[2017] IEHC 539

THE HIGH COURT

[2015 No. 10100 P]

BETWEEN

BALLYMORE RESIDENTIAL LIMITED AND CROSSWINDS COTTAGE LIMITED

PLAINTIFFS

AND

ROADSTONE LIMITED, CRH PUBLIC LIMITED COMPANY, MURPHY CONCRETE (MANUFACTURING) LIMITED AND WILLIAM MILEY LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Murphy delivered on the 28th day of July, 2017.

1. The plaintiffs are the builders and developers of a residential housing estate of 145 houses at Drumnigh Wood, Portmarnock, County Dublin. The first and third named defendants are providers of stone products, which products they supplied to the plaintiffs during the course of construction of the Drumnigh Wood development.

2. By notice of motion issued on 3rd June, 2016, the plaintiffs sought inspection facilities in respect of seven quarries owned by the first defendant together with the right to drill; take samples; conduct experiments and make general observations. In addition the plaintiffs sought an order directing the first defendant to cooperate with the inspection by identifying the location in its various quarries from which stone supplied to the plaintiffs had been sourced.

3. As against the third named defendant the plaintiffs sought an order directing the third named defendant to identify the quarry/quarries from which the stone it had supplied to the plaintiffs' development had been sourced and thereafter an order directing the third defendant to submit to a similar inspection as that sought against the first defendant.

4. The application is brought pursuant to O. 50, r. 4 of the Rules of the Superior Courts which provides:-

> *"The Court, upon the application of any party to a cause or matter, and upon such terms as may be just, may make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid may authorise any person to enter upon or into any land or building in the possession of any party to such cause or matter and for all or any of the purposes aforesaid may authorise any samples to be taken or any observations to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence."*

5. The initial application was grounded upon the affidavit of the plaintiffs' solicitor, the affidavits of Ian Somerville, professor of geology, University College Dublin, and Robbie Goodhue, geologist of Trinity College Dublin. The latter's expertise is as the experimental officer within the geology department of Trinity College Dublin.

6. Since the filing of the original notice of motion, 27 further affidavits have been filed bringing the total number of affidavits in this application to 31. 16 affidavits have been sworn on behalf of the plaintiffs, 10 of which have been sworn by geological and engineering experts retained by the plaintiffs. 8 affidavits have been filed on behalf of Roadstone Limited, 4 of which were sworn by its geological expert Dr. John Kelly who is a professional geologist in an environmental consultancy firm known as SLR Consulting Limited. The third defendant filed 5 affidavits, 3 of which were sworn by its expert geologist, Mr. George Matheson, who is a chartered geologist and chartered engineer with a company called Matrock Consulting Limited, a consultancy firm based in Scotland. Any application which generates 31 affidavits is unlikely to be straightforward and so it has transpired on this application which was heard over three days between 30th May and 1st June, 2017.

Background

7. As already stated, the plaintiffs are the developers/builders of a residential housing estate of 145 houses at Drumnigh Wood in Portmarnock, County Dublin. For the purposes of this application the following appear to be the material facts:-

8. The estate was constructed in three phases between November, 2001 and August, 2007. 21 houses were built during phase one which commenced on 15th November, 2001. Contracts for the purchase of the phase one houses were signed between 31st October, 2002 and 29th October, 2004. 33 houses were built in the second phase which commenced on or about 29th August, 2003. Contracts of sale for those houses were signed between 12th January, 2004 and 21st July, 2005. 91 houses were built during phase three of the construction which commenced in or about the month of April, 2005. Contracts of sale for those 91 houses were signed between 30th June, 2005 and 13th November, 2006.

9. During the course of construction stone products of varying grades were supplied by the first, third and fourth defendants. The highest grade of rock supplied appears to have been "*clause 804*" which the Court has been told is ranked by the National Roads Authority as the grade suitable for stone infill in road construction. Also supplied by the defendants were various grades of crushed rock, the grade being identified by rock size. Finally a product known as "*quarry screenings*" was supplied. This is the lowest grade of rock being, as the Court understands it, the equivalent of slag which one might get from coal production.

10. According to the evidence on this application the vast bulk of the stone used in this construction was supplied by Roadstone. Initially that was stated to be in the order of 72% of the total stone supplied, but by the time the application came on for hearing it was stated and averred to be in the order of 80% of the stone supplied. The third defendant supplied in the order of 16% of the stone used in the development and the fourth defendant who is not a party to this application, supplied approximately 4% of the stone used in the development of the estate. In excess of 30,000 tons of stone of varying grades were delivered to Drumnigh Wood by the first, third and fourth defendants. According to the affidavit of Jim Murray, general manager of the housing division of the plaintiffs, who managed the development of Drumnigh Wood, the stone supplied to the plaintiffs was used for all purposes for which stone was required. It was used as subfloor stone infill in the houses in Drumnigh Wood and was also used as stone fill for driveways, patios and paths associated with the houses. Ballymore does not have any record of which defendant's stone was placed in the subfloor of any particular house, and so cannot from its records say whose stone was used in each house. Stone was used for all purposes as it was delivered on site and so it is possible that stone from more than one source may be present in the subfloor of some of the houses.

11. As part of the package offered to buyers of the houses Ballymore, the first named plaintiff, arranged a guarantee in respect of defects with Liberty Insurance. The guarantee was for a period of ten years from the date of sale and covered damage manifesting itself within that period and based on complaint made within a particular format within that ten year period.

12. From September, 2010, homeowners began to complain of what appeared to be structural defects. The problem is alleged to have been pyritic heave.

13. As the Court understands it, pyrite is a normal, natural element of limestone, muddy limestone and mudstone. Pyrite does not present a problem when properly and fully encased in hard rock. The contention of the plaintiffs in this case is that the stone supplied by one or other or more of the defendants contained highly reactive framboidal pyrite. The problem presented by this type of pyrite is that in certain conditions it is liable to expand by a process of oxidation. Reactive framboidal pyrite is not suitable for subfloor infill. Hydration in damp conditions can lead to the generation of sulphuric acid. If the stone infill contains calcite, the sulphuric acid generated by the pyrite can form gypsum calcium sulphate. If expansion in fact occurs in subfloor infill, the material has nowhere to go and creates upward pressure on the floor of the house. The upward pressure created (the pyritic heave) can cause the tightening of doors against floors and within door frames; damage to floors and floor finishes; wall and ceiling wall junction cracking; ceiling cracking and cracking in the walls above doors. The initial 50 householder claims were dealt with under the defects guarantee. The damage was remediated by removing the subfloor infill, replacing it, and repairing the damage already done. Having remediated the 50 or so houses, Liberty Insurance, the providers of the guarantee, issued subrogated claims against Roadstone and Murphy Concrete. Those cases were listed for case management on the non jury side at the time of this application.

14. In August, 2015, initiating letters of claim were sent on behalf of more than 30 additional homeowners to the within plaintiffs. The claim in each case was as follows "*due to the presence of pyrite in material used as infill during construction beneath this residential home major defects are present in same.*" Plenary summonses on behalf of each of the additional homeowners were issued in November, 2015. Each of the parties to the current application is a defendant in the additional homeowner proceedings. On 3rd November, 2015, the plaintiffs Ballymore Residential Limited and Crosswinds Cottage Limited, issued a plenary summons against these defendants claiming a declaration that they are entitled to a contribution to the extent of a full indemnity from the defendants in respect of the new homeowner claims as well as damages under various headings.

15. Between December, 2015 and May, 2016 the plaintiffs repeatedly sought to arrange inspection of the defendants' quarries. The requests for inspection were refused by both the first and third defendants. A satisfactory arrangement appears to have been arrived at with the fourth defendant William Miley Limited. Beginning on 26th February, 2016, the plaintiffs carried out inspections of the subfloor stone infill of all of the houses in respect of which claims have been made against them. The first and third defendants were notified of the inspections and were in attendance and took samples at many of them. According to the plaintiffs' experts the samples taken show the presence of reactive framboidal pyrite in the subfloor infill of the houses. According to the evidence of the plaintiffs' engineer, Mr. Forde, damage inspected by him in the affected houses is consistent with "*pyritic heave*". In May, 2016, the plaintiffs served the within plenary summons on the defendants. Appearances were entered by the first and third named defendant on 27th May, 2016 and 30th May, 2016 respectively. On 3rd June, 2016, the plaintiffs issued the within notice of motion seeking inspection facilities.

The application

16. Initially, the plaintiffs' application was for inspection facilities in respect of seven quarries owned by the first defendant together with the right to drill; take samples; conduct experiments and make general observations. The plaintiffs further sought an order directing the first defendant to cooperate with the inspection by identifying the location in the various quarries from which the stone supplied to the plaintiffs had been sourced. By the time of the hearing of the application, the plaintiffs' application had been modified to the extent that they were now seeking inspection of only three of the first defendant's quarries and were no longer seeking facilities to drill rock face nor to conduct experiments. Insofar as the third defendant was concerned, the quarry from which it had which it had delivered stone to the plaintiffs' development had been identified by the time of the hearing of the application as a quarry in Hollywood and again the inspection facilities sought did not include drilling nor the conduct of experiments.

17. During the exchange of the 31 affidavits between the parties their respective positions in respect of the "*necessity*" and "*expediency*" of inspection also evolved. The application was launched by the plaintiffs on the basis that they needed inspection in order to draft a statement of claim. In the course of the second round of affidavits it was contended on behalf of the plaintiffs that inspection was necessary because remediation of the damage could not take place until liability for pyritic heave had been established. The final position adopted by the plaintiffs was that inspection would allow them with certainty establish which of the defendants' stone products was in the subfloor infill in each house allegedly affected by pyritic heave. The plaintiffs' experts maintain that once they complete inspections they will in effect, be able to do a type of DNA analysis which will permit the identification of the quarry source of the reactive framboidal pyritic rock in the subfloor infill in each house affected.

18. Roadstone has maintained throughout the process that the application for inspection is premature, unnecessarily invasive and that the parameters and mode of inspection are not sufficiently clear. On the issue of prematurity, Roadstone submitted that in the absence of pleadings from the 30 plus homeowners claiming damage from pyritic heave it is too early to decide whether or not inspection of its quarries is warranted. It is submitted that it is only in exceptional circumstances that inspection would be ordered in a case such as this where the pleadings had not yet closed. In support of this submission it maintained that any order for inspection would also entail an order directing them to disclose the rock faces quarried by them between 11 and 15 years ago when it supplied stone to the plaintiffs and at a time when the issues between the parties have not yet been joined. It is submitted that their quarries are all working quarries and cover approximately 300 acres of land and that the ordering of inspection at this juncture would constitute an unwarranted and unnecessary interference with its business and would cause it reputational damage. Roadstone also maintained that the sampling methodology proposed by the plaintiffs gives rise to health and safety concerns as well as requiring Roadstone to assist the plaintiffs by the provision of plant and equipment.

19. While Roadstone has consistently objected on the grounds set out above its position on the issue of liability has altered significantly during the exchange of affidavits. Its initial position was a trenchant denial of liability, asserting that having produced over a hundred million tons of material over a significant period of time, its quarries had never been identified as a source of hardcore displaying pyritic heave. Testing done by Roadstone on eight samples acquired from allegedly affected houses showed according to the affidavit of Michael Buckley that two of the samples had a rock type different from any rock in any of the Roadstone quarries and clearly derived from another source. Of the other six houses whose samples were tested on behalf of Roadstone, the future swelling risk had been assessed as negligible. Roadstone's initial position therefore was that the material it supplied did not cause damage to the residential properties. By the time the application came on for hearing, the position on liability had altered somewhat. In later affidavits and at the hearing of the application for an order for inspection, Roadstone pointed out that it provides a variety of rock products suitable for different purposes. It submitted that once the product leaves its quarries it has no control over the use to which the product is put. In his submission to the Court, counsel for Roadstone, while making it clear that he was not binding Roadstone to

any particular position, suggested that any problems which may exist may be due to a misuse of its product by the plaintiffs. The plaintiffs put stone infill containing mudstone and muddy limestone into the subfloor infill when same was not suitable for that purpose because of the potential for it to contain reactive framboidal pyrite. Should this position be maintained in its defence of the plaintiffs' claim, then inspection may not be required at all. In such circumstances, liability would hinge, not on the source of the material, but rather on the purposes for which the material was used. In submissions to the Court, counsel for Roadstone stated that the only material suitable for subfloor stone infill was stone of the grade of clause 804 which is the highest and most expensive grade of stone supplied by Roadstone. If this transpires to be the defence of Roadstone, and the Court notes that its defence is due imminently, then it is doubtful whether inspection will be required at all.

20. The third defendant Murphy Concrete, having adopted the submissions of Roadstone on the issues of prematurity and the breadth and method of sampling, took the position of "*doubting Thomas*" in respect of the plaintiffs' claim that it is possible to establish with a high degree of certainty the provenance of rock in the subfloor of each relevant house by measuring it against samples taken from the supplying quarries. Mr. Matheson of Matrock Consulting on behalf of Murphy Concrete has requested proof that inspection and sampling of the material in the quarries would allow the precise identification of the source of the subfloor infill in each affected house. He remains to be convinced as to the capacity of XRD analysis to establish the "*DNA*" of the subfloor infill. It was submitted that the Murphy quarry which is now being used for landfill should not be compelled to submit to an inspection until such time as the plaintiffs' experts prove that such an inspection will have the asserted results.

21. As the experts exchanged affidavits, the pleadings continued. On 24th November, 2016 the plaintiffs, notwithstanding their initial position that they could not plead their case until after inspection, in fact served a statement of claim pleading negligence and breach of contract against the defendants and one or other or more of them arising from the supply of stone infill. This gave rise to multiple notices for particulars being served by both the first and third defendants the latest of which was served shortly before the hearing of this application. The first defendant Roadstone is seeking particulars of specific houses in which stone infill supplied by Roadstone was used as subfloor infill. The plaintiffs suggest that they can not answer that question until inspection of the Roadstone quarries has been completed. Shortly before this application came before the Court the plaintiffs had issued a motion for judgment in default of defence.

The current position

22. On the basis of the affidavit evidence before the Court, it appears that the plaintiffs are in a position to prove that they acquired all of their stone infill for the Drumnigh Wood development from three suppliers, namely Roadstone, who supplied up to 80% of the stone infill; Murphy Concrete who supplied 16% of the stone infill; and Mileys the fourth defendant who supplied approximately 4% of the stone infill. The plaintiffs are in a position to prove that there is damage to more than 30 houses in respect of which plenary summonses have been issued. The plaintiffs have evidence from Peter Forde, engineer who has particular expertise in the area of pyritic heave, who has averred on the basis of the evidence of the plaintiffs' expert Michael Eden of the presence of pyritic expansion in the subfloor infill, that the damage which is evident in the houses is consistent with pyritic heave. The Court observes that the evidence of Mr. Forde is corroborated to an extent by the fact that 50 houses, the subject of the premier guarantee, have already been remediated because of the presence of pyritic heave. Actual proof of pyritic heave in the 30 plus houses the subject of this application, in the absence of an admission that same has occurred, may well require the removal of the floor of the affected dwellings. The plaintiffs' experts have already compared samples taken from the subfloor of the affected dwellings with material purchased from the same Roadstone quarries that supplied stone infill to the development. On the basis of that comparison, the plaintiffs' experts say that stone infill purchased from Roadstone quarries is present in the subfloor of the affected houses. Both Roadstone and the third defendant Murphy Concrete were facilitated in taking samples from the affected houses and are therefore in a position independently to confirm whether or not this is so. The Court notes that in respect of a number of samples Dr. Kelly, Roadstone's expert, has averred that samples from two houses did not come from Roadstone quarries. It is implicit in Dr. Kelly's evidence that it is possible to scientifically identify the precise source of the subfloor infill in each house. The plaintiffs now seek inspection of the Murphy quarry at Hollywood and the three Roadstone quarries at Huntstown, Feltrim and Belgard for the purpose of identifying with even greater certainty the precise source of reactive framboidal pyrite in the infill of each affected house.

The law

23. Order 50, rule 4 confers on the Court a discretion to order inspection. Its purpose, as stated by Murphy J. in *Bula Ltd v. Tara Mines (No. 1)* [1987] I.R. 85 is to give effect to the constitutionally guaranteed right of access to the courts to litigate justiciable disputes. It is there to ensure equality of arms, so that one party to litigation will not be disadvantaged in the conduct of that litigation, by the fact that relevant material is under the control of his opponent. In deciding whether or not to grant inspection the Court should bear in mind that a litigant has within reason, and subject to the rules of evidence, the right to present his case as he considers appropriate, so that even if the Court considers that the case might be presented in a different manner, that of itself would not act as a bar to an application for inspection. An order for inspection can also serve the purpose of ensuring that when a Court comes to determine a justiciable dispute it will have before it the best available evidence.

24. Order 50 does not specify or delimit the time within which an application for inspection can be made. It was submitted by counsel for Roadstone that it is only in exceptional circumstances that an application can be made before pleadings are closed. It seems to the Court unwise to constrain the operation of O. 50, r. 4 in this way. What is necessary or expedient will vary considerably depending on the facts of any particular case. Roadstone sought to elevate a factual statement in Delany and McGrath, *Civil Procedure in the Superior Courts*, 3rd Ed., (Round Hall, 2012) to a rule that it is only in exceptional circumstances that an application would be entertained prior to the close of pleadings. To so hold would place an unwise constraint on O. 50, r. 4. The rule is flexible enough to deal with any given set of facts presented to a court. The Court is therefore satisfied that it is not necessary to show exceptional circumstances in order to bring an application for inspection prior to the close of pleadings. To quote Chesterman J. in *Evans Deacon Pty Ltd v. Orekinetics Pty Ltd* [2002] QSC 42 as cited by Martin J. *in Process Minerals International Pty Ltd v. Consolidated Minerals Pty Ltd* [2012] WASC 254 at p. 17:-

> *"The discretion conferred by the rule is a wide one. It should not be limited by the superimposition of conditions not found in the rule itself. The order should not be made, unless on the material before the court, it is proper to do so. It must be remembered that the rule exists to promote the efficient and economical conduct of litigation."*

The first defendant relied on *Softco v. DHL Information Services (Europe) SRO* [2013] IEHC 623 in support of its contention that the plaintiffs' application is premature. It appears to this Court that that case was decided on its own facts. The application was brought on the basis that inspection of a computer system was necessary in order to allow the plaintiff to plead its case. The Court found on the facts and averments in the affidavits before it, that such was not the case. Additionally the Court rejected the application on the grounds that the breadth of the inspection sought was not clear. While Ryan J. at para. 18 of the judgment did approve of the statement in Delany and McGrath on *Civil Procedure in the Superior Courts* (2nd Ed.) that inspection will not normally be ordered until the pleadings are closed he did not import into O. 50, r. 4 a rule that it is only in exceptional circumstances that inspection would be ordered prior to the close of pleadings. At para. 18 he stated:-

> *"It seems to me to follow from the observations of Murphy J. in this case and the comments of Delaney and McGrath in the work cited that inspection will be ordered in an appropriate case where it is necessary to do so to enable the party to make its case. Discovery of documents is not ordered unless the party seeking it establishes a solid ground of reasonable necessity and it would not normally be considered before the pleadings have been closed. It is only at that stage that relevance can be decided. Even more important is to be able to establish what is not relevant. I take it therefore that in principle there should not be an order for inspection any more than an order for discovery until it has been shown to be practically necessary and it will normally be difficult to do that until the pleadings have been closed."*

That does not amount to a requirement that exceptional circumstances must exist before inspection will be ordered prior to the close of pleading. As can be seen from the Bula cases and indeed the decision of Morris P. in *Hearne v. Marathon Petroleum Ireland Limited* [1998] 4 I.R. 186 it is not at all unusual for an inspection to be ordered in this jurisdiction prior to the close of pleadings. Morris P. put the matter succinctly at p. 189 of his judgment when he stated:-

> *"This then is, in my view, a clear indication of the principles which should guide a court in considering applications of this sort. It must in the first instance ensure that circumstances are created in which the plaintiff will have facilities for presenting his case to the court so as to enable the court to have the benefit of all the advices and information which the plaintiff may wish to make available to the court. On the other hand the defendant's rights as a property owner must be protected during this inspection so as to ensure that the inconvenience of the inspection is not injurious to his rights as a property owner."*

As is almost invariably the case the Court on an application of this sort must balance the right of the plaintiff to meaningful access to the courts to present his case against the right of the defendant not to have his property unreasonably interfered with.

22. Having reviewed the various authorities, Costello J. in *James Elliot Construction Limited v. Lagan & Ors* [2015] IEHC 631 discerned certain principles relevant to applications for inspection. At para. 12 of her judgment she summarised the principles as follows:-

> *"(1) The Court may order that a party may take samples of the property of another party to proceedings which may be necessary or expedient for the purpose of obtaining full information or evidence.*
>
> *(2) The power must be viewed in the context of a party's constitutional right of access to the courts.*
>
> *(3) The Court must ensure that the litigant will have facilities to present his case to the Court. This includes all the advices and information which the litigant wishes to present to the courts, either in support of his own case, or to undermine that of his opponent.*
>
> *(4) The right to an order for inspection or the taking of samples is not dependant upon the strength of the case of the party seeking the order.*
>
> *(5) Inspection, or the ordering of the taking of samples, should be facilitated if it can be achieved while at the same time protecting the interests of the opposing party. The interests of an opposing party that a court takes into account are those relating to that party's rights as an owner or occupier of property.*
>
> *(6) The proposed inspection or taking of samples must be shown to be necessary or expedient by reference to the issues in the case.*
>
> *(7) The inspection or sampling ordered should be limited to that which the party seeking the order has shown to be necessary or expedient to his own case or his defence of his opponent's case."*

Decision of the Court

23. Applying the law to the facts of this case, the Court is satisfied on the basis of the evidence before it, that at this juncture, it should order the inspection and sampling of the Murphy quarry at Hollywood and should adjourn the issue of inspection of the three Roadstone quarries at Huntstown, Belgard and Feltrim until the nature of the dispute between the parties is clarified by the filing of the first defendant's defence. The Court's reasoning is as follows:-

24. There is at present an inequality of arms between the plaintiffs and the first and third defendants. It arises in the following way. The plaintiffs obtained stone products for their development at Drumnigh Wood from three suppliers, being the first, third, and fourth named defendants. The fourth defendants are not a party to this application and the Court infers therefrom that the plaintiffs have reached an inspection accommodation with the fourth defendant. The plaintiffs used deliveries of stone from the three suppliers as they arrived on site, for all purposes for which stone was required, including for subfloor stone infill in houses. The plaintiffs have no records as to whose product was used in any particular house and are therefore hampered in identifying the source of any reactive framboidal pyrite present in the subfloor infill. The defendants, on the other hand, have had access to the subfloor stone infill of the allegedly affected houses and have had the opportunity to analyse it and compare it to the stone in their quarries.

25. That access has allowed Dr. Kelly, Roadstone's expert, to aver that of six samples tested, four did not emanate from Roadstone quarries. The results of tests conducted by Roadstone on the balance of samples taken from the subfloor infill in the houses are not before the Court.

26. Dr. Kelly's evidence that he is able to identify whether or not particular stone comes from a Roadstone quarry is helpful to the plaintiffs' application for inspection because it supports their argument that access to the quarries will allow them in turn to identify the source of any reactive framboidal pyrite found in the subfloor stone infill. His averment also undermines the third defendant's argument that as a condition of directing inspection, the plaintiffs should first be required to prove the efficacy of its proposed testing.

27. According to the plaintiffs' experts they can establish by a process analogous to DNA testing the provenance of the stone by comparing the stone infill from the houses with stone from the quarries. They have already made some preliminary findings in respect of Roadstone arising from comparison between subfloor stone infill and stone bought for the purpose from relevant Roadstone quarries.

28. Equality of arms and the meaningful exercise of the right of access to the courts requires that the plaintiffs be afforded the same opportunity as Roadstone and Murphys to establish the provenance of the subfloor stone infill containing reactive framboidal pyrite. In

this context, the Court notes that while resisting inspection of its quarries by the plaintiffs, Roadstone in its notice for particulars has asked the plaintiffs to identify specific houses in which their stone was used.

29. That being so, the Court asks itself what is the least intrusive inspection which will satisfy the plaintiffs' need and entitlement to obtain evidence necessary to permit it to pursue its claim, while interfering to the least possible extent with the rights of others?

30. It appears to the Court that this can best be achieved by making an order now for the inspection and sampling of the Murphy quarry at Hollywood. Unlike the Roadstone quarries, this is not a working quarry and is currently being used for landfill. Since drilling is not required, there is no danger of deleterious substances leaching into the water table. By contrast, inspection of Roadstone's quarries would require interference in working quarries and would potentially require ancillary orders directing disclosure of various matters such as quarrying sites at the relevant times.

31. Furthermore, assuming, as I think the Court should do on an application for inspection, that the plaintiffs' experts can establish the source of the rock in the subfloor of each house by a process analogous to DNA testing, it follows logically that where there are only three sources of rock, the establishment of the source of two of them, *ipso facto* identifies the source of the third. The Court notes that the plaintiffs' expert has already come to some preliminary conclusions on the basis of testing done on rock purchased from Roadstone's quarries.

32. Balancing, therefore, the plaintiffs' right to litigate their claim and the defendants' rights to have their property rights interfered with as little as possible and considering the desirability of having the best available evidence before the court of trial, the Court considers that these ends are best achieved by directing inspection of the Murphy quarry at Hollywood and that that inspection, on the basis of the plaintiffs' expert's own evidence, should allow the identification of the Roadstone product in the subfloor housing.

33. The Court is not at this point refusing or rejecting the application for inspection of the Roadstone quarries. It is simply adjourning the matter to see, for example, whether Roadstone takes a different line in its defence than that taken in its submissions on this application, and whether Roadstone puts the plaintiffs on full proof of all matters alleged in relation to the stone. In that event, the Court will revisit the matter of inspection if necessary. However, it seems to the Court as a first step, that if the plaintiffs get access to and are allowed to sample the stone from the Murphy quarry then on their own evidence, they have two angles of the triangle and the dimensions of the third angle become apparent.

34. The Court therefore makes an order for the inspection of the Murphy quarry at Hollywood and authorises the taking of samples on the grounds that it is necessary and expedient for the purposes of obtaining full information and evidence pursuant to O. 50, r. 4 of the Rules of the Superior Courts.

35. Finally, the Court observes that there are now before the courts in excess of 80 claims arising from this development at Drumnigh Wood, 50 being subrogated claims of Liberty Insurance and the balance being claims against these parties to this application. While in the normal course applications for contribution or indemnity follow the determination of the main action, in this case, it may well be in the interests of the efficient administration of justice and the significant minimising of costs for all the parties, were the issue between the plaintiffs and defendants in this case determined first. In the Court's view, this would allow for the more efficient conduct of the 80 plus outstanding claims because the party ultimately found liable could take control of all claims and defend them or settle them as it considered appropriate.