Neutral Citation Number: [2008] IEHC 355

**THE HIGH COURT**

**2008 3216 P**

**BETWEEN**

**THE COUNTY COUNCIL OF THE COUNTY OF MEATH**

**APPLICANT**

**AND**
**PATRICK SHIELS**

**RESPONDENT**

**Judgment of Mr. Justice Hedigan, delivered on the 13th day of November, 2008**

1. This case relates to the use of a quarry owned and operated by the respondent. The applicant contends that there has been unauthorised development on the respondent's lands within the meaning of the Planning and Development Act 2000. The applicant is therefore seeking orders under section 160 of the Act of 2000 to the following effect:

(a) Restraining the respondent from carrying out and continuing with the unauthorised development of the lands, and

(b) Prohibiting the respondent from carrying out any intensification of quarrying activities, and

(c) Directing the removal from the lands of any machinery, equipment or materials used in connection with the unauthorised development.

**Background**

2. A number of affidavits have been sworn and filed on behalf of the parties and oral evidence was given at the hearing of the matter. As they appear from the affidavits and the oral hearing, the facts are as follows. The stone quarry in question, which is located in Slane, Co. Meath, commenced operation in the late 19th century. It was owned and operated by a local family, the Keoghs, from the 1930s until 2004. The respondent acquired the quarry from Pascal Keogh in 2004 for the sum of €1 million. The applicant says that the quarry was used on an occasional basis only until 2004, generating from 0-20 loads per day or from 0-100 loads per week. The respondent accepts that the operation of the quarry was small until he acquired it in 2004 and that there were no emissions as a result.

**Use of the Land: 2004-2005**

3. On 14th December, 2004, the respondent applied for registration of the quarry in compliance with section 261 of the Planning and Development Act 2000. The applicant advertised notice of the registration on 8th June, 2005, but there is a factual dispute as to the details registered. The dispute is material and I will return to it.

4. In June, 2005, Con Kehely, a Senior Executive Engineer assigned to the applicant's Planning and Enforcement Division, visited the site on behalf of the applicant. He reported that it was a small scale operation, the quarry floor was not deep, there was no-one and no plant on site, no excavation taking place, and no pumping, screening or drilling equipment on site. There was some evidence of recent activity but no evidence of significant or intensive quarrying operations taking place.

5. The respondent contests the accuracy of those observations. He has invested €1.5 million in plant and equipment since 2004, and has submitted documentation that he says shows the presence on site of the plant and equipment as well as crushing equipment. He also says that the quarry has been very active in the past decade owing to the increased demand that resulted from the construction boom.

**Use of the Land: 2006-2007**

6. As and from February, 2006, numerous complaints were made to the applicant by local residents - including Robert Newman, Finbar Wall, Peter Mooney and Eoin Mahon - about the operation of the quarry. The complaints related to the intensity of quarrying operations, long hours, dust, noise and explosions. In May, 2006, an inspection was carried out on behalf of the applicant by Angela Brereton, an Executive Planner assigned to the applicant's Planning Office, who noted a number of machines in operation, a portacabin on site, and a number of trucks, tractors and trailers accessing and leaving the site. She concluded that there had been an intensification of the scale of quarrying operations and, as a result, a Warning Letter was sent to the respondent in June, 2006 pursuant to section 152 of the Act of 2000. The respondent was, therefore, from this date, on notice of the applicant's views.

7. During a further inspection in June, 2006, Angela Brereton, accompanied by Con Kehely, informed the respondent that she was of the opinion that the quarrying activities that were being carried out amounted to intensification and required planning permission. The respondent undertook to engage a Planning Consultant and to provide information about the past operation of the quarry. The applicant served an Enforcement Notice on the respondent in August, 2006, pursuant to section 154 of the Act of 2000, calling on him to cease the unauthorised development that was taking place and revert to the scale of operations as detailed in the Registration forms submitted in compliance with section 261. The respondent replied, stating that operations would continue as per the details specified in the Registration forms submitted. The dispute as to the details registered becomes relevant in this context.

8. Further inspections were carried out in August, 2006 by Angela Brereton and John Sweeney, who is a Senior Executive Planner assigned to the applicant's Planning Office, and it was found that over a three-day period, 57, 66 and 56 loads of stone were taken from the quarry. In September, 2006, Jimmy Young, a Senior Staff Officer in the applicant's Planning Department, notified the respondent on behalf of the applicant that continued non-compliance with the Enforcement Notice would result in legal proceedings being instituted. On 9th October, 2006, the County Manager signed an Order authorising the commencement of proceedings. In November, 2006, the applicant's solicitors wrote to the respondent requiring him to revert to the scale, nature and level of operations detailed in the Registration forms submitted in December, 2004, and again advising him that failure to do so would result in legal proceedings being issued.

9. In February, 2007, the applicant's representatives obtained copies of blast records and a log book of deliveries in respect of the respondent's quarry. This was possible only after a warrant was granted under section 253 of the Act of 2000 by a District Court judge; the respondent had refused to produce the documentation in January, 2007, despite repeated requests – both written and oral – on behalf of the applicant. The documents that were obtained pursuant to the warrant show that an average of 221 loads per week (approximately 105,000 tonnes of material in total) were excavated and transported from the quarry as a result of blasting during the period of 1st January, 2006 to 3rd February, 2007.

10. The within proceedings were commenced on 20th March, 2007. An interim injunction was in place from 29th March, 2007 to 24th

July, 2007, limiting the operating hours of the quarry and the number of loads per day. Since the interim injunction was discharged in July, 2007, the quarry has been operating at its previous level, i.e. approximately 60 loads per day.

**The Registration Forms**
11. As has already been noted, the respondent applied to the applicant in 2004 for registration of his quarry, in compliance with section 261 of the Act of 2000. Two versions of the second page of the respondent's Registration Form have been submitted to the Court. The applicant's version of the Form states that the total site area of the quarry is 3.46 hectares. As to emissions, it states "None – operation is small and confined." In relation to traffic, it says:-

> "Current demand is variable depending on the requirements of P Shiels ranging from 0 to 20 loads per day or 0 to 100 loads per week. In this regard, we could estimate that traffic varies from 0 movements per day to 40 movements depending on the demand of P Shiels Plant Hire Ltd."

12. The respondent's version of the Form states that the total site area is 4.46 hectares. As to emissions, it contains two entries, one identical to the applicant's version and the second containing the additional words "note occasional blasting takes places, this dependent on the hardness of the rock." As for traffic, it states:-

> "Current demand is variable depending on the requirements of P Shiels ranging from 0 to 200 loads per day or 0 to 1400 loads per week. In this regard, we could estimate that traffic varies from 0 movements per day to 400 movements depending on the demand of P Shiels Plant Hire Ltd. and clients."

13. Thus, the details on the respondent's version of the Form indicate a significantly higher output from the quarry, an increase in the area of the quarry, increased emissions, and the use of blasting as a method of production. The respondent says that the applicant's version of the Form is an early, draft version which was submitted to the applicant in error by his sister, Siobhán Shiels, in his absence. Ms Shiels has sworn an affidavit in support of this contention. The respondent says that he noticed the error upon his return and submitted the correct Form – the version that he has provided to the Court – to the applicant. He contends that the details contained in his version are the details that were registered by the applicant. He submits that he would never have sought to register an output of 0-20 loads per day as it would not have been commercially viable to do so, and his accountant, Susan O'Reilly, has sworn an affidavit to the same effect.

14. The applicant alleges that the respondent's version of the Form is forged and was changed to reflect an increase in quarry's output. It is said that the applicant's version of the Form was reviewed at a public meeting on 10th August, 2006 but that the second page thereof then went missing from the file. It is said that numerous visitors examined the Form in the applicant's Planning Department in the interim, but no log of visitors was kept. The applicant obtained a duplicate copy of the missing page and it is that copy that is exhibited. Affidavits have been filed by the nine staff members who could have received a correction to the original application Form; no member of staff recalls receiving such a correction nor is any record available thereof.

15. The first and second pages of the respondent's version of the Form are both stamped "received" but the third page is not. Only the first page of the applicant's version is stamped. An analysis of 74 other equivalent application Forms carried out on behalf of the applicant reveals that all were stamped on one page only and not one was stamped on the second page. The applicant commissioned Brian Craythorne, a forensic scientist, to analyse the stamp on the second page of the respondent's version of the Form. The report compiled by Mr. Craythorne concludes that there is "conclusive evidence" that the stamp on the respondent's version was taken from a copy of the stamp on the first page of the applicant's version and placed on the respondent's version of the Form. Mr Craythorne suggests that this was carried out "most likely by means of composite photocopy process."

16. Furthermore, documentary evidence in the form of an email dated 24th August, 2006 from Robert Newman, a local resident who inspected the Form at the applicant's Planning Department and wrote to the applicant raising certain questions as to the contents thereof, shows that after inspecting the Form that was on file, Mr. Newman was of the opinion that the respondent was seeking to register for traffic of 0-20 loads per day.

17. On behalf of the respondent, Gwynne Thomas, an expert in the field of quarrying and blasting, states that in December, 2006, she attended the offices of the Planning Department with the respondent and inspected the file in respect of the quarry registration. She states that the Quarry Registration Form referred to the production of 200 loads per day and 1400 loads per week.

**The Applicant's Submissions**
18. The applicant contends that there has been a material change in the use of the land since 1st October, 1964 such that "development" has occurred within the meaning of the Planning and Development Act 2000. It is said that the development is "unauthorised" within the meaning of section 160 of the Act of 2000, and that the Court therefore has jurisdiction to grant the reliefs sought by the applicant.

19. The applicant contends that since February, 2006, there has been a significant intensification of quarrying activities on the respondent's lands. It is pointed out that the inspections carried out and the documentation obtained reveal a doubling of the amounts of material extracted and transported from 0-100 loads per week to approximately 221 loads per week; major changes in the production method, including the use of blasting; and an increased scale of operation. The applicant has produced Ordnance Survey maps and photographs which demonstrate that an increased area is now being used beyond the original area of extraction. The applicant contends that this intensification has led to an increase in the levels of noise, dust and traffic in the area and that the impact of the quarry has, consequently, increased to a very significant extent. Affidavits have been sworn by several local residents in this respect, certain of which state that structural damage has been caused by the blasting operations.

20. The applicant accepts that not all of the development of the site is unauthorised: it is accepted that the use of the site to extract 20 loads of stone per day would not be unauthorised but it is contended that the use of the land to extract any more than 20 loads a day is unauthorised.

**The Respondent's Submissions**
21. The respondent contends that the increase in the number of loads that are transported from the quarry per day from 20 to 60 does not constitute a change in the use of the land; rather, it is submitted that the quarrying activities that are currently ongoing at the site are merely a natural and logical continuation of the use of the land since 1st October, 1964 (which is known as "the operative date" in planning terms). The same is said of the use of modern extraction methods (e.g. blasting). The respondent says that the plant and equipment associated with blasting has been on the site for over 30 years. It is also said that the site has been used as a stone quarry for 100 years and that its current use is identical to its historical use. The respondent also submits that the within proceedings are part of an ongoing campaign against the respondent by a small group of neighbouring homeowners.

22. On behalf of the respondent, Gordon Bennett, a local haulier, states that he drew stone from the quarry from 1985 to 2004 and delivered it to and on behalf of local people, and that his father was a Plant Hire operator working out of the same quarry from the 1950s. He also states that it is a matter of local knowledge that blasting occurred at the quarry before the respondent took over.

23. The respondent's predecessor in title, Pascal Keogh, says that there is a long history of quarrying in the area, that production began at the quarry before 1900, that the intensity of production was intermittent and dependent on local demand, that blasting took place in the 1950s, and that there was very intense output during the 1970s when the N2 was under construction.

24. The respondent commissioned surveys with respect to dust and noise emissions, the result of which indicate - he says - that the emissions from his quarry are not excessive. He has submitted a report on blasting which states that the emissions from his blasting operation are significantly lower than the structural damage threshold. William Cashman, the engineer who compiled the report, says that he believes that it is not possible that the blasting conducted on the respondent's site gave rise to any structural damage to buildings in the vicinity.

25. Furthermore, an affidavit has been sworn by Frank Burke, a civil engineer who carried out an inspection of damage to a roadside boundary wall that was alleged to have resulted from blasting carried out on the respondent's site. Mr Burke concludes that the crack in the wall had been in existence for some time and was not a result of the blasting but, rather, a combination of its location beside a drain and the raising of the road to the level of the N2.

**The Relevant Law**
26. The Court has jurisdiction to grant orders under section 160 of the Planning and Development Act 2000 only where it is satisfied that "unauthorised development" has occurred within the meaning of that Act. It is necessary, therefore to examine the relevant law in that respect. It must first be asked if a "development" has occurred within the meaning of section 3 of the Act of 2000, which defines "development" as "the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land."

27. In the present case, attention has been focussed on the question of whether or not there has been a material change in the "use" of the land, as opposed to whether "works" are being carried out. In *Roadstone Provinces Ltd v An Bord Pleanála* [2008] IEHC 210, Finlay Geoghegan J. stated that the following two questions must be addressed, in the following sequence, when assessing whether or not there has been a material change in the use of the land:

> a. Has there been a change in the use of the land?
>
> b. If yes, was that change "material" for planning purposes?

28. If these questions are answered affirmatively, it will be clear that "development" has occurred. It must then be asked whether or not the development in question is "unauthorised" within the meaning of the Act of 2000, section 2(1) of which defines an "unauthorised development" as:-

> "In relation to land, the carrying out of any unauthorised works (including the construction, erection, or making of any unauthorised structure) or the making of any unauthorised use."

29. The terms "unauthorised structure", "unauthorised use" and "unauthorised works" are further defined in section 2(1). In essence, a *structure* is unauthorised unless it was in existence on 1st October, 1964 or has been the subject of a permission for development. The use of land is unauthorised where it commenced on or after 1st October, 1964, and relates to a development other than an exempted development or a development which is the subject of a permission. *Works* that were commenced on or after 1st October, 1964 are unauthorised unless the development is an exempted development or a development which is the subject of a permission. The common thread is, therefore, whether the "development" commenced before the operative date, is an exempted development, and/or has been the subject of planning permission.

**The Court's Assessment**
30. It is common case that the quarry began operation before the operative date and is, therefore, what is commonly known as a pre-1964 quarry. Therefore, the questions that fall for consideration by the Court are as follows:-

> (i) Has there been a change in the use of the land since the operative date?
>
> (ii) If yes, is that change material?
>
> (iii) If yes, is the development "unauthorised"?
>
> (iv) If yes, should the Court exercise its discretion under section 160?

31. Before turning to those matters, there are two preliminary issues that must be addressed, relating to the application of section 160(7) of the Act of 2000 and the contents of the County Manager's Order authorising the within proceedings.

**The application of section 160(7)**
32. The respondent has submitted that if "development" has occured, which he denies, such development was commenced more than seven years prior to the commencement of these proceedings and the applicant is, therefore, statute-barred in accordance with section 160(7) of the Planning and Development Act 2000. I am not convinced by this argument. The complaints that have been made in respect of the respondent's quarrying activities commenced in early 2006. There is no suggestion on the part of the applicant that any intensification occurred prior to that date. The within proceedings were commenced on 20th March, 2007. Thus, even if one is to assess development from the date on which the respondent purchased the quarry in 2004, section 160(7) is of no application.

**The Manager's Order**
33. The respondent has criticised the contents of the Order signed by the County Manager on 9th October, 2006, authorising the commencement of the within proceedings. It is contended that the Order fails to make any reference to any material change of use, and that it is silent on the nature or type of proceedings to be brought. It is said that the Order does not consequently authorise the institution of these proceedings and that the applicant is therefore acting *ultra vires* and pursuant to an unlawful delegation of power.

34. The applicant submits that as it is well established that it is a matter for the Court to determine whether or not a material change of use has taken place, it is immaterial whether or not the planning authority expressed a view on the matter. It is also pointed out

that under section 151(1) of the Local Government Act 2001, there is no stipulation that the County Manager must carry out his or her executive functions in any manner other than "by a written order signed and dated by him or her".

35. I am persuaded by the applicant's argument in this regard; it is my view that the County Manager acted without error and that the applicant was, therefore, properly authorised to commence the within proceedings.

**(1) Has there been a change in the use of the land?**
36. In *Roadstone Provinces Ltd v An Bord Pleanála* [2008] IEHC 210, Finlay Geoghegan J. considered whether or not the planned expansion of a quarry constituted a "change" from the use of the quarry prior to 1st October, 1964. In that context, she held as follows (at para. 34):-

> "[T]his is a question of fact which must be determined independently of planning considerations. Planning considerations only arise if a change in use is identified and it becomes necessary to consider and determine the materiality for planning purposes of such identified change in use."

37. The Court must therefore decide, as a matter of fact, whether or not there has been a change in the use of land, without reference to planning matters. In this regard, I would note the following: it seems to be common case that up to 2004, when the quarry was taken over by the respondent, 0-20 loads were transported from the quarry each day. In June, 2005, the quarry was found to be a small operation by an engineer who visited the site on behalf of the applicant. In the applicant's copy of the respondent's original quarry Registration form, which was submitted on 14th December, 2004 in compliance with section 261 of the Act of 2000, it was stated that the operation was "small and confined"; no mention was made of the use of blasting and it was noted that there were no emissions. The Form produced subsequently by the respondent suggests that 0 to 200 loads were being transported from the quarry per day and that occasional blasting takes places, and it set out a site area that was greater by a hectare than that set out in the original form.

38. I have the gravest concern in relation to the evidence given by the respondent. It seems to me that there exist grounds to suspect that a serious, determined, carefully planned and carefully executed effort was made to subvert the planning process by altering or forging an official form subsequent to its original submission, in a manner highly advantageous to the respondent. In the circumstances, I will refer the papers in this matter to the Director of Public Prosecutions with a view to his consideration of criminal proceedings.

39. For the purposes of this judgment and weighing the evidence on the balance of probabilities, I reject the evidence of the respondent in relation to the Registration Form, and hold that the Form relied upon herein by the applicant is the correct Form that was submitted.

40. Complaints were made as and from February, 2006 as to an increase in noise, dust and emissions. It is common case that an average of 60 loads per day has since been transported from the quarry and that blasting is now used on a regular basis. Apart from evidence of the respondent and his predecessor in title, to which I accord little weight, there is no objective evidence that blasting was used prior to 2006. Moreover, a comparison of aerial photographs taken from 1973 to 2003 with that taken in May, 2007 indicates that between the period of 2003-2007, the topography of the quarry has been altered in a significant manner, hedges and boundaries have been displaced, and large areas of rock have been removed. Indeed, the earlier photographs suggest that there was little or no quarrying being carried out on the site at the time.

41. In sum, since 2006 there has been a threefold increase in output, a significant change in the production methods used, an increase in dust, noise and emissions, and an increase in the area of the quarrying operations. In my view, this is a classic case of intensification which, as is well established, can amount to a change in the use of land as a matter of law.

42. In *Waterford County Council v John A Wood* [1999] 1 IR 556, it was held by the Supreme Court that the quarrying activities that were at issue were not a continuation of the original quarrying operations that had commenced before the operative date. Rather, they constituted "a distinct operation or at the very least a different phase" from the pre-1964 activities. Although the Supreme Court was not specifically assessing whether or not there had been a change in the use of land, the considerations addressed therein remain useful when determining that question, as was pointed out by Finlay Geoghegan J. in *Roadstone Provinces Ltd v An Bord Pleanála* [2008] IEHC 210. In the circumstances, it is instructive that the quarrying activities carried out in the present case since 2006 at the respondent's quarry fall squarely within the same description as the "works" that were at issue in the case that was being considered by the Supreme Court: the commercial venture that is currently being carried out at the quarry is operating in an entirely distinct or new phase to that which was carried out on the site prior to 1964 and, indeed, even prior to 2004. In the circumstances, I am satisfied that there has been a change in the use of land.

**(2) Was the change of use "material"?**
43. It is now well established that the materiality of a change in the use of land is to be considered in accordance with current planning considerations for the relevant area (*Monaghan County Council v Brogan* [1987] IR 333; *Roadstone Provinces Ltd v An Bord Pleanála* [2008] IEHC 210). In the case of a pre-1964 quarry, materiality must also be assessed by reference to the following test set out by Barron J. *in Galway County Council v Lackagh Rock Ltd* [1985] IR 120:-

> "To test whether or not the uses are materially different, it seems to me, that what should be looked at are the matters which the planning authority would take into account in the event of a planning application being made either for the use on the appointed day or for the present use."

44. As was explained by Finlay Geoghegan J. in *Roadstone Provinces Ltd v An Bord Pleanála* [2008] IEHC 210, this requires a consideration and comparison of the planning considerations raised by the pre-1964 use and the identified change in use. Put otherwise, both the pre-1964 use and change in use must be considered in the context of the altered planning and development considerations of the relevant area.

45. I am of the view that the change of use that has quite clearly occurred on the respondent's quarry is material in the context of the current planning and development of the area. Prior to 1964 and, indeed, as I have noted, up until 2004, there were no complaints made in respect of dust, noise, vibrations or emissions emanating from the quarry; quarrying activities had not impacted on the topography or tree cover in the area; it did not generate the volume of traffic that it now does nor did it contribute to congestion; blasting did not take place regularly (if at all); and the hours and days during which the quarry was operated did not affect the local residents as they do now. It is beyond doubt that the impact of the quarry on the environment, landscape, natural heritage and appearance of the surrounding areas now raises different planning considerations to those which may have been considered on or before 1964.

46. In my view, it is of no significance that the dust and noise that now emanate from the quarry are not excessive, or that the emissions from his blasting operation are significantly lower than the structural damage threshold. What is significant is that emissions are now emanating from the quarry and blasting is being carried out, whereas there were no such emissions prior to 2004 and there is no objective evidence that blasting was carried out prior to that date with any frequency, if at all.

47. This case may be distinguished from the cases of *Galway County Council v Lackagh Rock Ltd* [1985] IR 120 and *Dublin County Council v Carty Builders & Co. Ltd* [1987] IR 355, on which the respondent seeks to rely. This was not a case where there was a natural and gradual continuation of the use of the land; rather, the intensification occurred with marked acceleration over a mere two-year period, after at least 50 years of minimal activities being carried out on the land. The intensification could not be said to be have been reasonably contemplated or anticipated as the continuation of the operation being carried out prior to the appointed day or even prior to 2004. A further distinction that may be drawn is that in the *Lackagh Roc*k case, Barron J. noted that no complaints had been made in respect of the quarry; the opposite is true in the present case. While the absence of evidence that a particular use is affecting persons in the neighbourhood of the alleged development is not – as noted by Keane J. in *Monaghan County Council v Brogan* [1987] IR 333 – a crucial factor, such evidence is a factor to be taken into account.

48. In *Butler v Dublin Corporation* [1999] 1 IR 565, Keane J. (as he then was) made the following analogy, which is particularly illustrative in the present case:-

> "One man digging up stones in a field and carrying them away in a wheelbarrow for a few hours each week may be succeeded by a fleet of bulldozers, J.C.B.s and lorries extracting and carrying away huge volumes of rocks from the same site. The use in both instances may properly be described as quarrying, but that its intensification to particular degree may constitute a material change in the original use is, I think, … consistent with the underlying policy … of ensuring that significant changes in the physical characteristics of the environment are subject to planning control."

49. In the light of the foregoing, I am satisfied that the change in the use of the respondent's land is "material", such that "development" has occurred within the meaning of the Planning and Development Act 2000.

**(3) Is the development "unauthorised"?**
50. It is common ground that the quarrying activities that are the subject of the present proceedings do not constitute an 'exempted development' within the meaning of the Act of 2000, and that no permission has been procured for those activities. Moreover, as I have reached the conclusion that the use of the land has changed in a material fashion from the use thereof before the operative date, it cannot be said that current use of the quarry is a pre-1964 development. In *Westmeath County Council v Quirke & Sons* (unreported, High Court, Budd J., 23rd May, 1996), Budd J. held that:-

> "If the present day development differs materially from the development being carried out prior to the 1st of October, 1964, I do not think that it can be said that it was commenced prior to the appointed day."

51. The development is, therefore, unauthorised. In the circumstances, it is clear that the Court has jurisdiction under section 160 of the Act of 2000. Such orders will not be granted lightly, however, and it must therefore be considered whether or not the Court should exercise its discretion to grant the relief sought.

**(4) Should the Court exercise its discretion?**
52. Henchy J., giving the judgment of the Supreme Court in *Morris v Garvey* [1983] IR 319, offered guidance as to how the High Court might exercise its discretion under section 27 of the Local Government (Planning and Development) Act 1976, which is the predecessor to section 160 of the Act of 2000. At p.324, he stated:-

> "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."

53. Further guidance may be derived from the decision in *Leen v Aer Rianta CPT* [2003] 4 IR 394. In that case, McKechnie J., at pp.410-411, set out the following matters which are to be given particular attention by the High Court when assessing whether or not to exercise its discretion under section 160 of the Act of 2000:-

> "(a) the conduct, position and personal circumstances of the applicant;
>
> (b) the question of delay and acquiescence;
>
> (c) the conduct, position and personal circumstances of the respondent;
>
> (d) the public interest."

54. As was the case in *Leen*, the concept of acquiescence has no importance in this case, with the issue of delay or laches likewise being irrelevant. Further, the conduct of the applicant might be compared to that of the respondent in *Leen*, which "acted at all times in a *bona fide* manner, in that it was actively seeking a solution to the effluent disposal problem".

**The conduct of the respondent**
55. The evidence that is before the Court indicates that the respondent has fabricated evidence on at least one occasion in the course of the present proceedings, in respect of the second page of the Registration form. It is possible that he has also fabricated a letter bearing a Union Jack logo that he submitted to the Court which he says was sent to him by the Knockmooney residents' association. He says this was used to insult his political sensitivities. Robert Newman, Eoin Mahon and Peter Mooney, who are all members of the said residents' association, state that the Union Jack was not used on the letterhead of that association, and I accept their evidence.

56. Of further note is the respondent's refusal in January, 2007 to provide documents to the applicant that were properly sought and which the applicant was entitled to inspect. The respondent acted in such a way as to waste the time of those acting on behalf of the applicant, to force them to seek a warrant from a District Court judge, and to oblige them to engage the services of local Gardaí to carry out the search permitted by the warrant. Moreover, as and from June, 2006, the respondent was on notice of the applicant's views as to the intensification on the site and the complaints of local residents in that regard, and he thereafter acted in what I consider to have been a deliberate and conscious disregard of the applicant's *bona fide* attempts to ensure compliance with planning laws. Such conduct should be taken into account with respect to the exercise of the Court's discretion. In the words of McKechnie J.

in Leen, "[r]espect cannot be insisted upon from some and yet not demanded from others; otherwise, disrepute will follow and the entire [planning] regime will suffer."

**The position and personal circumstances of the respondent**
57. It is submitted on behalf of the respondent that his business would be unsustainable if he were confined to 20 loads per day, as is sought by the applicant. He submits that to grant the reliefs sought would result in disproportionate hardship to him and he therefore urges the Court not to exercise its discretion.

58. I am guided in this regard by the decision of the Supreme Court in *Morris v Garvey* [1983] IR 319. That case concerned the jurisdiction of the High Court to grant an order under section 27 of Local Government (Planning and Development Act 1976, the predecessor to section 160 of the Act of 2000, directing the respondent to demolish the partly-built gable and front wall of his building, which had been found to be in breach of conditions attached to his planning permission. Henchy J. acknowledged that the demolition expenses would be substantial but noted that such expenses were "foreseeable and avoidable" and that "the justice of the case requires that they should fall on the respondent." This was because the respondent, having received due notice of his unpermitted building operations, carried on with them despite the threat of legal proceedings. The actions of the respondent in the present case may be compared to those of the respondent in *Morris*.

**The public interest**
59. In *Leen v Aer Rianta CPT* [2003] 4 IR 394, McKechnie J. held (at p.411) that to be included in the consideration of the public interest were the following:-

> "(i) as part of that interest, the business, commercial and tourist activities conducted at the airport and in the wider general area and
>
> (ii) as members of the public, those who derive any employment benefit, either directly or indirectly, from the airport's overall operation as well as persons in the wider community and those who avail of or utilise the respondent's facilities."

60. Thus, the public interest includes those who are directly or indirectly dependent on employment from the development. Consideration must be given, therefore, to the respondent's submission that he employs 50 people locally, and that the quarry provides stone to major infrastructural projects such as the M3 construction works, which now accounts for a very significant portion of the respondent's business. It is noteworthy, in this context, that the reliefs sought in the present case cannot be compared to those sought in *Leen*. In that case, the applicant sought an order prohibiting the use by the respondent of an extension to the main terminal at Shannon airport, pending compliance with the conditions of planning permission. The grant of such an order would, in effect, have been tantamount to a closure of the airport itself. In the present case, the applicant is seeking merely for the site to be operated in the manner set out in the applicant's version of the Registration form, in particular a restriction to 20 loads per day. This would not mean that the site would shut down or that all of the respondent's employees would lose their jobs; it would simply mean that the scale of the quarrying operations would be reduced to its pre-2004 level. The grant of the reliefs sought would not, therefore, have a "devastating" or "destructive" effect in the terms set out in *Leen*.

61. The Court has a wide discretion under section 160 and I am mindful that the Court must play a role so as to uphold and enforce the planning code. In the light of the foregoing and, in particular, the *mala fides* of the respondent, I am satisfied that the Court should exercise it discretion under section 160 to grant the reliefs sought.

**Conclusion**
62. I am satisfied that there has been unauthorised development within the meaning of the Planning and Development Act 2000 and I am of the view that this is a case where the Court should exercise its discretion under section 160 of that Act and I propose to do so in the terms sought by the applicant herein. I would like to have counsel address me as to the exact terms of the order that will be granted.