dated the 23rd April, 2007, twenty three conditions were imposed on the operation of the quarry. Two maps are relevant in this regard. Map 1 shows a designated area outlined in blue within which area no quarrying was permitted. Map 2 shows a designated area outlined in red. The most southern boundary of that area is slightly south of Ruddy's Lane. Within the designated area, no quarrying was to be permitted north of the letter "I" in the word "Hilltown" shown on that map. The total area in respect of which quarrying was permitted was less than two hectares.

23. The respondent, as it was entitled to do, appealed that decision to An Bord Pleanála by letter dated the 18th May, 2007. That appeal sought to extend the ten-year limitation on quarrying activity to thirty years, and to increase the area in respect of which quarrying would be permitted to five hectares. The appeal was unconditionally withdrawn on the 22nd June, 2007.

Issue 1: Is the respondent's quarry an unauthorised development?
24. The parties are agreed that if quarrying did not commence on the lands in question prior to the 1st October, 1964, the respondent's quarry constitutes unauthorised development.

25. Notwithstanding the absence of express statutory guidance, it is accepted by both parties that the onus of proof is on the applicants to establish that the use of the land by the respondent is unauthorised and that the legal position is as was advised by Finlay P. in *The Right Honourable the Lord Mayor and Aldermen and Burgesses of Dublin v. Sullivan* (Unreported, High Court, Finlay P., 21st December, 1984) where he stated at pp. 3-4:-

> "…I am satisfied, since the Applicants come seeking relief which would affect the ordinary property rights of the Defendant and which potentially could cause him loss that in the absence of some express provision to the contrary which does not exist either in section 27 of the 1976 Act or otherwise in the planning code that the general position must be that it is upon the Applicants there rests the onus of proving the case which they are making."

26. The respondent maintains that the location of the quarry prior to the 1st October, 1964, was within the wooded area of 3.028 acres, to which I have already referred. In seeking to discharge the onus of proving that there was no quarrying on those lands prior to 1964, the applicants, apart from their own evidence, called as witnesses a number of Bellewstown residents. Further, reliance was placed on a number of the maps and photographs to which I will later refer.

27. The respondent was not in a position to produce any positive evidence of pre 1964 use. It placed reliance upon the evidence of Mr. McGuinness who stated that Major Boylan had told him that rock had been quarried from two areas within the 3.028 acres of woodland in the late 1950s. Mr. McGuinness stated that he walked these lands prior to purchasing them and saw two holes or pits "8, 10 metres wide, probably 2 metres deep", which he believed were caused by quarrying. He identified the location of these pits on one of the maps produced to the court.

Conclusion
28. In reaching my conclusions on this issue, and indeed on all other issues in this case I have carefully considered the extent to which I can rely upon the independence of the evidence of the applicants and also of those witnesses called on their behalf who are not parties to the proceedings. All of these witnesses are clearly opposed in principle to the respondent's quarry and were adamant that their lives and property rights have been adversely affected by its operation. Further, not only were a number of these witnesses of mature years, but they were required to try to recollect the state of the relevant lands over several decades and at times as far back as 50/60 years ago. These are all matters to which I have had regard when assessing the weight to be attached to their evidence.

29. Notwithstanding the reservations just referred to, I accept the evidence given by the local residents regarding the nature and formation of this area of land prior to 1964. I accept the evidence of Mr. John Wood; that he spent a lot of time in the wooded area whilst mitching from school in the late 1960s, and his evidence that there was no sign of quarrying ever having taken place on those lands. I accept his evidence that the presence of trees and shrubbery would have made access for such purpose practically impossible.

30. Likewise, I accept the evidence of Mr. Desmond Woods, who was friendly with the son of the manager of the Boylan estate, that the area had never been quarried. I accept his evidence that the presence of a 5ft perimeter wall around most of the wooded area, a fact not contested by the respondent, would have made getting machinery and equipment in and out of the area impossible.

31. I further accept the evidence of Mrs. Annie Cassidy and Mrs. Vera Ball that there was no quarry in the wooded area prior to 1964. In particular, I accept the evidence of Vera Ball that from the time she was fourteen or fifteen years of age she, being a keen horse woman, rode over the Boylan estate even after her marriage in 1960. I believe her evidence to the effect that she never saw any quarrying within the wooded area and also her description of these lands as completely overgrown and inaccessible.

32. Finally, Mr. George Ball, told the court that he hunted over Major Boylan's lands in the 1970s and 1980s and that occasionally he had to go into the wooded area looking for sheep. He described the area as completely covered with vegetation and I accept his evidence that there was no sign of any quarrying ever having taken place in that area.

33. The evidence of the aforementioned residents was corroborated by what I consider to have been the wholly independent evidence of Mr. Coyle who purchased the lands in 1975. He told the court that the relevant three acres were covered in trees when he purchased them and that there was no evidence of any quarrying in that area. He subsequently uprooted the trees on this site

and this operation left a lot of loose shale. He also buried some of the trees on the land.

34. In reaching my conclusion I have also placed some weight upon the ordinance survey aerial photograph of the 5th April, 1973, which I consider to be inconsistent with the respondent's assertions that there were two sites within the wooded area where quarrying is alleged to have taken place.

35. I have also relied upon the fact that the Kilsaran Quarry was part of the Boylan estate at the time it is alleged that stone was being quarried in the wooded area, even though I note the respondent's evidence to the effect that the stone within that quarry may be somewhat different from that owned by the respondent. Further, had there been any history of quarrying at this location, one might have expected that the existence of that quarry would have been noted on the 1958 ordinance survey map, which clearly identifies the presence of the Kilsaran Quarry, but shows no quarry in the 3.028 acres of woodland of relevance to these proceedings.

36. The weight of the applicants' evidence on this issue is such that I cannot prefer the evidence of Mr. McGuinness which did no more than recount the fact that Major Boylan had told him that some quarrying had been carried out on the lands and that Mr. Lawlor, from whom the court heard no evidence, had shown him two areas where quarrying had taken place in Major Boylan's time.

37. Accordingly, the applicants have discharged the burden of proof on issue 1.

Issue 2: Given the absence of quarrying on the lands prior to the 1st October, 1964, are the applicant's proceedings time barred by reasons of the provision of s. 160(6)(a)(i)?
38. The relevant section provides that an application for relief under the section shall not be made:-

> "in respect of a development where no permission has been granted, after the expiration of a period of 7 years from the date of the commencement of the development."

39. The applicants maintain, and the respondent did not contest, that the onus of proof lies upon the party who seeks to rely on a statutory time limit to defeat a claim to prove that assertion.

40. The respondent maintains that it has established that the relevant lands were used for quarrying purposes on an annual basis since 1986. It submits that once the court is satisfied that commercial quarrying commenced on these lands prior to the 11th February, 2001, the claim must be dismissed. It emphasised the commencement of commercial quarrying on these lands with effect from December, 1995.

41. The factual history which the respondent maintains it has proved is as set out in the written submissions delivered to the court, and to which I will now briefly refer, namely:-

> 1986 – 1995: Stone was quarried by Mr. McGuinness and his brothers and used to construct foundations of buildings and areas of hard standing and roads on the farm of which the lands formed part and other lands farmed by them.
>
> 1996 – 1997: The lands were quarried intensively by Mr. John Gallagher who excavated a large area.
>
> 1997 – 2002: Mr. McGuinness continued to quarry and engage contractors with specialised machinery to do so.
>
> 2002 – 2005: Quarrying continued in conjunction with the landfill operations on the lands that had been previously excavated.
>
> 2005 – 2007: Mr. McGuinness progressed with an application for registration of the quarry pursuant to s.261 of the Act.
>
> Feb 2007: The respondent commenced activities on the lands.

42. Having regard to the respondent's submission that the applicant's claim is statute barred, it is necessary for me to make findings of fact in relation to the use of the lands over all of the aforementioned periods. In doing so, I will augment the respondent's submission where necessary by reference to the submissions made by counsel. I will also briefly set out, in respect of the same periods, the applicant's case in relation to the use of the lands prior to setting out my own conclusions.

1986 to 1995
43. During this period of time, the respondent maintains that Mr. McGuinness and his brothers quarried many thousands of tonnes of rock for roads, drains, stores and foundations for buildings on his lands and those of his brothers.

44. The applicants denied that any quarrying took place over this period. Reliance was placed upon the evidence of a number of the local residents living close by who regularly travelled up and down the Mullagh Road. They maintained (*inter alia*) that there were no roads on Mr. McGuinness' lands, that drainage on the farm had been done by his predecessors, that the yard attached to Mr. McGuinness's home had existed in Major Boylan's time and that stone from the quarry was not used or required as foundations for any buildings on the lands over that period.

Conclusion
45. My conclusion as to what was happening on the relevant lands during this period of time, and indeed for all of the period from 1996 to 2002 inclusive, has been greatly influenced by my assessment of the relevant witnesses. In general, I found the evidence given by local residents to be very consistent, careful and reliable with one or two exceptions which are not of particular relevance. The respondent's case as to the use of the lands over this sixteen year period was entirely based upon the evidence of Mr. McGuinness who I cannot view as an independent witness, insofar as he sold the relevant lands to the respondent on a representation which has now been established to be incorrect, namely, that these lands were quarried prior to 1964. Further, having listened carefully to this witness give his evidence, and having observed his demeanour I find myself agreeing in no small way with the written submissions delivered by the applicants where they describe his evidence as evasive, inaccurate and riven within inconsistencies. Every aspect of his evidence, which was subjected to a sustained challenge from the outset of the proceedings, was capable of independent corroboration yet, with the exception of two invoices and a number of photographs to which I will refer later, his evidence was left unsupported by independent testimony. This is hard to understand given that the applicants gave their evidence as to the use of the lands in December, 2009 and January, 2010 and the respondent's case, with the exception of two local authority witnesses who gave evidence in February, 2010, did not recommence until July 2010, thus affording the respondent every opportunity to corroborate Mr. McGuinness' evidence.

46. In his affidavit, dated the 27th March, 2008, Mr. McGuinness swore that between 1986 and 1995, he and his brothers drew many thousands of tonnes of rock from the relevant area. He made a like averment in respect of 1997 to 2002, during which period he stated he used three named contractors to quarry like amounts of stone for his own use. He gave evidence that stone and rock was used to put in bridges, build drains, make roadways and construct stores. He said that he used a significant amount of stone as foundations for his first set of sheds which he built in his yard over the period 1987 to 1996.

47. If Mr. McGuinness had quarried the volumes of rock contended for over this period, it seems highly unlikely that such activity could have escaped the notice of each of the applicants. Quarrying of that nature would have left a trail of objective evidence potentially available to the court. Contractors would have been required to operate the machinery, to transport the rock and to lay it as foundations. Further, if bridges and roads had been built with this stone they could have been photographed or their location pointed out on the photographs and maps produced. Notwithstanding this fact, no witness was called to corroborate Mr. McGuinness's testimony as to the use of stone over this period. Whilst he produced a number of photographs showing a section of roadway around his home, that roadway could have been built at any time and with stone obtained from any of a number of locations.

48. I reject Mr. McGuinness's evidence that he built the green sheds which appear on his land using stone from the quarry over the whole of this nine-year period. Only the foundations of these sheds required stone and I cannot believe that if stone was used for the foundations, that it was not all quarried and laid in a once-off operation.

49. Of significance to the court in relation to this period is a photograph of December, 1988 which clearly shows the relevant area of land as being one which was overgrown and partially wooded. That photograph is inconsistent, to my mind, with the possibility that Mr. McGuinness was gaining access to draw thousands of tonnes of rock each year from this area of land. That photograph, when combined with the evidence of all of the residents, has drawn me to the conclusion that no rock was taken from this area, certainly prior to 1989.

50. As to what happened over the period from 1989 to 1995, I do not accept as credible, Mr. McGuinness' account of the activities on the lands having regard to the ordinance survey photograph dated the 26th June, 1995, which depicts much of Mr. McGuinness' farm and shows the area from which he maintains he was quarrying thousands of tonnes of rock every year. There is no obvious area under excavation. The entirety of the area is surrounded by agricultural land. There is no sign of the roads allegedly constructed from stone, nor any obvious entrance to the relevant area as might be expected if heavy machinery was accessing the lands. This photograph very much supports the applicant's evidence as to the absence of quarrying activity between 1986 and 1995.

51. Insofar as this period of time is concerned, the only additional document that lends any support to the respondent's case is the letter Mr. McGuinness wrote to the planning authority in support of his application to have the lands registered as a quarry dated the 26th April, 2005, where he stated as follows:-

> "In 1989 the quarry was used to supply stone for roadways and farmyards around the residence. Stone from the quarry has also been used to repair stone walls locally."

Whilst this letter may lend weight to Mr. McGuinness's assertion that some quarrying may have taken place in 1989 I must equally consider it as evidence that he was not drawing thousands of tonnes of rock from the lands each year over the period1986 to 1995. Given that this letter was a representation made to support his application for registration of this quarry, I cannot accept that this is the description he would have given had he been quarrying thousands of tonnes of rock on a yearly basis.

To conclude, I prefer the evidence given by the applicants' witnesses in relation to the state of these lands between 1986 to 1995. Mr. McGuinness's assertion of having drawn thousands of tonnes of stone from this quarry over this period of time is not borne out by the evidence. Not only has there been almost no corroboration of his account of events, his letter to the local authority dated the 26th April, 2005, substantially undermines his oral evidence. If the activity referred to in that letter took place, and it amounts to quarrying within the definition of that activity under s. 3(2) of the Mines and Quarries Act 1965, I am satisfied that same was a modest, effectively once-off use of the quarry in 1989, which did not continue over the following years up to and including 1995.

1996 to 1997 and 1997 to 2002.

52. The respondent's case in relation to the use of the lands over the aforementioned periods is summarised at para. 41 above and is also dealt with in depth by Mr. McGuinness at paras. 5, 6, 7 and 8 of this affidavit sworn on the 27th March, 2008. In oral evidence he told the court about the agreement he entered into with Mr. John Gallagher on the 11th December, 1995. He maintained that, on foot of that agreement, Mr. Gallagher quarried large amounts of rock over a period of two years. He stated that he took thousands and thousands of loads of stone from the land and that at the peak of his operation it was bigger than that of the respondent at any time since it purchased the lands.

53. Mr. McGuinness told the court that in December, 1996 he had a disagreement with Mr. Gallagher because he was digging out rock which he maintained he was not entitled to do under the agreement. He said the agreement permitted Mr. Gallagher to strip the 3.028 acres of all existing shale. Following his complaint, he maintained that he had no further dealings with Mr. Gallagher who continued to quarry stone in accordance with the agreement. He said that he later received a letter from Mr. Gallagher dated the 4th March, 1997, which referred to the disagreement and in which he threatened to sue him for a substantial sum. He, nonetheless, maintained that Mr. Gallagher had continued to quarry shale from the site until late in 1997, prior to leaving the site without restoring it as was required under the agreement.

54. After Mr. Gallagher left in 1997, Mr. McGuinness maintained that he continued to work the quarry using three different contractors by the names of Chambers, McArdle and Lambe. He said that they quarried thousands of tonnes of rock to allow him to put in additional roadways and to provide foundations for his sheds and stores. In particular, Mr. McGuinness maintained that in 2001/2002, he built the last two sheds in his yard using stone from the quarry for the foundations.

55. The applicants, through the evidence of a number of the local residents, accepted that Mr. Gallagher carried out a significant operation on the lands for a number of months in 1996. All were agreed that his operation did not go on for longer than eleven months and that thereafter the gates to the quarry were closed until 2003. In particular Mrs. Coyle, who could see the quarry from her house, was adamant that the quarry gates remained closed and that cliff face remained precisely the same for the five-year period after Mr. Gallagher left. The applicants denied that the quarry was used after Mr. Gallagher left and in particular denied knowledge of the presence of any contractors or heavy machinery on the lands for any purpose prior to 2003. Mr. Woods, however, told the court that when Mr. Gallagher left, Mr. McGuinness moved a large quantity of stone which had been left by Mr. Gallagher on the quarry site and took it down to his own premises

Conclusion

56. I am satisfied that Mr. Gallagher quarried the relevant lands on foot of the agreement made with Mr. McGuinness on the 11th, December, 1995. I accept the applicants' evidence that Mr. Gallagher left the site by the end of 1996, and not in late 1997 as asserted by Mr McGuinness and that he did so as a result of the argument in December 1996 as to the depth to which he was entitled to work under the agreement. I do not find Mr. McGuinness's assertion that, notwithstanding that disagreement Mr. Gallagher continued to quarry the lands on his terms without digging into rock to be credible. I believe this conclusion is supported by the tone of Mr. Gallagher's letter dated the 4th March, 1997, threatening to sue him for very significant sums of money. I accept, however, that Mr. Gallagher took substantial amounts of stone from the site during the currency of the agreement given that he took stone off an area described as 1.5 acres, and I further accept that it is highly likely that this stone was used on what has been described as the Colpe Cross project.

57. I reject the respondent's assertion that the operation carried out by Mr. Gallagher, even at its height, was anything approaching the scale of the significant mechanised operation carried on by the respondent in the present case. In coming to this conclusion, I have had regard to the fact that Mr. Gallagher left the site because he was curtailed from digging out rock from the site and was limited to taking shale off the site. This is to be contrasted with the depth of the excavations forming part of the respondent's operation shown in exhibit 7.3. Further, the operation did not involve blasting or the erection of any structures on the land. There was no mechanised crushing of stone and no significant traffic movement in and out of the site. I accept Mr. Wood's evidence that Mr. Gallagher was limited to using two trucks. By way of contrast, on the 13th August, 2007, a Meath County Council inspector noted seventy-six lorry movements at the respondent's quarry that day. I also accept the evidence adduced by the applicants that the work carried out by Mr. Gallagher was not continuous and that it did not have significant implications for the living conditions of local residents.

58. As to the respondent's claim that quarrying continued on the lands until after Mr. Gallagher left in 1997, up until 2003, I reject Mr. McGuinness's evidence in this regard. I do not accept that he retained Messrs. Chambers, McArdle or Lambe, those being firms specialising in heavy machinery, for the purposes of drawing thousands of tonnes of rock for projects on his farm. These facts were put to the applicants' witnesses as far back as December, 2009, when each of them denied any such activity. Notwithstanding their denials and the fact that the respondent's substantive case did not commence until July, 2010, not one witness from any of these firms was called to corroborate Mr. McGuinness' evidence. Further, whilst Mr. McGuinness agreed that each of these firms would have submitted invoices which would have been with his accountants, he produced no books of account to validate payments for any such works.

59. Insofar as Mr. McGuinness maintained that he drew thousands of tonnes of rock for projects on his lands, it has to be remembered that he made the same claim in respect of the ten-year period from 1986 to 1995. The totality of photographic evidence produced to support an alleged fourteen years of quarrying thousands of tonnes of stone per year were a number of recent photographs identifying one roadway around his farm and two sets of sheds on an area of some 4 to 5 acres, all of which he stated required stone from the quarry. Even if the foundations for all of the structures shown in these came from the quarry to suggest that this work required the periods of time or the quantities of stone referred to by Mr. McGuinness in his evidence is simply untenable. Further, if there were any other structures built using stone from the quarry, I am sure that I would have had these structures brought to my attention.

60. I have carefully noted the manner in which it was asserted that the first set of sheds were an evolving project over the period of 1986 to 1995. Foundations are normally laid in a once off operation. Unfortunately I believe it probable that the first set of sheds in Mr. McGuinness's yard have been used as a contrivance to stand up his evidence that quarrying took place over a period of years where no other evidence of quarrying could be found and which evidence is in conflict with his representation to the local authority at the time he applied to register his quarry which confined such activities to the year 1989. I will refer to the sheds allegedly built by Mr. McGuinness in 2001/2002 shortly.

61. I reject Mr. McGuinness's evidence that he quarried the lands in question on a year-in, year-out basis, using firms which specialised in heavy machinery. Having rejected Mr. McGuinness's evidence, it is not for the court to try and come up with an alternative scenario that might reflect the truth of what occurred on these lands over this period. Given the respondent's assertion that the applicant's claim is time barred, the onus of proof is on the respondent in respect of that issue. In this case, the applicant's witness, Mr. McGuinness, has given an account of the use of the lands which I simply cannot accept.

62. In reaching this conclusion, I have been marginally influenced by the fact that Mr. McGuinness's oral evidence was at variance with that which was sworn by him in his affidavit. At para. 7 of his affidavit, he referred to a period of time which commenced after Mr. Gallagher finished his quarrying activities in 1997. He asserted that "my brothers and I were drawing many hundreds of loads of rock from the quarry every year during this period" and referred to work being carried out by Messrs. Chambers, McArdle and Lambe. No mention was made of the laying of foundations for the two large sheds seen in Mr. McGuinness's yard. Mr. McGuinness, in his affidavit, did not specify the period in respect of which these assertions were being made, but in the following paragraph, he recommenced his historical account of the use of the lands with the period 2001/2002. Accordingly, I read his affidavit at para. 7 as referring to the period from 1997 to the end of the year 2000.

63. In respect of the years 2001 and 2002, Mr. McGuinness, in his affidavit, did not refer to quarrying activities or to the building of sheds, matters which he stressed in the course of his oral evidence. In his affidavit, he referred to putting topsoil back into part of the area which had already been quarried, and to his intention to apply for a waste permit and planning permission, which would allow him fill the exhausted areas of the quarry. There is no reference to stone being quarried for the purposes of laying foundations for the sheds in his yard during this period of time or to any works being carried out by Messrs. Chambers, McArdle or Lambe.

64. I am not satisfied, as a matter of probability, that the foundations for the two largest sheds in Mr. McGuinness's yard were constructed from stone quarried from the relevant lands, or that they were constructed in 2001 and 2002. Apart from the divergence between Mr. McGuinness's affidavit and his oral evidence, I have also taken into account that whilst these sheds were referred to over the early days of the trial it was not until the fourteenth day of the hearing that counsel for the respondent for the first time suggested to one of the applicant's witnesses that these two sheds were constructed in 2001 and 2002. What concerns me further is that this specific date for the construction of the sheds only emerged after the validity of invoices, which might otherwise have established the carrying out of quarrying on the lands over these years, was called into question by the court. I will now deal with these two invoices.

65. In an effort to corroborate a vital assertion on the part of Mr. McGuinness, having regard to the respondent's defence that the applicant's claim is time barred, two copy invoices were produced purportedly furnished by Richard Chambers and Sons dated the 19th December, 2000, and the 27th February, 2001. I raised concerns regarding the validity of these invoices with counsel for the respondent in December, 2009 when they were first produced. The original writing on the invoice of the 19th December, 2000, referred only to "ploughing and sowing" for which a sum of £9,000 was billed. The invoice of the 27th February, 2001, originally only

bore the following legend: "year 2000 ploughing and sowing 40 acres", for which a sum of £4,477.50 was billed. I drew counsel's attention to the fact that the other entries on the invoices were in a different handwriting to those entries just referred to and questioned whether the invoices had been altered. Added to the invoice of the 19th December, 2000, are the words: "digging and hauling rock at Hilltown", and on the invoice of the 27th February, 2001: "digging rock at quarry".

66. I do not accept Mr. McGuinness's explanation for altering the invoices, namely that he did so for clarity purposes shortly after they were paid. Having regard to the concerns raised by the court as to the validity of these invoices as evidence of quarrying activities having taken place on the lands over the periods mentioned therein, I cannot understand why, if the invoices were genuinely raised in respect of quarrying work as opposed to ploughing and sowing by Mr. Chambers, he was not called as a witness to confirm the relevant facts. I find it extraordinary that, in circumstances where it is alleged that Mr. Chambers continued to work at this quarry throughout 1997, 1998, 1999, 2000 (as per Mr. McGuinness' affidavit) and during 2001 and 2002 (as per Mr. McGuinness's oral testimony) that the only invoices produced are in respect of the 19th December, 2000, and the 27th February, 2001, and even these, when submitted, did not mention the word "quarrying". I regrettably conclude that Mr. McGuinness introduced these invoices in an effort to try to bolster the respondent's claim that these lands were being used as a quarry on a continuous basis for a period in excess of seven years prior to the institution of these proceedings. The proceedings were instituted in February, 2008 and hence the importance to the respondent of trying to establish quarrying activities on these lands for the period 2001/2002, a period devoid of any allegation of quarrying in Mr. McGuinness' affidavit. I am satisfied that as a matter of probability that Mr. McGuinness has embellished these invoices with the intention of misleading the court as to the type of work being carried out by Mr. Chambers at the relevant time.

67. I reject Mr. McGuinness's specific oral testimony that he quarried substantial amounts of stone to complete the foundations for the two large sheds in his yard in 2001 and 2002. In reaching this conclusion, I have taken into account the fact that his affidavit was silent as to this significantly important event. I also take into account that the first time a date was ascribed to the erection of the sheds was on day fourteen of the trial. Likewise, I have taken into account the applicant's evidence that there was simply no quarrying on these lands from the time Mr. Gallagher left, in late 1996, and formed the view that these sheds could have been constructed in any one of a number of years and the stone used for their foundation could have come from a number of possible sources. One such source was proffered by Mr. Woods who stated that Mr. McGuinness took a large amount of stone from the quarry to his house shortly after Mr. Gallagher left.

68. In the light of the importance of the assertion that Mr. McGuinness's more recent sheds were built in 2001 and 2002 to the respondent's plea that the applicants' claim is statute barred, I find it incongruous that no witness was called to confirm the erection of the sheds in those years, nor any witness to state that the foundations were constructed from stone taken from his quarry. If those sheds had been built in 2001 and 2002, the contractors who assisted in the carrying out of the construction work must have been available to validate when they were built and the origin of any stone used for their foundations. Further, those contractors must have raised invoices in respect of their work from which the date of the construction could have been established, but no such invoices have been proved.

69. In reaching my conclusions, I have ignored the fact that it was only at the commencement of the trial of this action that the respondent sought to amend its defence to maintain a claim that the applicants' claim was time barred by reason of the provisions of s. 160(6)(a)(i) of the Act. I have reached all of my conclusions based upon the evidence adduced by both parties and in particular have been influenced by the absence of any reliable documentary or oral corroborative evidence of the account given by Mr. McGuinness. The absence of evidence from Messrs. Chambers, McArdle and Lambe who are alleged to have quarried thousands of tonnes of rock on an annual basis on behalf of Mr. McGuinness seems inexplicable as is the absence of any evidence to prove what work was carried out by Mr. Chambers and was charged to Mr. McGuinness in the invoices which were subsequently altered by him or evidence in relation to the construction of the final sheds allegedly built on Mr. McGuinness's lands in 2001/2002.

70. In coming to the conclusion as to the use of the lands over the aforementioned period, I have also relied upon photographs of the relevant area for the following dates, namely:-

(i) the 11th July, 1999;

(ii) the 6th May, 2000;

(iii) the 23rd August, 2000;

(iv) the 7th April, 2002; and

(v) the 25th September, 2002

71. Having considered these photographs, I am satisfied that the photograph of the 11th July, 1999, shows the relevant lands in the condition that they were in when Mr. Gallagher left them. The photographs do not support the respondent's claim that Mr. McGuinness was drawing many hundreds of loads of rock from the quarry every year, up to and including 2002, and that this is borne out by the change in the position of the rock face over this period. The photographs show that the rock face is in much the same position in each of the photographs and this can be determined by reference to the outcrop of rock which is in the field directly north of Ruddy's Lane. This outcrop is shown most clearly in the photograph of the 25th September, 2002. The photographs are much more consistent with the process of land reclamation described by Mr. McGuinness at para. 8 of his affidavit. The photograph of the 7th April, 2002, shows that a very significant amount of topsoil has been spread on the site which was formerly the subject matter of Mr. Gallagher's agreement. All of the land up towards the cliff face appears to be back in agricultural use, particularly the area closest to the Mullagh Road. The total area which has been returned to agricultural use is even clearer in the photograph of the 25th September, 2002. I believe that my findings in this respect are supported by what was stated by Mr. McGuinness in his affidavit and also by the provisions of clause 6 of his agreement with Mr. Gallagher dated the 11th December, 1995, which obliged Mr. Gallagher, following the completion of his works, to "backfill 3.028 acres suitable for agricultural use".

72. Accordingly, these photographs, when taken with the absence of any corroborative evidence from Messrs. Chambers, McArdle or Lambe, or anybody else involved in the construction of the sheds, leads me to conclude that, on the balance of probabilities, for all of the period from 1997 up to and including December, 2002, quarrying did not take place on these lands. In the section of this judgment dealing with the period 2002 – 2005, I will also refer to a number of documents submitted to the planning authorities, which I believe support this conclusion.

73. In reaching my conclusions in respect of this period of time, I have also taken into account but rejected a number of submissions made by the respondent in its written submissions. I cannot conclude that vast quantities of stone were quarried from these lands

over the relevant period due to the depth of the rock face shown on the contour map lodged in support of the planning application for the land recovery operation, or from the fact that vastly more truck loads of waste were delivered than the four deliveries per day permitted as a condition of the planning permission.

74. The contour map is of little value given the absence of any earlier equivalent map from which comparisons might have been drawn. It is common case from all of the photographs that the landscape, when the trees were removed from the site by Mr. Coyle, demonstrated a natural cliff face with a significant slope down to the adjacent ground. Mr. Mulvey's photographs of the 19th March, 2004, whilst introduced to establish a history of quarrying along the central aspect of the cliff face, show in photograph No. 9, show the depth of the natural cliff face irrespective of any quarrying. In this regard, the left-hand side of photograph no. 9 and the right-hand side of photograph no. 10 are of assistance. It is patently clear that, even if no quarrying had ever taken place on these lands prior to the planning application, vast quantities of waste would have been required to level the site from the entrance gate up to the top of the cliff face. Indeed, the application for planning permission refers to the fact that the field immediately in front of the cliff face had to be raised by 2m to 2.5 metres. Further, I also have Mr. Pierson's evidence and his photograph of December, 1988 showing the very significant natural slope of these lands falling away to the east from the Mullagh Road.

75. For the aforementioned reasons, I simply cannot conclude, from either the contour map or the numbers of trucks containing waste which were brought onto the site, that substantial quarrying was carried out by Mr. McGuinness or his agents, over the period 1997 to 2002 inclusive. Further, Mr. McGuinness, in his own evidence, stated that he always knew that the permitted four loads of waste *per* day would not fill the site and that he hoped that in due course he would obtain permission to extend the number of trucks entering the site.

2002 to 2005

76. The respondent maintains that quarrying continued throughout this period in conjunction with the land recovery operation. Mr. McGuinness maintained that the quarry was operated by three contractors by the names of Larkin, Fallon and Faye and that at times, twenty to one hundred loads of stone *per* week were leaving the quarry during this period. The respondent also relied upon certain documents emanating from the planning section of Meath County Council, which noted quarrying activity on the lands at the time of various inspections.

77. The applicants maintain that throughout 2002, and until such time as the landfill operation commenced in 2003, no quarrying took place. When the land recovery operation commenced, they were not aware of any quarrying on the lands and neither were they aware of stone going out in lorries that had entered with waste. They all expressed concern that the land recovery operation was operating at a level vastly in excess of that which had been permitted, that it was adversely affecting the local community and that it had generated health and safety issues.

78. Having assessed all of the evidence in relation to this period of time, I am satisfied, as already stated, that there was no quarrying on these lands in the year 2002. I believe that this conclusion is borne out by the documentation submitted to the local authority in relation to the application for a waste management permit and also the documentation submitted in support of the planning application for the land recovery operation. It is important to note in this regard that these documents were completed by Mr. Frank Burke, of Frank Burke and Associates, a planning consultant who is still practising in Navan and from whom the court heard no evidence. I will refer briefly to a number of the documents in support of my conclusion that whatever quarrying operations had previously been carried out on these lands, the same were abandoned when Mr. Gallagher left the site in December 1996.

79. The application for the waste management permit was made on the 20th March, 2002. The nature of the facility required was described by Mr. Burke in the following terms:-

> "Michael McGuinness owns and operates a large farm at Hilltown, Bellewstown, Duleek, just south of the Duleek/Julianstown Road . . . The part of the farm on which the recovery operation is to take place was used in the past for quarrying and as such is the location of disused quarry workings. The area of the workings has very limited use as far as agriculture is concerned. The purpose of this application is to improve the agricultural potential of the subject area."

80. In respect of the method to be adopted by Mr. McGuinness it was stated:-

> "It is proposed to progressively cover the deposited material with other inert material in layers and finally covering the total area with topsoil. The reclaimed lands back into agricultural use at the first available opportunity and this is expected to occur within one year of starting."

81. It was further confirmed by Mr. Burke that "apart from the above simple method, there are no other processes proposed for the Hilltown Little lands at this time".

82. Insofar as potential noise was concerned, reference was solely made to that generated by the adjacent quarry workings, *i.e.* those of Kilsaran. The only reference to noise from the subject site was confined to that which might be generated by traffic entering or leaving and/or from the spreading operation. Similarly, in respect of dust, reference was confined to the adjacent quarry. Further, all references to quarrying on the subject lands were purely historic with the only reference to ongoing quarrying being in respect of the Kilsaran Quarry.

83. Regrettably, much of the documentation relating to the planning application for the land recovery operation lodged on the 19th December, 2002, has been mislaid. However, there are a number of documents which are of assistance. The formal application completed by Mr. Frank Burke refers to the proposed area in respect of which planning permission was sought as being 3.85 hectares. The map attached to the application incorporates the rock face and the area immediately north of it. This sits comfortably with the written submissions made by Mr. Burke, indicating the intention of Mr. McGuinness to effectively obliterate all evidence of any past quarrying activity on these lands and to return them in their entirety to agricultural use.

84. The planning application led to the generation of a number of internal documents and also to an inspection of the site. In this regard, Mr. Matthew McAleese, acting executive planner, reported to Ms. Wendy Moffett, senior executive planner on the 18th February, 2003, in a long report which includes the following relevant information. The description of the application is as follows:-

> "Permission for land recovery operation wherein inert soil and topsoil complying with class 10 of the fourth schedule of the Waste Management Act shall be imported and spread on site with consequential benefit for agricultural activity on lands at Hilltown Little. Waste permit already granted 2002/10."

85. The purpose of the application was stated to be for the improvement of the agricultural potential of the disused quarry and the

site was described as follows:-

> "The site is located on the Cr412, to the northwest of Bellewstown. The site is a disused quarry. The nearest dwelling is located approximately 300 - 400m away from the subject lands. There is an active quarry on the other side of the Cr412 with the quarry entrance directly opposite the existing agricultural entrance to the application site."

86. In considering the effects of the proposed development on the county development plan, Mr. McAleese reported as follows:-

> "I consider the principle of the development acceptable as:-
>
> (a) the unused pit will be fully restored to agricultural use,
>
> (b) open quarry pits by their nature are unsightly,
>
> (c) no further quarrying on site will occur."

87. Mr. McAleese went on to report that the proposed development would not have an adverse effect on the residential amenity of existing dwellings given that there would only be eight truck movements per day permitted under the waste permit.

88. Mr. McAleese, in dealing with the visual impact/recreational and natural assets of the area, stated as follows:-

> "The subject lands of application are located within an area identified as a S.R.U.N.A.-sustainable recreational use of natural assets – within the Rural Detail Maps of the CDP 2001. Section 3.6.18 of the CDP 2001 states that their protection and/or development, will be pursued by the planning authority as an objective as appropriate. In my opinion the purpose of this application to improve the agricultural potential of the subject will have a beneficial visual impact to the SRUNA that it is located within. The application will have the effect of removing the unsightly exposed rock face of the disused quarry and restoring the land to agricultural pasture land."

89. When the aforementioned documentation is taken in conjunction with the evidence given by the applicants, I have no doubt that at the time of the application, both for the waste management permit and also for the planning permission, there was no ongoing quarrying on these lands. Further, Mr. Prenter confirmed that the lands would have been inspected by the local authority as part of the planning process and, in these circumstances, he confirmed that there could have been no quarrying on the lands.

90. I reject Mr. McGuinness's evidence that when he applied for the waste management permit and the subsequent planning permission that he intended to continue quarrying any portion of these lands. I believe that this conclusion is consistent with the documentation submitted; the fact that neither Mr. Burke nor any of the three contractors referred to in evidence were called to give evidence and also with the agreement made with Mr. Gallagher dated December, 1995 which required Mr. Gallagher at the end of the contractual period to backfill the 3.028 acres suitable for agricultural use.

91. There is no doubt however that during the currency of the land recovery operation some activity which falls within the legal description of quarrying, took place on the lands covered by the planning permission. In this regard, I have paid particular attention to the letter written by Mr. Gallagher to the local authority on the 11th December, 2003, complaining that Mr. McGuinness was digging out rock and selling it in breach of the conditions attached to his planning permission. It is also clear from the report of Mr. Joe Garvey dated the 2nd December, 2003, that unauthorised quarrying was taking place in December, 2003. Similarly, I have documentation from Mr. George Mulvey that an excavator was moving stone from the rock face on the 11th December, 2003, and a report of Mr. Jim Holmes, consulting engineer and inspector for the mines and quarries of the region dated the 19th December, 2003, stating that he observed the extraction of rock from a 12 metre shale face and the transport of rock by truck to another location.

92. I am satisfied therefore that a certain amount of quarrying took place on the relevant lands between September, 2003 and April, 2005. The extent of that quarrying is hard to gauge, as is the extent to which stone left the site or was merely used onsite for the construction of access roads within the landfill site. In this regard, Mr. Paul Larkin, who met Mr. George Mulvey on site on the 19th March, 2004, advised him that the rock being quarried was being used to construct access roads within the site.

93. The evidence adduced has not convinced me, as a matter of probability, that over this period of time, Messrs. Larkin, Fay and Fallon were taking out 20 to 100 loads of stone *per* week. This is an assertion which, once again, was based entirely on Mr. McGuinness's uncorroborated evidence in the face of staunch denials from the applicants and other residents. They had not noticed quarrying operations nor stone being removed from the site while the landfill operation was going on. Further, the lands were subjected to a significant number of inspections by council officials, due not only to Mr. Gallagher's complaint regarding quarrying, but due to complaints that Mr. McGuinness was vastly exceeding the number of deliveries permitted in his planning permission per day. In the course of these inspections, the number of trucks coming into the premises was noted, as was the failure on the part of those trucks to use the wheel wash leaving the premises. I find it hard to believe that if twenty to one hundred trucks per week were leaving this site laden with stone this would not have been noticed by the relevant inspectors. The inspection of the site by Ms. Helen Smith on the 21st March, 2005, is one such occasion on which such activities might have been noticed.

94. I am satisfied that whatever quarrying was taking place over the period from 2003 to 2005, was occasional rather than continuous. In relation to the activities on the lands during this period the court has again not been afforded any corroborative evidence from Messrs. Larkin, Faye or Fallon in support of Mr. McGuinness's evidence. Indeed I remain significantly troubled regarding Mr. McGuinness's account of what he maintains occurred in the years 2003 to 2005. Firstly, it is clear that notwithstanding the conditions attached to his planning permission from the outset he started delivering numbers of loads of waste vastly in excess of those permitted. Further he continued to operate in this manner notwithstanding ongoing warnings given to him by council officials. By way of example, on the 21st March, 2005, the site register showed 25 to 30 loads of waste being delivered daily. Secondly, insofar as Mr. McGuinness maintained that Mr. Burke knew, at all stages, of his intention to continue quarrying alongside his proposed landfill operation on the basis of an established pre-October 1964 use, Mr. Burke was not called to give evidence. Thirdly, if Mr. McGuinness genuinely believed he was entitled to quarry the lands because of a pre-1964 use, it seems extraordinary that following warnings by the local authority that quarrying onsite was not authorised he never once maintained either orally or in writing his entitlement to quarry the site because of a pre-1964 use. Neither did he ask Mr. Burke, whom he states was aware of his intention to continue quarrying, to liaise with the local authority in this regard. Finally, when the planning section, by letter dated the 13th April, 2005, sent a warning letter regarding unauthorised quarrying activity and demanding an immediate cessation Mr. McGuinness did not reply that his activities were lawful by virtue of a pre-1964 use.

95. As to the vast amounts of stone allegedly taken from the site by Messrs. Larkin, Faye and Fallon, the terms of the agreement

which were entered into with those parties is of some significance to my conclusions. Those agreements provided that any stone to be removed from site had to be paid for. It was conceded by Mr. McGuinness that he never received any payment from any of these contractors for stone removed from the site. He sought to justify his non-receipt of payment for 20 to 100 loads of stone per week from the contractors on the basis that they were not able to make money out of the landfill operation. For this reason, he decided to let them take the stone out for free. I find Mr. McGuinness's evidence on this issue untenable, given that not one invoice was raised in respect of stone leaving the site from the outset of the land recovery operation. This is not a case where some months after the commencement of the operation, the contractors complained that they could not make money from the landfill operation and successfully convinced Mr. McGuinness to renegotiate the agreement to allow them remove stone without charge. No money was ever paid thus leading me to believe that whatever stone was taken was modest in terms of quantity and was a sporadic occurrence.

96. In coming to this conclusion, I have also relied upon the application lodged by Mr. Frank Burke to register Mr. McGuinness' quarry under s. 261 of the Act where he stated: "The quarry is in occasional use" . . . "when the quarry is in use working procedures within the quarry are such that there is no impact on non-related properties in the vicinity". This description does not fit with Mr. McGuinness's evidence that, at times, 20-100 loads of stone per week were taken from the site - an assertion which I believe was an effort to marry the level of activity on the site over this period of 2003 -2005 to that of the respondent.

97. To conclude, unauthorised development by way of quarrying took place on these lands between September 2003 and April 2005. That use was at best "occasional". In reaching this conclusion, I have rejected the testimony of a number of the witnesses called on behalf of the applicants, all of whom denied that any quarrying took place on the lands over this period of time. I accept that their evidence was genuine in this regard and can well understand, in the light of the intensity of the land recovery operation taking place, how they may well have failed to notice the fact that some quarrying took place on an occasional basis.

2005 to 2007 and 2007 to date

98. The respondent accepts that quarrying ceased following the delivery of the warning letter by the local authority dated the 13th April, 2005. That letter referred to the unauthorised use of the lands by Mr. McGuinness, and also to his failure to comply with the conditions attached to his planning permission. Thereafter, on the 27th April, 2005, Mr. McGuinness applied to have the quarry registered pursuant to s. 261 of the Act.

99. The respondent maintains that some degree of quarrying took place between the date of the service of the warning notice and its purchase of the quarry. Mr. Keegan stated that the quarry face looked fresh to him as if it had been worked in the months leading up to its purchase. In support of its contention that quarrying continued over this period, the respondent relies upon Mr. Kehely's report, written following his inspection of the lands in October, 2005, wherein he confirmed that the lands sought to be registered clearly constituted a quarry. Finally, the respondent maintains that at the time of the institution of the present proceedings its quarrying operation was no greater than that conducted by Mr. Gallagher when he was operating the quarry.

100. The applicants deny that any quarrying took place between the date of the delivery of the warning letter by the local authority on the 13th April, 2005, and March, 2007 when the respondent commenced his activities. They were unaware of the registration process which had been embarked upon by Mr. McGuinness in April, 2005 and maintain that the gates were closed during all of this period. Insofar as the respondent's activities at the time of the issue of these proceedings are concerned, the applicants maintain that the size and intensity of that operation bears no relationship to anything previously carried out on the relevant lands including the operation of Mr. Gallagher.

Conclusion

101. I accept the applicant's evidence that the gates to the relevant lands were closed between April, 2005 and February, 2007 and that no quarrying took place over this period of time. Mr. McGuinness, in his oral evidence, confirmed that this was so, notwithstanding instructions given to the respondent's solicitor on the 12th December, 2009, contending for an alternative proposition. Mr. Keegan's evidence that the quarry looked fresh to him is unconvincing against the backdrop of the applicant's evidence of the gates being closed and their failure to note any activity on the site. Also, there is nothing in the documentation emanating from the local authority to suggest that any activity continued on these lands during this period. In the light of the warning notice, one would have expected the local authority to have been monitoring the situation. The fact that Mr. Kehely, in his report of October, 2005, confirmed that the lands constituted a quarry is not evidence of any quarrying activity taking place at that time. Indeed, had quarrying activity been taking place, it would be surprising if this fact had been omitted from his report. I also think it highly unlikely that Mr. McGuinness, when seeking to register his quarry with the local authority, was likely to carry on quarrying in breach of the warning notice of the 13th April, 2005. Accordingly, I conclude that the lands were left vacant and unused for any purpose during this period.

102. In the context of my aforementioned conclusions, and my findings in relation to the reliability of Mr. McGuinness as a witness, I believe it important to record that each of the residents who gave evidence were cross-examined on the basis that Mr. Fallon and Mr. McGuinness would say that, notwithstanding the service of the warning notice on the 13th April, 2005, landfill and quarrying continued on this site. It was put to each witness that after the service of the warning notice lorries were coming in to deposit waste at the landfill site and that one in every ten lorries that came in left with stone on board. All of the residents denied that the lands were being used for either landfill or quarrying over this period and each contended that the gates were closed. In the course of the cross-examination, it was also put to Mrs. Coyle that Mr. McGuinness himself continued to quarry rock post-April, 2005, a proposition which elicited a rather bold but pertinent question, namely, to what purpose Mr. McGuinness was putting this latest quantity of rock?

103. It was only following the conclusion of the applicants' case that counsel for the respondent advised the court that Mr. McGuinness's position would not be that which had been maintained during the applicant's case and his evidence would be that quarrying activities ceased on the 13th April, 2005. The court was told that specific instructions had been received from Mr. McGuinness in December, 2009, and that these instructions had been committed to writing by the respondent's solicitor following a meeting with Mr. McGuinness which lasted for over an hour and in the course of which the evidence already given in the case had been explained to Mr. McGuinness.

104. The fact that Mr. McGuinness withdrew his earlier instructions is not surprising. Given the service of the warning letter of the 13th April, 2005, clearly, no landfill trucks could have been entering the site thereafter. Accordingly, however desirable it may have been for Mr. McGuinness to continue to contend that stone left the site thereby establishing ongoing quarrying, it would have been difficult for Mr. McGuinness to contrive an explanation as to how this could have happened in the absence of trucks depositing waste and being free to take stone out of the quarry. This is yet another example of Mr. McGuinness's unreliability as a witness.

105. Overall, the respondent's case based upon the provisions of s. 160(6)(a)(i) has been predicated upon the evidence of Mr. McGuinness over the entirety of the period from 1986 to 2007 inclusive. For reasons best known to himself, he has tried to bolster the respondent's case and has unsuccessfully sought to convince the court that with the assistance of six contractors, he quarried

thousands of tonnes of rock every year out of these lands from 1985 through to 2005, with the exception of the brief period of time when the quarry was in Mr. Gallagher's possession. All of his evidence was capable of corroboration but none was forthcoming. He contradicted himself on innumerable occasions. For example, he stated that he only became aware of the significance of the 1st October, 1964, when he applied to register his quarry in April, 2005. However, he had earlier maintained that at the time he applied for the waste management permit and the planning permission for the land recovery operation, he intended to continue quarrying and had an entitlement to quarry due to the fact that the quarry predated the 1st October, 1964. Further, he changed his instructions in relation to what occurred on the site after the warning letter of the 13th April, 2005, was served. He had maintained that this quarrying was carried out by Mr. Fallon and that one in every ten lorries leaving the site left laden with stone. This position was later changed, firstly, to an assertion that all of the contractors stopped their operations after the 13th April, 2005, but he himself continued quarrying on the site. This alternative position was later withdrawn in favour of his final resting position, which was that all activity stopped after the 13th April, 2005.

106. Apart from the matters just referred to, perhaps the most significant evidence of Mr. McGuinness's unreliability is the evidence he gave to the court in relation to the alleged quarrying carried out by Mr. Richard Chambers on his lands between 1997 and 2002, evidence which was uncorroborated and supported by invoices which I have concluded were altered for the purposes of misleading the court. All of these factors, when viewed alongside Mr. McGuinness's whole scale disregard for the conditions attached to his planning permission during the entirety of the period of his land recovery operation, render his evidence an entirely unreliable foundation for any finding in the respondent's favour.

Summary of findings of fact

107. The lands, the subject matter of the present proceedings, were not used as a quarry prior to the 1st October, 1964. It is possible that the lands concerned were used for quarrying stone for a brief period in 1989. There was no further use of the lands for quarrying until December, 1995 when Mr. Gallagher entered the lands and used them to quarry stone on an intermittent basis until December, 1996. It is possible that for some discreet period post-December, 1996, that rock, which had earlier been quarried by Mr. Gallagher, was brought down by Mr. McGuinness for use in and about the maintenance of his home and adjacent structures. However, I am not satisfied, on the balance of probabilities, that Mr. McGuinness built his final set of sheds using stone which had been quarried from the relevant lands during the period of 2001 and/or 2002.

108. The next use of the lands took place following the application by Mr. McGuinness for a waste management permit on the 20th March, 2002, and a subsequent grant of planning permission for a land recovery operation granted the 19th May, 2003. That work only commenced in the summer of 2003. I am satisfied that the lands were not used as a quarry between December, 1996 and the commencement of the land recovery operation. Further, I have concluded that Mr. McGuinness, when he applied for the Waste Management Permit, did not intend that quarrying would continue on the site on a commercial basis when the land reclamation commenced. Quarrying did, however, take place on the lands on an intermittent basis from September, 2003 until the service of a warning letter by the local authority in respect of this unauthorised development on the 13th April, 2005. At that point in time Mr. McGuinness accepted that his previous activities amounted to an unauthorised use of the lands. Thereafter, he applied to register the quarry on the 27th February, 2005, after which the lands remained vacant until such time as the respondent commenced his activities in February, 2007.

The legal implications of the aforementioned findings of fact

109. Given that no quarrying took place on the relevant lands prior to the 1st October, 1964, the first use of the lands as a quarry subsequent to that date was an unauthorised use. If that use commenced in 1989, it was only for a short period of time. There followed a manifest period of interruption and the lands were abandoned in the legal sense until Mr. Gallagher commenced his activities in December, 2005. In any event, the statutory time limit for those wishing to avail of the injunction procedure was not introduced until 1992 and, accordingly, any use of the lands in 1989, is irrelevant from a legal perspective.

110. I reject the submission made by counsel for the respondent that once the court was satisfied that excavation of rock commenced on the lands prior to the 11th February, 2001, the respondent's current activities are immune from suit by reason of the provisions of s. 160(6)(a)(i) of the Act.

111. Since the introduction of the statutory time limit for those who decide to pursue injunctive relief, the court has, in a number of decisions, considered the effect of any break in the continuity of an unauthorised use. There are two decisions of particular relevance to this issue, the first of which is *South Dublin County Council v. Myles Balfe Limited, Shift-a-Lift Limited and Reginald Brogan* (Unreported, High Court, Costello J., 3rd November, 1995) and the second being *Kildare County Council v. Goode & Ors* (Unreported, High Court, Morris J., 13th June, 1997). In the first of these decisions, the learned trial judge considered the respondent's submission that since the unauthorised use had commenced more than five years prior to the commencement of the proceedings the respondent was immune from challenge. In that case, the original unauthorised use was the carrying on of a plant hire business, subsequent to which the premises had been used for the storage of chemicals. Costello J. in dealing with the defence that the unauthorised use had been continued over a period of five years stated as follows:-

> "In my opinion when a use has been abandoned and then recommenced nearly four years later an occupant cannot rely on an earlier use to support a claim that the limitation period in the section should run from the earlier date and not from the date of recommencement. If construed in the way urged by the respondents it would be a simple matter to drive a coach-and-four through the section by discontinuing an unauthorised use after a warning notice had been served and then re-commence it again after several years when a limitation period based on the discontinued unauthorised user had expired, and I consider that the section cannot be so construed. Secondly, when a wrongful continuous act (such as an unauthorised user of land) has been discontinued and abandoned then the wrong has ceased. When it is recommenced a new wrongful act occurs, and it is from the date of the recommencement that the time limit in the section begins to run in respect of this new unauthorised use."

112. In the decision of Morris J. in *Kildare County Council v. Goode & Ors.* (Unreported, High Court, Morris J., 13th June, 1997) the respondents had been extracting sand and gravel from a pit in Co. Kildare prior to the 30th April, 1991. The proceedings, which sought to restrain this activity, were not commenced until May, 1996 and the respondent contended that the then five-year time limit had expired. Morris J. found that an application for planning permission had been made and refused in April, 1992 and that thereafter, extraction of sand and gravel only recommenced two years later in May, 1994. Referring to the respondents' submissions that the applicant's right to injunctive relief was statute barred, the learned trial judge stated as follows:-

> "If the Respondents were correct in their submissions it would mean that the performance of an act of mining or taking sand by the Respondents for however a limited period of time, would be sufficient to cause the limitation period to start and, not withstanding the fact that the Respondents might have, in response to a warning notice discontinued the activity, would still continue to run. In my view, this cannot be correct. On the correct interpretation of this subsection,

> it appears to me when applied to mining and quarrying cases that the limitation period must be defined as commencing upon the date upon which an unauthorised development of the land occurs and that period will continue to run unless there is a manifest interruption or abandonment of the said development. If it were otherwise, then warning notices would be meaningless and a local authority would be required to ignore the fact that a person engaged in an unauthorised development of removing sand, gravel, rock etc., had responded to the notice, but would be required to move in Court.
>
> Accordingly, a manifest interruption or abandonment of the development is in my view sufficient to stop the time provided for in subsection, running and this time will only commence to run upon the re-commencement of the unauthorised development. It appears to me that each case must be determined on its own facts and it is for a Court to decide if there has been an abandonment or a discontinuance of the development so as to interrupt the time running. In the present case, I am satisfied that the conduct of the Respondents in discontinuing their activities upon the service of the warning notice…satisfies me that there was a sufficient abandonment or discontinuance of the activity to defeat the defence based on this sub-section."

In concluding that the use of these lands as a quarry was abandoned when Mr. Gallagher left in December, 1996, I have applied an objective test and I believe that my conclusions are reasonable not only in the light of Mr. Gallagher's departure, but also in the light of the evidence adduced by the applicants regarding the condition of the lands over the subsequent period, including the closure of the gate and also the absence of any corroborative evidence to support Mr. McGuinness's testimony and the documentation lodged at the time of application for the waste management permit and the subsequent planning permission.

113. Based upon the findings of fact which I have made, I have concluded as a matter of law that any unlawful use of the relevant lands before February, 2001 was abandoned and that the quarrying, which next occurred on these lands in late 2003, was the commencement of a new wrongful act on the part of Mr. McGuinness and/or his agents.

114. Even if I had not concluded that Mr. McGuinness had abandoned the use of the relevant lands as a quarry subsequent to Mr. Gallagher's departure in December 1996, I am satisfied that, as soon as the landfill operation commenced, as it did in mid-2003, any prior use of these lands as a quarry would in any event, as a matter of law, have been extinguished.

115. In this regard, there are a number of decisions referred to by the applicants, namely those of *Pilkington v. Secretary of State for the Environment & Ors* [1973] 1 WLR 1527, *Leighton & Newman Car Sales Limited v. Secretary of State for the Environment* [1976] 32 P. & C. R. 1 and *Prossor v. Minister for Housing and Local Government* [1968] 67 L.G.R. 109, all of which are authority for the proposition that an established use may be lost if a planning permission inconsistent with that use is obtained and implemented. In the case of *Prossor v. Minister for Housing and Local Government* [1968] 67 L.G.R. 109 the subject property had been used for car sales prior to an application for planning permission to rebuild a petrol station. That planning permission was granted subject to the condition that no retail sales of motor vehicles would be permitted on the site. After the rebuilding, second hand cars were displayed on the site for sale. An enforcement notice was served and the court then had to consider the effect of the planning permission of the previously existing use rights. Lord Parker C.J. stated:-

> "Assuming that there was . . . an existing use right running on this land for the display and sale of motorcars, yet by adopting by the permission granted in April 1964, the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site, as it were, seems to me to begin afresh on 4 April, 1964, with the grant of this permission, a permission which was taken up and used..."

116. Given that I am satisfied that quarrying works did not recommence on this site until approximately September, 2003, I am satisfied that any quarrying rights as may have existed prior to the application for the waste management permit and the planning permission for the land recovery operation were extinguished on the commencement of the landfill operation.

117. Having regard to my findings of fact in respect of the use of the lands for some quarrying activity between late 2003 and April, 2005, it is clear that the use of the lands in this fashion was unauthorised. However, the unauthorised use came to an end on the 13th April, 2005, when in the legal sense, I am satisfied that Mr. McGuinness once again abandoned the wrongful use of these lands as a result of the warning letter. The fact that he subsequently applied to register the quarry does not legally alter that position. That this act on the part of Mr. McGuinness amounts to an abandonment of the prior use seems to be borne out by the decision of Morris J. in *Kildare County Council v. Goode & Ors*. (Unreported, High Court, Morris J., 13th June, 1997). That decision was later upheld by the Supreme Court. In that case, the trial judge pointed out that if there was a risk that a statutory period could continue to run, notwithstanding a cessation of activities following the service of a warning notice, a local authority would then be obliged to ignore the fact that the unlawful activities had stopped and would be required to move to court, in any event, to defeat a defence that might otherwise be raised by a respondent to the effect that it was immune from challenge.

118. Having regard to the aforementioned legal conclusions and to the court's earlier ruling as to the effect of the registration of a quarry under s. 261, it is clear that the respondent's activities amount to unauthorised development which commenced in either February or March, 1997.

119. Having regard to all of the aforementioned findings, the respondent has not discharged the onus of proof to establish that the applicant's right to seek injunctive relief under s. 160 of the 2000 Act is statute barred.

120. For the sake of completeness, I am quite satisfied that the use of the relevant lands by the respondent which commenced in February/March 2007, amounts to an entirely new unauthorised development which is materially different from any use to which the lands were previously put. The respondent's present operation is not comparable in any way to the activities previously carried out by Mr. Gallagher during his brief period on the lands. The present operation is highly mechanised. Rock is excavated and crushed. Blasting takes place, albeit infrequently. These processes all generate substantial noise and dust. Further, large volumes of trucks come to and from the premises, having regard to the fact that forty loads *per* day are permitted under the conditions attached to the quarry's registration. The change in the use of the lands is material in the planning sense and the fact that some 23 conditions were imposed by the local authority when it registered the quarry under s. 261 of the Act, is strong and cogent evidence that the respondent's operation is entirely different in calibre, nature and character from anything which had previously occurred on these lands. Indeed, what has happened on the subject lands appears not too dissimilar to that which was reported on by Budd J. in his decision in *Westmeath County Council v. Quirke & Sons* (Unreported, High Court, Budd J., 23rd May, 1996) where, in dealing with an intensification issue, the learned trial judge contrasted what he considered to have been "a sleepy country quarry" with its successor which was a highly mechanised operation when concluding that a material change of use had occurred.

121. For all of the aforementioned reasons, the respondent's defence fails.

Issue 3: Given that the present proceedings are not time barred by reason of the provisions of s. 160(6)(a)(i) of the Act, should the court exercise its discretion in favour of the applicants?

122. The parties are agreed that the burden of proof in relation to this issue lies upon the respondent and the applicants maintain that the respondent must prove the existence of exceptional circumstances such that would justify the court refraining to grant the injunctive relief sought. In this regard, the applicants relied upon the decision of Henchy J. in *Morris v. Garvey* [1983] I.R. 319 where he stated as follows:-

> "[T]he High Court becomes the guardian and supervisor of the carrying out of the permitted development according to its limitations. In carrying out that function, the court must balance the duty and benefit of the developer under the permission, as granted, against the environmental and ecological rights and amenities of the public, present and future, particularly those closely or immediately affected by the contravention of the permission. It would require exceptional circumstances (such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship, or suchlike extenuating or excusing factors) before the court should refrain from making whatever order (including an order of attachment for contempt in default of compliance) as is 'necessary to ensure that the development is carried out in conformity with the permission'."

123. The applicants also relied upon the decision of Charleton J. in *Lanigan & Ors v. Barry & Ors* [2008] IEHC 29, (Unreported, High Court, Charleton J., 15th February, 2008) where the balancing exercise to be carried out by the court in dealing with its discretion was stated by him to "start with the duty of the court to uphold the principle of proper planning for developments under clear statutory rules". In granting the relief sought in that case, the learned trial judge stated:-

> "Unfortunately, this is a clear case where I must act to restrain major breaches of the planning code which have flaunted the legal rights of the community in favour of an unrestrained action that has seriously impacted on the character of a quiet area and the reasonable use by neighbours of their farms and dwellings."

124. The respondent contends that the decision in *Morris v. Garvey* [1983] I.R. 319 must be viewed in the context of the facts of that case which involved a gross violation of the planning acts and urged the court to take guidance from a number of more recent decisions of the court where the extent of the courts discretion was stated to be much wider. In particular, counsel relied upon the decision of Blayney J. in *White v. McInearny Construction Ltd*. [1995] 1 IRLM 374 and the decision of Barrington J. in *Avenue Properties Ltd. v. Farrell Homes Ltd* [1982] ILRM 21 where he stated at p. 26:-

> "It seems to me therefore that the High Court in exercising its discretion under s. 27 should be influenced, in some measure , by the factors which would influence a Court of Equity in deciding to grant or withhold an injunction."

125. As to the circumstances in which a court, having concluded that a respondent is in breach of the planning code, should exercise its discretion and refuse to make an order under s. 160 of the Act, it seems to me that the requirements outlined by Henchy J. in *Morris v. Garvey* [1983] I.R. 319 have been loosely interpreted and that it is now relatively well established that each case must turn on its own facts. Accordingly, I propose to consider each of the factors which the respondent seeks to rely upon for the purposes of deciding whether or not I should grant the relief to which the applicants are otherwise entitled. In this regard, the respondent relies on the following matters in support of its assertion that I should not exercise my discretion in the applicant's favour, namely:-

> (i) The respondent's *bona fide* belief that the quarry was authorised and amounted to exempted development when he purchased the quarry and commenced his investment;
>
> (ii) The hardship which an order under s. 160 would visit upon the respondent;
>
> (iii) The potential hardship to third parties;
>
> (iv) Delay/laches on the part of the applicants;
>
> (v) The attitude of the planning authority.

(i) *Bona fides*

126. The respondent relies upon a number of decisions including *Dublin Corporation v. McGowan* [1993] 1 I.R. 405; *Altara Developments Ltd v. Ventola Ltd* [2005] IEHC 312, (Unreported, High Court, O'Sullivan J., 6th October, 2005) *Grimes v. Punchestown Developments Co. Ltd.* [2002] 4 I.R. 515 and *Leen v. Aer Rianta c.p.t.* [2003] 4 I.R. 394 in support of its submission that if a respondent has acted *bona fide* in the belief that their development was authorised, this is a factor to be taken into account by a court in deciding whether or not to grant the relief sought.

127. Counsel for the respondent submitted that Mr. Keegan had seen evidence of the existence of a quarry on the lands prior to purchasing them on behalf of the respondent, and that as he had no knowledge of the history of the lands he had no option but to rely upon the vendor's representations that quarrying had been carried out on the lands since 1958. It was further submitted that the respondent's *bona fides* are borne out by the fact that in replies to requisitions on title raised by Mr. Keegan's solicitors, the vendor had warranted the use of the lands as a quarry on a continuous basis without material change since the 1st October, 1964. Finally, it was submitted that the respondent acted *bona fide* in believing that the status of the quarry was assured when it was registered by the local authority, subject to conditions.

128. I have reviewed the evidence of Mr. Keegan for the purposes of considering whether or not the circumstances in which he purchased these lands on behalf of the respondent are such that it would be manifestly unjust to grant the relief sought.

129. In evidence, Mr. Keegan initially stated that he purchased the lands as a quarry relying upon what Mr. McGuinness told him about the use of the lands, and also because of the fact that they had been registered by the local authority as a quarry subject to the imposition of conditions. He later stated that he was "indifferent" to the pre-1964 use as he believed that the history of the quarry was settled in the mind of the local authority and that the position was legally nailed down when it was registered. If this is correct then the respondent entered into the contract for the purchase of the relevant lands for a very substantial sum of money and with the intention of significant further investment on his own belief that the legal status of the quarry was assured.

130. Insofar as I am asked to exercise my discretion on the basis that Mr. Keegan *bona fide*, if incorrectly, formed the view that the history of the quarry was settled when it was registered, I reject that submission. Mr. Keegan has been in the quarrying business for

almost 30 years. He, or companies under his control, own several quarries. From his evidence, it is clear that in his mind, at the time of the purchase, was whether the quarry was an authorised development from a planning perspective. Thus if he did enter into this multi million euro purchase based upon his own judgment as to the legal status of the quarry without taking professional advice he acted foolishly and with reckless disregard for the respondent's position as was discussed by Geoghegan J. in his decision in *Cavan County Council v. Eircell Limited* (Unreported, 10th March, 1999).

131. I find it difficult to believe that Mr. Keegan did not take legal or planning advice on the legal status of the quarry prior to completing its purchase. Because of the nature and extent of his quarrying business, Mr. Keegan must have regular dealings with planning experts and lawyers. Issues such as planning applications, compliance issues and negotiations with local authorities must be part and parcel of everyday life for those involved in quarrying. Indeed, in the present case, as soon as the respondent purchased these lands, Mr. Keegan engaged the services of Mr. William Sheil, Planning Consultant, to prepare an appeal against the conditions imposed at the time of the registration of the quarry.

132. I find it difficult to accept Mr. Keegan's evidence that he *bona fide* but incorrectly himself formed the view that the history of the quarry was settled when it was registered and proceeded to act on that basis alone. In this regard, the requisitions on title raised by his solicitors canvassed the use of the lands both prior to and post the 1st October, 1964. Further, special condition no. 9 of the contract for sale provided that "the lands are sold with the benefit of the Meath County Council letter dated 15th December, 2006". It seems to me highly likely that whoever was dealing with the purchase of these lands on behalf of the respondent would have explained to Mr. Keegan the significance of the requisitions raised and the replies received.

133. If the respondent received expert advice regarding the planning status of the quarry prior to the completion of the contract to the effect that its status was assured, I believe that I would have been informed of this fact given the respondent's reliance upon the decision of O'Sullivan J. in *Altara Developments Ltd v. Ventola Ltd* [2005] IEHC 312 (Unreported, High Court, O'Sullivan J., 6th October, 2005). In that case, the court refused to grant relief under s. 160 in circumstances where the respondent had received professional advice prior to proceeding with the development complained of that it was in compliance with its planning. In these circumstances, I think it is fair to assume either that the respondent sought no direct expert advice on the planning status of the quarry, or that, if it did, it received advice to the effect that complete reassurance could not be given. In the first scenario, the respondent was the author of its own misfortune. If the latter situation pertained, then the respondent accepted a risk which any entity is entitled to take. In neither scenario would the relevant circumstances justify the court exercising its discretion in the respondent's favour.

134. However, given that the respondent's submission is based upon the factual assertion that Mr. Keegan, as a layman, entered into a contract to purchase these lands for the respondent, based upon his own belief that the legal position was assured rather than based upon any professional legal or planning advice, the respondent is the author of its own misfortune.

135. Even if it be the case that Mr. Keegan's initial evidence was correct, and that I accepted that he forged ahead with the purchase on the basis of what Mr. McGuinness told him regarding the pre-1964 use of the lands, I reject the submission made on his behalf that he "had to rely on the representations made to him by the vendor". There is simply no reason why inquiries could not have been made in the locality regarding the historic use of these lands. There was clear evidence given in this case that the respondent would have been in a position to access all of the files in the planning department in relation to the relevant lands which would have demonstrated to him the rather flimsy evidence available to the local authority at the time it registered Mr. McGuinness's quarry. This is not a case where the respondent made the relevant inquiries and either got no answers or incorrect answers thereto.

(ii) Hardship to the respondent

136. The respondent maintains that to grant the relief sought would visit a gross and disproportionate hardship upon it. It relies upon a number of decisions including those of *Dublin County Council v. Sellwood Quarries Ltd* [1981] ILRM 23, *Grimes v. Punchestown Developments Co. Ltd* [2002] 4 I.R. 515; *Leen v. Aer Rianta c.p.t.* [2003] 4 I.R. 394 and the decision of Barrington J. in *Avenue Properties Ltd. v. Farrell* [1982] I.L.R.M. 21. As to the facts relied upon, the respondent refers to the very substantial purchase price paid for the lands he purchased from Mr. McGuinness and also to the sum of €350,000 or thereabouts, which he spent complying with the conditions imposed by the local authority.

137. I reject the respondent's submission in relation to this issue on much the same basis as that referred to when dealing with the preceding issue. If it is the case that the respondent purchased the lands from Mr. McGuinness for a very substantial sum based upon his own legal understanding as to the significance of the registration of the quarry with conditions attached rather than upon formal legal or planning advice, then the respondent has been the author of its own misfortune.

(iii) Hardship to third parties

138. I accept that the court, in exercising its discretion under s. 160, is entitled to have regard to hardship that may result to innocent third parties in the event of an order being made. I accept the evidence of Mr. Keegan that the making of the order under s. 160 of the Act will likely result in five redundancies, and that the closure of the quarry may also have a knock on effect on the business of some of the respondent's subcontractors.

139. However, the hardship to third parties, when it comes to the discretion of the court, must be viewed against the nature of the development complained of. The facts in *Grimes v. Punchestown Developments Co. Ltd* [2002] 4 I.R. 515, relied upon by the respondent, give a good indication as to the circumstances in which a court might, in its discretion, fail to make the order sought. In that case, the applicant sought to restrain the holding of a pop concert and did so not long before it was due to take place. In the proceedings, the applicants contended that there was no planning permission for the holding of a concert, that the facilities and surrounding area did not have the capacity to deal with the substantial number of people likely to be involved and that the event would likely cause substantial inconvenience and disruption to those living in the locality.

140. Undoubtedly, a pop concert may have a significant adverse effect on those living close by but its effects will be short-lived. In the present case, a failure to impose the planning code would have a permanent and deleterious effect on the lives of all of those who reside in Bellewstown. In particular, I refer to noise and dust pollution and also to the traffic hazards created by the lorries travelling to and from the quarry, which populate not only the adjacent narrow rural roads, but also pass by the local national school located in the main street of the village. In addition, the blasting operations, infrequent as they are, cause significant upset to the residents. Further, the landscape of the area has been destroyed. The fact that the operation of the Kilsaran Quarry generated problems for the residents of Bellewstown from time to time is to my mind irrelevant, particularly in circumstances where the detrimental effect on the community arising from that quarry has been substantially reduced due to the settlement of legal proceedings instituted against the owners of that quarry.

141. I can easily understand how, having regard to the temporary adverse effect that the breach of the planning code was to have

had on the applicant in *Grimes*, how Herbert J. concluded that he should exercise his discretion so as to avoid loss which would otherwise have been experienced by innocent third parties such as caterers, transport companies, ticket holders and others had the injunction sought been granted. Likewise, I can appreciate how McKechnie J. in *Leen v. Aer Rianta c.p.t.* [2003] 4 I.R.394, a case which concerned the passenger terminal at Shannon Airport, refused the injunction sought and decided to exercise his discretion rather than risk making an order which might possibly have led to the closure of the airport with consequential damage to a multiplicity of organisations and also to the interests of the wider community.

142. On the facts of the present case, the potential hardship to third parties is not sufficient to justify the court exercising its discretion in favour of the respondent.

(iv) Delay/laches on the part of the applicant
143. The respondent maintains that the applicants have delayed in instituting these proceedings such that, in my discretion, I should refuse to make the order sought.

144. The respondent submits that the applicants were aware of quarrying activities on the relevant lands for many years prior to 2008 and took no steps to institute proceedings. In particular, the respondent relies upon a complaint made to the local authority as early as the 9th March, 2007, regarding its quarrying activities, and submits that in allowing almost a further year to pass before the commencement of their proceedings they caused the respondent to expend approximately €350,000 in developing the site

145. I have considered the authorities relied upon by the respondent in support of this argument, and having done so I do not accept that the legal position is as asserted by the respondent, insofar as reliance is placed upon the decision of Finlay P. in *Dublin Corporation v. Mulligan* (Unreported, High Court, Finlay P., 6th May, 1980) wherein he stated that:-

> "[T]he length of time between the commencement of an unauthorised use or the making of an unlawful development and the time when the application is made to the Court under Section 27 must always remain one of, but not the only material factor in regard to the exercise by the Court of its discretion as to whether or not to make an order under Section 27.

If the applicant to the Court could be said to be guilty of laches and delay quite clearly as in any other proceedings seeking an injunction he might and should be disentitled to relief."

146. At the time of the decision in *Dublin Corporation v. Mulligan* (Unreported, High Court, Finlay P., 6th May, 1980) there was no statutory time limit on an application for an injunction. A statutory time limit was first introduced in 1992, and this fact casts doubt about the relevance of all earlier decisions in relation to delay. Indeed, whether delay is a factor at all having regard to the existence of the statutory time limit was called into question by McKechnie J. in *Leen v. Aer Rianta c.p.t.* [2003] 4 I.R.394. Nonetheless, there are a number of decisions of the High Court where the issue of delay has been considered to be a factor for the court when considering its discretion and I do believe that, notwithstanding the statutory time limited provided for in s. 160(6)(a)(i), in certain circumstances delay or laches on the part of the applicants could preclude them from the relief which they are otherwise entitled to.

147. However, having regard to the presence of a statutory time limit, I am not satisfied that any delay on the part of the applicants, unless either culpable or unreasonable to the point that it might be considered to amount to acquiescence, should be a factor to be considered by the court when dealing with its discretion, and on the facts in this case I do not consider that there has been any delay which can be so described.

148. I accept the evidence of the applicants that, even though the intention of the local authority to register the quarry subject to conditions was notified in the Meath Chronicle in October, 2005, this fact did not come to their attention at that time. Having considered the applicant's evidence as to what happened over the 12 month period prior to the institution of these proceedings, and in particular what I consider to have been the highly reliable evidence of Mr. Pearson, I am satisfied that the applicants moved in a focused and purposeful manner as soon as the activities of the respondent came to their attention in March, 2007.

149. This is not a case where these applicants sat idly by acquiescing in the activities of the respondent. They were at all times diligently and actively pursuing a resolution of their complaint. They needed to call a residents meeting and form a committee. They faced difficulties in obtaining the documentation they required and were told by the County Council that they would need to make a freedom of information request, which they did and for which purpose they retained a solicitor. The applicants took up their concerns with local representatives in the hope that matters might be resolved at local level and were advised by one such representative to try anything but to avoid going to court at all costs. Their T.D. advised them to make representations to the Road Safety Authority and the Health and Safety Authority, which they duly did.

150. I do not accept that the applicants should be criticised for any delay brought about by their efforts to exhaust the further possibility that their grievance could be resolved with assistance from An Taisce, the North Eastern Health Board and the Environmental Protection Agency, in addition to those other bodies already mentioned. I believe that Mr. Pierson's approaches to the planning section of Meath County Council, to the area engineer, to An Bord Pleanála, to the county manager, to the Department of Heritage and Local Government, and to a number of ministers prior to instituting the within proceedings cannot be faulted. It was only when making little progress and having exhausted these avenues that the committee decided to take legal advice from solicitors and counsel. Further, I accept that, prior to launching expensive High Court proceedings, it was appropriate and reasonable for the applicants to engage with the planning authority in the hope that they as the statutory body established to regulate potential unauthorised development would take the appropriate steps, thus making it unnecessary for them as members of the public to take such drastic action.

(v) Attitude of the planning authority
151. It is submitted that where proceedings are taken pursuant to s. 160 by a private citizen as opposed to a planning authority that the court, in exercising its discretion, should attach considerable weight to the attitude of the planning authority to the development in question.

152. I agree that as a matter of principle in most cases the legal position as advanced by the respondent is correct. However, I reject the submission in the present case in circumstances where the planning authority, pursuant to s. 261 of the Act, had registered the respondent's quarry subject to conditions and had decided not to require an application for planning permission on the basis that the quarry had commenced its operations prior to the 1st October, 1964.

153. Having accepted the truth of the representation made as to the date of the commencement of quarrying activities on the site, and having registered the quarry on that basis, it is not surprising that the planning authority did not take up the reins on behalf of the local residents who sought to maintain that the use of the quarry did not predate 1964.

154. I reject the argument that I should attach weight to the fact that the planning authority failed to follow up the warning letter dated the 13th April, 2005, directed to Mr. McGuinness relating to the carrying on of an unauthorised development, namely, quarrying on his lands. Given that all activity stopped on the site following the service of the warning letter, there was no need for any further intervention on the part of the local authority. The next activity that took place on the lands occurred in February and March, 2007, at which stage the quarry had been registered subject to conditions.

155. I have considered the approach of the local authority to the respondent's activities over all of the relevant period and I simply cannot accept the final submission made by the respondent on this issue, which is that because the planning authority did not write a warning letter to the respondent consequent upon Mr. Pierson's letter of complaint of the 9th March, 2007, I should infer that the applicants' complaints were viewed as trivial. The applicants were complaining that the quarry was unauthorised. The local authority had taken the contrary view when it registered the quarry on the basis of Mr. McGuinness' representation that it had commenced prior to the 1st October, 1964. The local authority was hardly likely to then start investigating the representations made by Mr. McGuinness regarding the use of the lands prior to the 1st October, 1964, particularly in circumstances where Meath County Council was responsible for the control of some seventy quarries with only one member of personnel available for that purpose. Hence, the absence of any warning letter following the commencement by the respondent of its quarrying activities in March, 2007 is irrelevant.

Miscellaneous

156. I have been urged by the applicants to take a number of matters into account for the purposes of considering the respondent's submission that I should not exercise my discretion in their favour. I will deal with the more significant events relied upon by the applicants, in turn.

157. The applicants maintain that the conduct of the respondent should be taken into account and they maintain that the evidence has established that, when Mr. Keegan visited Mr. Pierson's home in early 2007, he engaged in what may be described as somewhat strong-armed tactics. Mr. Pierson maintained that Mr. Keegan told him that it was his intention to quarry "all the way down the hill" on the respondent's lands, far beyond the northern boundary permitted under the planning permission, and that he further told him that it was his intention to continue quarrying for thirty years, rather than for the ten-year period provided for in the planning permission.

158. I accept Mr. Pierson's account of the argument which he alleges took place with Mr. Keegan, and I believe that his account is consistent with the submission made on the respondent's behalf by Mr. John Shiels in seeking to appeal the conditions attached at the time of the registration of the quarry. However, I get the impression that, whilst this may have been an unpleasant conversation from Mr. Pierson's perspective, Mr. Keegan's approach did not have the effect of curtailing Mr. Pierson's actions. Accordingly, I have entirely discounted this event for the purpose of dealing with my discretion.

159. The applicants have submitted that Mr. Keegan sought to mislead the court in his evidence regarding his understanding as to the boundary fixed by the local authority at the time the quarry was registered. Likewise, it has been submitted by the applicants that the respondent has quarried beyond the limit of the permitted boundary.

160. I am satisfied on the evidence that the applicants have established that Mr. Keegan well knew the northern perimeter of the boundary, which is to be gauged by drawing a line across the word "Hilltown" through the top of the letter "I" where it appears on the map attached to the application to register the quarry. In reaching this conclusion, I am satisfied that Mr. Keegan was advised, as a result of an inspection which took place at the quarry on the 13th August, 2007, that he had reached the limit of permitted boundary. I accept Mr. Griffin's evidence that, on the 25th September, 2007, at a meeting at his office, he explained to Mr. Keegan and to his colleague, Mr. Perkins, from whom the court heard no evidence, that he was not permitted to quarry beyond the letter "I" on the map and that to demonstrate this fact to Mr. Keegan, he drew a line across the top of the word "Hilltown" on the same map to demonstrate the northern boundary permitted under condition No. 2 of the registration conditions.

161. I am also satisfied that the map scheduled to the warning letter sent to Mr. Keegan on the same date shows a line drawn across a number of the letters in the word "Hilltown", confirming what was explained to Mr. Keegan at his meeting with Mr. Griffin on the 25th September.

162. I found Mr. Keegan's evidence as to his understanding of the northern perimeter of his quarry to be self-serving. I reject his evidence to the effect that he believed that the northern boundary was to be found by drawing a line through the letter "I" in the word "Hilltown", but keeping that line parallel with the southern boundary of the site. There is simply no logic to this interpretation. Further, no expert was produced to the court to support this interpretation. Neither did Mr. Keegan produce evidence from Mr. Perkins to support his alleged *bona fide* understanding as to the northern perimeter of the property following his meeting with Mr. Griffin, nor did Mr. Keegan take any expert planning advice from Mr. Burke or anybody else as to how condition No. 2 was to be interpreted.

163. I also accept the evidence of Mr. Prenter that the respondent has now excavated somewhat beyond the northern boundary of the quarry site and I am satisfied that his opinion is sustained by the most recent photographs of the quarry.

164. Notwithstanding the court's findings on these issues, I am satisfied that the breach by the respondent of condition No. 2 was canvassed for the first time in the course of Mr. Prenter's evidence. In these circumstances, the breach by the respondent of condition No. 2 does not appear to have been a factor which influenced the applicant's decision to institute these proceedings. Accordingly, in exercising my discretion, I have not taken into account my findings as to Mr. Keegan's knowledge as to the true boundary fixed by the local authority in respect of the quarry nor my finding that such boundary has been breached by the respondent.

165. For all of the aforementioned reasons, I will exercise my discretion in favour of the applicants who are entitled to an order pursuant to s. 160 of the Planning and Development Act 2000, as amended, restraining the respondent, by itself, its servants or agents or otherwise from using its lands at Hilltown, Bellewstown, Drogheda, Co. Meath as a quarry.

166. I will hear the parties as to any consequential orders as may be sought or required.