

## THE HIGH COURT

[2012 No. 1279P]

BETWEEN

NUTGROVE SAND AND GRAVEL LIMITED

PLAINTIFF

AND

JAMES SHERLOCK

DEFENDANT

AND

SEAN WISELY AND JOHN WISELY

DEFENDANTS TO THE COUNTERCLAIM

**JUDGMENT of Mr. Justice David Keane delivered on the 2nd November 2018****Introduction**

1. In this plenary action, Nutgrove Sand and Gravel Limited ('Nutgrove'), a quarry operating company, claims for breach of agreement against James Sherlock, an owner of quarry lands, who denies that claim and counterclaims for breach of agreement against Sean Wisely and John Wisely ('Mr Wisely Jnr'), a father and son (together, 'the Wiselys') who are directors of Nutgrove. Further, Nutgrove seeks the attachment and committal to prison of Mr Sherlock for deliberate breach of an interlocutory order already made in the proceedings on 2 July 2015 by Gilligan J.

**The conflicting claims***i. Nutgrove's claim*

2. Nutgrove advances the following case.

3. In April 2005, Mr Sherlock agreed to allow it to develop and operate a limestone quarry on lands described as 'the old quarry lands' at Kilmainham, Mountmellick, County Laois. Mr Sherlock represented himself as the owner of those lands and, indeed, confirmed that was so in a letter, dated 9 January 2006, that he wrote to Laois County Council ('the Council'). Nutgrove duly expended a significant sum of money in the preparation and submission of an application for planning permission for the development of a quarry there, with the knowledge and consent of Mr Sherlock. Only when that application for planning permission was opposed by Mr Sherlock's brother did Nutgrove become aware that the old quarry lands still formed part of the unadministered estate of Mr Sherlock's deceased father (also James Sherlock), who had died intestate in 1972. Nutgrove then withdrew that application for planning permission on 17 January 2007, having incurred significant losses.

4. Undeterred, Nutgrove entered into a further agreement with Mr Sherlock in November 2007, whereby it obtained the exclusive right to quarry limestone rock on certain adjoining lands to the south, referred to in these proceedings as 'the lower field', directly owned by Mr Sherlock. Nutgrove was to apply for planning permission and, should it be obtained, to develop and operate the quarry. Nutgrove was to pay Mr Sherlock €20 per load of saleable limestone rock extracted from the quarry for the life of the quarry or the duration of the planning permission; whichever occurred sooner. Mr Sherlock was to have the right to extract stone and gravel from the quarry for his own personal use. Nutgrove was to make aggregate payments to Mr Sherlock in accordance with the agreement in the first week of every month.

5. Nutgrove expended considerable time, effort and money in applying for, and obtaining, planning permission, and in developing the quarry. Planning permission was granted on 20 January 2009. By the beginning of 2012, Nutgrove had spent in excess of €134,000 to that end.

6. From September 2011, relations between the parties began to deteriorate. Mr Sherlock, directly or through others, interfered with Nutgrove's operation of the quarry, thereby breaching the agreement between them, in the following ways:

(i) knocking down a security barrier that Nutgrove had erected at the entrance to the quarry site on 31 December 2011 at Mr Sherlock's request;

(ii) on 3 or 4 January 2012, deliberately blocking access to the quarry by parking a combine harvester at the entrance of the laneway to it, preventing the operation of the quarry and causing damage and loss to Nutgrove's business;

(iii) on 10 January 2012, deliberately preventing a blasting operation, causing further loss and damage to Nutgrove's business;

(iv) and on 1 February 2012, deliberately blocking access to the quarry by placing a tractor and slurry tank across the entrance to it, preventing access and causing further loss and damage to Nutgrove's business.

7. Nutgrove seeks a number of reliefs: first, a permanent injunction restraining Mr Sherlock from preventing or impeding access to the quarry site; second, an injunction restraining Mr Sherlock from interfering with the conduct of Nutgrove's business; third, an injunction preventing Mr Sherlock from dealing with his lands in any manner that causes prejudice to Nutgrove; and fourth, damages.

*ii. Mr Sherlock's defence to Nutgrove's claim*

8. In his defence and counterclaim, Mr Sherlock pleads as follows.

9. In April 2005, the Wiselys approached Mr Sherlock to propose operating a limestone quarry at the lands known as the quarry field. Mr Sherlock had been in exclusive possession and occupation of those lands since his father's death in 1972. From the very outset, the Wiselys knew that Mr Sherlock was not the owner of the quarry field and knew that Mr Sherlock's brothers claimed a share in the

ownership of those lands and that they objected to the Wiselys operating a quarry there. The Wiselys did not spend any money on the proposed development of a quarry at the quarry field nor was there any joint venture between Mr Sherlock and either Nutgrove or the Wiselys in that regard. The letter that Mr Sherlock wrote to the Council, dated 9 January 2006, confirming his ownership of the quarry field was one drafted by the Wiselys. The Wiselys told Mr Sherlock that it was 'a formality required for administration purposes' by the Council and that he 'must' sign it. The Wiselys did not suffer any loss in seeking to develop a quarry at the quarry field and, if they did, Mr Sherlock was not responsible for it.

10. In November 2007, Mr Sherlock entered an agreement with the Wiselys (and not Nutgrove) to permit them to extract and quarry limestone from the lower field. That agreement included the following terms:

- (a) The Wiselys would carry out the quarrying activity through the vehicle of their company, Nutgrove.
- (b) Nutgrove would apply for planning permission for the quarrying operation and would operate the quarry in accordance with that permission.
- (c) The Wiselys would pay Mr Sherlock €1 per tonne of rock extracted.
- (d) The Wiselys would pay Mr Sherlock a rent in the sum of €8,000 *per annum*.
- (e) Nutgrove would only quarry and extract rock within the area, and using the access, specified in the planning permission.
- (f) Nutgrove would not cause damage to the adjoining lands or the support for those lands.
- (g) Nutgrove would not cause a nuisance or damage to Mr Sherlock's lands or those of his neighbours.
- (h) Nutgrove would not interfere with the water table.
- (i) Nutgrove was permitted to connect with Mr Sherlock's electricity, water and sewage services on a temporary basis, until the direct installation of those services.
- (j) The Wiselys would ensure that Nutgrove would comply with the terms of the agreement.

11. Despite Mr Sherlock's demand, the Wiselys refused to pay him for the rock Nutgrove extracted.

12. Nutgrove breached in a very substantial way the terms of the planning permission.

13. Nutgrove did not expend €134,000 on the development and operation of the quarry as it claims.

14. Relations between the parties deteriorated from September 2011 because Nutgrove fundamentally breached the terms of the planning permission for the development and operation of the quarry, causing damage to the environment and nuisance and damage to Mr Sherlock's property.

15. Mr Sherlock blocked the entrance to the quarry in February 2012 to prevent Nutgrove from operating the quarry in breach of contract; breach of environmental law; breach of Mr Sherlock's private law rights; and in fundamental breach of the planning permission. Nutgrove had concealed its breach of the planning permission from Mr Sherlock when Sean Wisely signed for a warning letter, dated 18 July 2011, that the Council had sent by registered post to Mr Sherlock but did not give it to Mr Sherlock.

16. Nutgrove did not suffer any commercial loss or damage as a result of Mr Sherlock's actions.

### *iii. Mr Sherlock's counterclaim against the Wiselys*

17. In addition to the matters pleaded in his defence to Nutgrove's claim against him, Mr Sherlock brings the following counterclaim against the Wiselys.

18. The Wiselys induced Mr Sherlock to enter into the lower field quarry agreement with them in November 2007 by warranting: that Nutgrove's quarrying activities would be carried out in compliance with the planning permission and without causing damage to the property of any adjacent landowners; that Mr Sherlock would be paid €1 *per tonne* of rock extracted; and that Mr Sherlock would receive a rent of €8,000 *per annum*.

19. Omitting needless repetition, the terms of the lower field agreement were as follows:

- (a) The Wiselys would carry out their quarrying activity through Nutgrove.
- (b) The Wiselys would apply for planning permission and operate the quarry in accordance with it.
- (c) Mr Sherlock would be paid €1 *per tonne* of rock extracted.
- (d) Mr Sherlock would be paid rent in the sum of €8,000 *per annum*.
- (e) The Wiselys would ensure that Nutgrove did not cause nuisance or damage to any adjoining land in the course of its quarrying activity in the lower field.
- (f) The Wiselys would ensure that Nutgrove did not interfere with the water table in the course of its quarrying activities.

20. In breach of that agreement, the Wiselys have:

- (a) excavated lands to the northwest of the area described in the planning permission;
- (b) quarried right up to the eastern boundary of the lower field quarry lands affecting the stability and support of the adjoining lands to the east owned by a non party;

(c) extracted rock below the water table;

(d) failed to pay Mr Sherlock for 260,377 tonnes of the 385,477 tonnes of rock extracted from the quarry, thereby withholding payment of €260,377 due to him under the agreement; and

(e) failed to pay Mr Sherlock the rent of €8,000 *per annum* for each of the years 2009, 2010, 2011 and 2012, amounting to the aggregate sum of €28,000.

21. Mr Sherlock repeats essentially the same particulars in asserting a claim in negligence, breach of duty (including breach of statutory duty), nuisance and misrepresentation against the Wiselys, supplemented by the following additional particulars of the tortious conduct of Nutgrove in (omitting repetition):

(a) operating the quarry in fundamental breach of planning permission;

(b) quarrying stone outside the areas permitted under the planning permission and the agreement between the parties;

(c) damaging the adjacent lands of Mr Sherlock and of a non-party;

(d) causing nuisance and damage to Mr Sherlock's lands; and

(e) constructing and operating the quarry office and weighbridge at an unauthorised location.

22. Mr Sherlock particularises the loss and damage he has suffered from the unlawful conduct of the Wiselys as follows: €60,000 as the sum required to drain the flooded quarry and construct a settlement lagoon; €32,500 to reinstate excavated lands to the north of the permitted quarry area; €56,475 to reinstate excavated lands to the northwest of the quarry area, €10,500 to replace 300 metres of hedgerow; €15,000 to relocate the office and weighbridge; and €20,000 for the investigation of, and works necessary to ensure, the stability of the quarry face and lands to the east of the quarry (all figures exclusive of VAT).

23. The Wiselys' conduct repudiates the lower field quarry agreement and Mr Sherlock is entitled to rely on their conduct as bringing that agreement to an end.

24. The reliefs that Mr Sherlock seeks against Nutgrove and the Wiselys are damages, a declaration that they have repudiated and, hence, terminated the lower field quarry agreement; an order directing them to restore Mr Sherlock's land to a condition compatible with the lower field quarry planning permission; and, in the alternative, an injunction, pursuant to s. 160 of the Planning and Development Act 2000, as amended ('the 2000 Act'), restraining Nutgrove from continuing its unauthorised activities, coupled with an order directing Nutgrove and the Wiselys to restore the lands affected to their condition prior to Nutgrove's unauthorised activities.

#### *iv. the reply of Nutgrove and the Wiselys to Mr Sherlock's counterclaim*

25. Nutgrove and the Wiselys have replied to Mr Sherlock's counterclaim in the following terms.

26. Neither Nutgrove nor the Wiselys engaged in any of the unlawful conduct alleged against them. Nutgrove, and not the Wiselys, was the counterparty to Mr Sherlock in the lower field quarry agreement. The terms of that agreement are as Nutgrove asserts and the Wiselys did not enter any agreement with, or provide any warranties to, Mr Sherlock. Nutgrove did not breach the lower field quarry agreement with Mr Sherlock and did not by any conduct repudiate that agreement. Nutgrove did not operate the lower field quarry in breach of the planning permission. Nutgrove was frustrated in its operation of the lower field quarry development by the conduct of Mr Sherlock. Mr Sherlock has suffered no loss or damage or, certainly, no loss or damage for which Nutgrove or the Wiselys are responsible.

#### **Procedural history**

27. A plenary summons issued on behalf of Nutgrove on 8 February 2012. While it was never produced, I gather from one of the booklets of *inter partes* correspondence furnished to the court that a memorandum of appearance was filed on behalf of Mr Sherlock at some point in May 2013. Nutgrove delivered its statement of claim on 4 July 2012. Mr Sherlock delivered a defence and counterclaim on 23 November 2012. Nutgrove and the Wiselys delivered their reply and defence to Mr Sherlock's counterclaim on 14 March 2013. Nutgrove served a notice of trial on 5 June 2013 and the action was set down for trial on 3 July 2013.

28. Meanwhile, on 8 February 2012, Nutgrove had issued a motion, seeking interim or interlocutory injunctive relief against Mr Sherlock, restraining him and any other person on notice of the order sought from interfering with its quarrying operations at the lower field quarry. Regrettably, on the pleadings and papers before me, the subsequent course of that application is unclear. That lack of clarity was at least contributed to, if not caused by, a change of solicitors on the part of Nutgrove and several changes of solicitor on the part of Mr Sherlock in the course of these proceedings.

29. In any event, there was a dispute between the parties about whether Mr Sherlock had furnished an undertaking to the court on 13 February 2012 in terms of the relief sought in Nutgrove's motion. That dispute appears to have been resolved when an order made by Murphy J on 19 June 2012 was perfected on 20 May 2014. In material part, the perfected order recites that, on that date, by consent between the parties, the court ordered Mr Sherlock and any other person on notice of the order be restrained from locking Nutgrove out of the lower field quarry or from otherwise interfering with Nutgrove's operations at the quarry.

30. Although the relevant order of the court was not produced by any of the parties at the trial of the action, it is tolerably clear that, on 29 October 2014, terms of heads of agreement entered into between Nutgrove and Mr Sherlock on that date were made a rule of court. I know this because a copy of an order made on 2 July 2015 by Gilligan J, varying and amending those heads of agreement as originally ruled, has been produced to me.

31. The original heads of agreement (which were included in a booklet of *inter partes* correspondence furnished to me) were as follows:

1. Following the carrying out of tests on or before 10th December 2014, Plaintiffs (sic) agree to inform the Defendants (sic) of their intention to continue to quarry the lands in issue.

2. If they choose not to do so, then they consent to an Order for possession to be made on 10th December 2014.

3. If they choose to stay and to quarry the lands, then, subject to payment of €50,000 and agreement of terms of a quarrying agreement on or before 1st April 2015, the parties agree to strike out the proceedings with no order as to costs and an order vacating all existing orders.

4. If there is a failure to agree the terms on or before 1st April then the parties agree to apply for a hearing date forthwith thereafter.'

32. The order made by Gilligan J on 2 July 2015 provides, in curial part:

'Upon the consent of the parties hereto, it is agreed that the meaning and effect of the Heads of Agreement dated 29th day of October 2014 previously entered into by the respective parties, handed in and made a Rule of this Honourable Court on such day be varied and amended by the following;

Allowing the Plaintiff Company, its servants or agents to re-enter upon the lands and premises the subject matter of these proceedings, namely those lands and premises at Kilmainham, Mountmellick, Co. Laois and as referred to and contained within both the Folio 2488F of the Register of Freeholders of the County of Laois and the lands the subject matter of the Planning Permission Reference No. 08/943 issued by Laois County Council for the sole purposes of effecting compliance by the Plaintiff Company with the provisions of any and all Enforcement Notices issued by Laois County Council pursuant to s. 154 of the Planning and Development Acts 2000-2014 served upon the parties hereto, including in respect of the lands as described in such enforcement notices.'

33. Sadly, the parties failed to agree terms and the matter proceeded to trial before me over 17 days between 22 November and 20 December 2016. In view of the considerable number of documentary exhibits produced by each side in a piecemeal fashion during the trial, at its conclusion I requested that the parties prepare and submit an agreed book of exhibits as soon as possible. Regrettably, the parties failed to reach an agreement with the unfortunate result that the court received two competing booklets of exhibits in July 2017, more than six months later.

#### **Nutgrove's application for the attachment and committal of Mr Sherlock**

34. By motion issued on 15 November 2016, Nutgrove has brought an application for various interlocutory reliefs, principal among which is an order for the attachment and committal of Mr Sherlock for contempt of the order made by Gilligan J on 2 July 2015, already described. The contempt alleged is that Mr Sherlock had been and remains in breach of the added term of the heads of agreement between the parties that were made a rule of court by that order whereby Mr Sherlock was to allow Nutgrove onto his lands for the purpose of carrying out the works necessary to effect compliance with any planning enforcement notice issued by the Council. Nutgrove also seeks various injunctions restraining any further interference with those works.

35. The essential facts averred to in the grounding affidavit of Sean Wisely, sworn on 11 November 2016, are the following.

36. On foot of a complaint made by Mr Sherlock, the Council served an enforcement notice, made under s. 154 of the 2000 Act and dated 11 February 2015 ('the first notice'), upon both Nutgrove and Mr Wisely, which – after extensive liaison between Nutgrove's planning adviser John Shiels and the Council – was later superseded by a more limited enforcement notice, dated 5 November 2015 ('the second notice').

37. The second notice asserts an unauthorised development comprising a failure to comply with four identified conditions of the planning permission. It sets out five requirements: first, to refrain from quarrying outside the permitted area; second, to provide a restoration plan for the lands quarried outside that area by 26 November 2015, with agreed restoration works to be completed by 7 January 2016; third, to provide a restoration plan to restore the quarry floor above the level of the water table by 26 November 2015, with agreed restoration works to be completed by 7 January 2016; fourth, to submit both a landscaping plan and a restoration plan for the quarry by 26 November 2015; and fifth, to provide a stock and trespass proof fence around the full perimeter of the site before 7 January 2016.

38. After lengthy exchanges between Nutgrove (through Mr Shiels) and the Council that extended well beyond the deadline in the enforcement notice, the Council confirmed in an e-mail dated 24 October 2016 that it was happy for the necessary works to commence in accordance with the plans that had been agreed between them.

39. However, much earlier Mr Sherlock had installed a locked barrier blocking access to the quarry site. By a letter of 26 October 2016, personally served on Mr Sherlock, and by email of the same date sent to his solicitors, Nutgrove notified Mr Sherlock of its intention to commence the necessary works at 9 a.m. on 1 November 2016. An incident occurred when personal service of that letter was effected on Mr Sherlock at his home on 29 October 2016, to which I will return. When Mr Wisely Jnr attended at Mr Sherlock's home on the morning of 1 November 2016, Mr Sherlock refused to provide him with the key to unlock the barrier. Mr Sherlock's solicitors wrote the same day to the Wiselys solicitors, requiring the provision of certain documentation as, in essence, a precondition to allowing Nutgrove access to the quarry to effect compliance with the enforcement notice, although the agreed amendment to the heads of agreement between the parties that was made a rule of court by Gilligan J on 2 July 2015 contained no such precondition and no application had ever been made on Mr Sherlock's behalf to speak to the terms of that order. Mr Sherlock again refused to give Nutgrove access to the quarry site on 3 November 2016.

40. In light of those events, Nutgrove, through its solicitors, again retained the services of a summons server to effect personal service upon Mr Sherlock of the order of Gilligan J of 2 July 2015 with a penal endorsement upon it. That led to a further incident at the home of Mr Sherlock on 12 November 2016 when that order was served upon him, to which it will also be necessary to make further reference in the course of this judgment.

41. Nutgrove's motion was adjourned to the trial of the action to be heard in conjunction with it.

#### **The evidence**

##### *i. the old quarry lands licence agreement*

42. Mr Wisely was the principal witness on behalf of Nutgrove. He had already sworn affidavits on 7 and 16 February 2012, 6 March and 29 April 2014, and 11 and 22 December 2016 in support of various interlocutory applications brought by Nutgrove. In those affidavits and, more particularly, in his evidence to the court, Mr Wisely gave broadly the following testimony.

43. He is the managing director of, and largest shareholder in, Nutgrove, which was incorporated in 1999 to engage in the business of quarrying for sand, stone and gravel. He has been engaged in the business of quarrying for about 40 years, initially as a sole trader

and, for some years now, through his company Nutgrove.

44. In April 2005, Mr Wisely, who was looking around for a quarry, was introduced to Mr Sherlock by a third party. After meeting Mr Sherlock several times at his house and on his lands, and having seen the old quarry field, Mr Wisely came to a verbal agreement with him to quarry limestone there.

45. Pursuant to that agreement, on 25 April 2005, Nutgrove applied to the Council for registration of the quarry as a pre-1963 development that did not require planning permission, under s. 261 of the 2000 Act. In response, the Council requested the submission of evidence demonstrating that the applicant had the necessary legal interest in the site. Through its planning consultant John Shiels, Nutgrove replied on 9 January 2006, enclosing a letter of the same date from Mr Sherlock to the Council. That short letter twice references Nutgrove; first, in the reference line as the applicant for registration of the quarry; and second, in the body of the letter as the company working the quarry. The letter is signed by Mr Sherlock and, in material part, states 'I wish to confirm that I am the owner of the lands' and that '[t]he quarry on the lands is being worked by [Nutgrove] subject to my consent.' The letter recites that a copy of the relevant title deeds to the lands is enclosed.

46. Mr Wisely had agreed that Mr Sherlock was to receive €20 per load of limestone extracted from the quarry.

47. The Council decided that the quarry development required planning permission. Nutgrove prepared and submitted the necessary application, expending €135,000 in the process on, amongst other things, a test well, and archaeological, hydrological and wildlife studies.

48. The Council received an objection to that planning application from a brother of Mr Sherlock on the basis that Mr Sherlock did not own the old quarry lands. It transpired that those lands were still held in the name of Mr Sherlock's father, also James Sherlock, who had died intestate and whose estate had never been administered, even after the subsequent death intestate of Mr Sherlock's mother in 2002. The planning application was withdrawn on 17 January 2007.

49. Mr Sherlock gave evidence at the trial of the action. He had previously sworn affidavits on 21 March 2014 and 21 and 22 December 2016 in opposition to various interlocutory applications. His evidence was broadly as follows.

50. Mr Sherlock challenged Mr Wisely's experience as a quarryman, distinguishing between experience with sand and gravel pits and experience with limestone quarries. He had provided Mr Wisely with the title deeds to the old quarry lands in April 2005, demonstrating that they were registered in the name of his father, albeit his father's name was also James Sherlock.

51. The agreement to permit Mr Wisely to operate a quarry on the old quarry lands involved the payment of €1 *per* tonne of limestone extracted from the quarry, together with an annual rental payment of €2,000 *per* acre. Mr Sherlock understood that the letter to the Council dated 9 January 2006 that he signed was 'a mere formality'. The letter was prepared for him by Mr Shiels and he signed it 'without any proper examination.' At all material times, he understood that he was dealing with the Wiselys, rather than Nutgrove or any other separate entity. Under cross-examination, Mr Sherlock claimed that Mr Wisely sought to pressure him to sign the letter by claiming that Mr Shiels had just been released from a psychiatric hospital and would be upset if Mr Sherlock did not sign the letter.

#### *ii. the lower field quarry licence agreement*

52. It is common case that Mr Wisely and Mr Sherlock entered into a further verbal agreement in November 2007 to enable the quarrying of limestone to take place in the lower field. On 3 December 2007, Nutgrove applied to the council for planning permission to do so there. On 4 July 2008, Mr Sherlock wrote a further letter to the council confirming both his ownership of the lands in question and his consent to that planning application by Nutgrove. The council granted the permission sought on 20 January 2009.

53. Mr Wisely testified that the terms of the lower field quarry agreement were the same as those of the old quarry lands one. Mr Sherlock was to receive €20 per load of limestone extracted for the life of the quarry. Aggregate payments were to be made monthly. Mr Sherlock was to have the right to draw rock from the quarry for his own use. The agreement was to be for the life of the quarry or the duration of the planning permission, whichever ended first. There was no agreement to pay any rent in respect of the lands. Nutgrove expended approximately €150,000 in the development of the quarry, including the development contribution it made to the council but excluding the bond it was required to provide.

54. Although, in an affidavit he had sworn earlier, Mr Sherlock had averred that he entered the lower field quarry agreement solely because of improper pressure applied to him by his own solicitor at the behest of Mr Wisely that left him with no choice, he did not repeat that claim in his defence or in his evidence in chief at trial. Rather, he testified that, under the terms of that agreement, he was to receive €8,000 *per annum* in rent, and €1 *per* tonne of extracted stone, adding that payment *per* tonne for extracted stone was important to him as he knew that lorry loads typically exceeded twenty tonnes and a payment of €1 *per* tonne was, thus, more lucrative, than one of €20 *per* load.

#### *iii. the collapse of the lower field quarry licence agreement*

55. The lower field quarry agreement operated without apparent incident throughout 2009, 2010 and much of 2011. Despite the economic crash, Nutgrove did reasonable business and made payments to Mr Sherlock amounting to €169,000 during that period. Its customers were construction firms and, to a lesser degree, local authorities. A delivery docket accompanied each load; the customer signed the docket; and Nutgrove retained the signed docket as evidence of each delivery. The dockets were used by Ms Bernie Hurley, Nutgrove's office manager, to calculate the payments due to Mr Sherlock. Mr Sherlock was generally paid by cheque (though sometimes in cash) on a monthly basis, save when certain of Nutgrove's customers sought and obtained deliveries of stone on credit terms over longer periods and Mr Sherlock agreed to wait for payment until Nutgrove was paid. The great majority of customer orders were for the delivery of stone by the lorry load, rather than by the tonne, and did not necessitate the use of the weighbridge, although a small portion of orders (most notably those from the council) did specify a particular number of tonnes of stone, and they did.

56. Relations between the parties began to deteriorate in September 2011. According to Mr Wisely, Mr Sherlock rang him in November 2011 to say that he was pulling the plug on the quarry. Mr Wisely testified that he asked why and Mr Sherlock replied that he knew why, although he didn't. Mr Wisely suspected, and still believes, that Mr Sherlock wanted to operate the quarry himself.

57. Mr Wisely gave evidence that Mr Sherlock's son, John Sherlock ('Mr Sherlock Jnr'), became actively involved in the operation of the lower field quarry agreement at that time. Mr Wisely testified that, in September 2011, Mr Sherlock had requested that he hold off on making payments to him under the agreement, as Mr Sherlock was in the process of handing over his farm to his son, who would

be dealing with Mr Wisely from then on. This resulted in the accumulation of an outstanding payment due to Mr Sherlock of €6,000, while Nutgrove awaited confirmation of whatever new payment arrangements Mr Sherlock wished to have put into effect.

58. Mr Wisely gave evidence of continuing engagement with Mr Sherlock at that time, pointing to various lengthy face to face meetings with the Sherlocks that took place in October, November and December 2011, and January 2012. The Sherlocks made various demands of Nutgrove or the Wiselys during that period.

59. First, the Sherlocks requested the creation of a new bank of earth at the edge of the quarry and the construction of a new barrier at the quarry entrance to prevent unauthorised vehicles from entering the quarry site. According to Mr Wisely, the earthen bank was created as requested and, over the Christmas period in 2011, he arranged for the barrier to be constructed, only to discover in January 2012 that it had been dismantled by digging out its foundation post and forcibly removing the lock from it. Mr Sherlock acknowledged that he had arranged for this to be done, but denied that the barrier had been damaged in the process. Mr Sherlock's evidence was that he removed the barrier because it was erected on lands forming part of his father's unadministered estate, over which he claims ownership by adverse possession, although he did not address Mr Wisely's testimony that the location of the barrier was selected in consultation with him to maintain access to another part of his own lands that Mr Sherlock wished to let by *conacre* to a third party.

60. Second, Mr Sherlock Jnr sought to be provided with a copy of the 'computer software' from the PC in the site office, which I take to be, in substance, a request for a copy of all of Nutgrove's customer, load and delivery data from whatever database the company maintained on that machine. Third, Mr Sherlock Jnr requested the installation of a security camera inside the site office and a key to that office. Mr Wisely refused each of those requests as, in his view, unreasonable.

61. Nutgrove did comply with the Sherlocks' request for a copy of its insurance policy and planning permission for the lower field quarry site.

62. On 1 January 2012, the Sherlocks requested that all future payments under the lower field quarry agreement be made to a new company that they were about to incorporate. Nutgrove agreed to do so on receipt of the necessary paperwork but it never arrived.

63. On 3 or 4 January 2012, when Nutgrove staff returned to the lower field quarry site to resume operations after the Christmas break, they found the quarry entrance blocked by a combine harvester that had been parked and left there by the Sherlocks, who only removed it later that day after the intervention of the guards at Nutgrove's request. Mr Sherlock states that this was done with 'the *bona fide* intention of attempting to open and maintain a proper line of dialogue' with Nutgrove and the Wiselys.

64. On 10 January 2012, Mr Sherlock Jnr intervened to prevent a blasting operation at the quarry that Eddie Hogan, a civil engineering contractor, was about to conduct on behalf of Nutgrove. Mr Sherlock's evidence was that this occurred because the blast was to be conducted on lands forming part of his deceased father's estate, outside the lands covered by Nutgrove's planning permission. Mr Wisely gave evidence that Mr Sherlock Jnr demanded a payment to permit the blast to proceed, as compensation for damage ostensibly caused by previous blasts to Mr Sherlock's house some distance away, a claim that Nutgrove denies.

65. On 23 January 2012, Mr Sherlock incorporated a private limited company named Kilmainham Quarry Limited, the principle activity of which is described as 'quarrying of stone for construction.' Mr Sherlock gave evidence that he did so at the direction of Mr Wisely. Mr Wisely denied that in his evidence. The directors of the company are Mr Sherlock and Mr Sherlock Jnr. Its registered address is that of Mr Sherlock's house at Kilmainham, Mountmellick, County Laois. In evident anticipation of the incorporation of the company, Mr Sherlock Jnr emailed Nutgrove late on the evening of Thursday, 12 January 2012, requesting it to supply him with a list of materials from the quarry and a price list and to set up a new account for Kilmainham Quarry with authorisation solely for his father and him. The following day, Nutgrove replied, thanking Mr Sherlock Jnr for his email and informing him that the details he had requested would be forwarded to him. On the evening of the day after that (Saturday, 14 January 2012), Mr Sherlock Jnr again emailed Nutgrove as follows:

'Owing to delay on your behalf regarding the payments and settlements Seamus Sherlock and kilmainham quarry ltd will have no option but to cease trading with nutgrove sand and gravel ltd as and from January 31st 2012.'

66. Mr Wisely gave evidence that the Sherlocks requested that Nutgrove place Mr Sherlock as an insured party on its business insurance policy for the operation of the lower field quarry but that he found that it could not be done because Mr Sherlock was not directly associated with the company.

67. Mr Wisely testified that the Sherlocks sought to renegotiate the payment structure under the lower field agreement to substitute a payment to Mr Sherlock per tonne of material extracted for the existing one per load of material. According to Mr Wisely, both sides resolved to make enquiries of other quarry operators with a view to ascertaining the 'current price per [tonne] of stone in the ground', as the basis for attempting to agree a payment *per tonne* in the future. Mr Wisely stated that, while Nutgrove made the necessary enquiries, it heard nothing further on the matter from the Sherlocks. Ms Hurley produced correspondence that Nutgrove had obtained from seven quarries in the region providing comparator prices, in preparation for the introduction of a new system by which every lorry carrying extracted stone would use the weighbridge and obtain a numbered docket for each load. The prices quoted by other quarries were in the range 40c to 60c *per tonne* of limestone rock.

68. Mr Wisely Jnr gave evidence that, one day in early January 2012, when he was getting ready to lock up and leave the site office, the Sherlocks approached him to inform him that Mr Wisely, his father, was having an affair with Ms Hurley, Nutgrove's office manager, and that they had a surveillance video recording, evidencing inappropriate behaviour between them. No such recording was produced in evidence at trial. Mr Wisely is a married man who was then in his late seventies and Ms Hurley is the lone parent of a child with special needs. Each flatly denied the allegation in evidence.

69. Without reference to what possible reason there could be for spreading gossip about Mr Wisely and Ms Hurley (whether true or false), whether as part of the commercial dispute between the parties or in any other circumstance, counsel for Mr Sherlock was instructed to put it to Ms Hurley that the allegation was true, and a close friend and neighbour of Mr Sherlock named Christine 'Maire' Scott when called to give evidence on behalf of Mr Sherlock testified that she had witnessed inappropriate conduct between Mr Wisely and Ms Hurley in the site office. Mr Sherlock first denied on oath under cross-examination that he had made any such allegation about Mr Wisely and Ms Hurley, before later admitting that he had.

70. In giving evidence that, on an unspecified date in September 2011, she had witnessed Mr Wisely and Ms Hurley in a compromising situation in the site office while searching for Mr Sherlock, Ms Scott described herself as an independent witness. Under cross-examination, it emerged that Ms Scott is a close friend and neighbour of Mr Sherlock, who attended every day of the trial as his

supporter, conferring frequently with his solicitor in that capacity. Mr Sherlock takes care of the maintenance of her property and, in return, she prepares a meal for him every day. Under cross-examination, Ms Scott acknowledged that she is the person depicted in various photographs taken at various times on various dates in 2014, accompanying Mr Sherlock in the vicinity of the lower field quarry site while he is taking photographs and, in one instance, taking photographs herself (at the request, she explained, of Mr Sherlock's daughter).

71. When, in January 2012, Mr Wisely was informed by his son of Mr Sherlock's allegation against him, he caused his solicitor to write to Mr Sherlock on 1 February 2012, demanding an apology and threatening defamation proceedings against him if he did not make one. Mr Sherlock did not apologise. Instead, he placed a copy of that letter in one of the front windows of his house and another copy on a piece of hardboard attached to the fence outside his house. Mr Sherlock's explanation for doing so was that, once the letter was sent to him, it was his property and he was entitled to do whatever he wanted with it.

72. On 26 January 2012, Mr Wisely met with the Sherlocks over several hours in the kitchen of Mr Sherlock's house in an attempt to resolve the issues between the parties. Ms Scott was also present, as was a gentleman named Seamus McDonald, a member of the council who, it seems, attended the meeting in a personal capacity. Mr Sherlock claims that, at that meeting, Mr Wisely acknowledged an outstanding debt to him of €83,000 for extracted rock and €24,000 for rent. Ms Scott gave evidence that she heard Mr Wisely acknowledge a debt to Mr Sherlock of €83,000 for stone and €2,000 *per* acre in rent (without reference to any agreed acreage, rental period or aggregate sum). Mr Wisely denied in evidence either that he acknowledged any such debt to Mr Sherlock at that meeting or that any such debt exists.

73. On 1 February 2012, Mr Sherlock caused a tractor and slurry tanker to be placed cross the entrance to the lower field quarry site, bringing all commercial activity there to a halt. According to Mr Sherlock, he did so on the advice of his solicitor at the time. That solicitor did not appear as a witness. Mr Sherlock does not accept that the action he took was unreasonable.

74. Mr Wisely gave evidence that, from that day forward, Nutgrove took no more material from the quarry and never resumed its operations at the quarry site. Mr Sherlock later replaced the safety barrier at the entrance the quarry site and placed his own lock upon it.

75. As already noted, Nutgrove issued these proceedings on 8 February 2012.

#### *iv. the break in at the site office*

76. At some point in or before February 2014, Mr Sherlock broke into the site office and changed the lock on the door to it. Mr Sherlock testified that he did so because the electricity supply for the site office came from his own house and a heater in it had been left on, grossly inflating his domestic electricity bills. He did not corroborate that claim by producing copies of those bills. Mr Sherlock conceded that he had received payments from Nutgrove for the cost of the utilities provided to the site office while the quarry was operating. Mr Sherlock claims that he raised the matter of his excessive electricity bills with Nutgrove before breaking into the site office, but did not corroborate that claim by producing a copy of any relevant communication. Mr Wisely testified that no heater was left on in the site office and that, even if it had been, a master switch for the electricity supply to the site office was located at Mr Sherlock's house.

#### *v. the sale of stone from the quarry*

77. In the affidavit that he swore on 21 March 2014, Mr Sherlock acknowledged that, after February 2012, he had removed stone from the quarry for what he described as remedial purposes, although he later acknowledged under cross-examination in evidence that he had been selling stone from the quarry. Mr Sherlock admitted that notices were placed in the Mountmellick Parish Newsletter on 16 and 23 March, and 27 April, 2014, on behalf of Kilmainham Quarry Limited offering 'all grades of filling for roadways, foundations, subfloors; sand and gravel; and a small quantity of excellent top-soil', and that this was a reference to the proposed sale of material from the quarry. Mr Sherlock Jnr accepted in evidence that two tractors, several trailers and, what both he and his father described as, 'a poor man's digger' were present at various times on Mr Sherlock's 19-acre farm.

#### *vi. the problems with signs at the lower field quarry site*

78. Mr Wisely gave evidence that, in 2015, Nutgrove had erected 30 signs at various points around the lower field quarry site, bearing the words '*Nutgrove Sand and Gravel, Danger - No Unauthorised Persons Allowed - Deep Quarry Face - Deep Water - Safety Equipment etc.*' On various dates between October 2015 and January 2016, all of those signs were either physically removed, torn down, destroyed or altered. In his evidence, Mr Sherlock admitted that he had cut off the portion of several of those signs bearing the words '*Nutgrove Sand and Gravel*' but denied that he had removed or torn down the others, which he suggested had probably blown down, not having been properly erected by Nutgrove in the first place.

#### *vii. the theft of cameras and destruction of a machine close to the lower field quarry site*

79. Mr Wisely went on to give evidence that, as a result of the destruction and damage caused to Nutgrove's signs, in October 2015 it had retained a security expert to install five covert cameras at or adjacent to the quarry site in order to keep it under surveillance. On three different dates in October and November 2015, one of those cameras captured Mr Sherlock Jnr closely inspecting a large machine owned by the company that it had obtained permission to store on separate lands adjacent to the lower field, at a point some distance from the main road in a rural area several kilometres away from the nearest town, Mountmellick. On 4 December 2015, all five cameras were stolen. On the night of 1 and 2 November 2016, just before Nutgrove was due to commence using that machine to carry out the remediation works that had been agreed with the council, it was destroyed by arson while still present on those adjacent lands. Mr Sherlock insisted in the course of his evidence that he had nothing to do with those events.

#### *viii. complaints made to the authorities of unlawful conduct by Nutgrove*

80. Mr Wisely testified that, in addition to the complaints that Mr Sherlock had made to the council concerning the breach by Nutgrove of its planning permission, anonymous complaints were made against Nutgrove to An Garda Síochána (and the Fraud Squad within An Garda Síochána), the Revenue Commissioners and the Health and Safety Authority, concerning a wide range of alleged improper business practices, although none of the resulting investigations led to any action against Nutgrove or the Wiselys.

#### *ix. the Revenue Commissioners' audit of Mr Sherlock*

81. Mr Sherlock gave evidence that he also had been audited by the Revenue Commissioners. Indeed, he called his accountant,

Brendan Allen, who gave evidence concerning two summaries of accounts that he had prepared for Mr Sherlock, covering the overlapping five year periods to the end of 2009 and to the end of 2012. The court was given to understand that these documents comprised a summary of Mr Sherlock's annual accounts for those years, by reference to which he had made his annual tax returns in the usual way, and that the Revenue Commissioners had accepted the accuracy of those accounts and of the tax returns that Mr Sherlock had made in reliance upon them when they carried out their audit. Only as a result of a casual enquiry made by the court at the conclusion of the cross-examination of Mr Allen did it emerge that the accounts concerned had been prepared only after, and in response to, the commencement of the Revenue Commissioners' audit of Mr Sherlock's tax affairs and that Mr Sherlock had made no annual tax return at any time during that period. In preparing those accounts, Mr Allen was obliged to rely upon the very limited diary records that Mr Sherlock first produced to him in 2012.

*x. Mr Sherlock's altercations with summons servers*

82. Thomas Jones is a retired member of An Garda Síochána, who has been working as a summons server for over 10 years. He was called as a witness on behalf of Nutgrove. He gave evidence that, in October 2016, the solicitors for Nutgrove requested him to effect personal service of certain documents on Mr Sherlock. On 29 October 2016, he attended at the dwellinghouse of Mr Sherlock for that purpose. Mr Jones testified that Mr Sherlock was extremely hostile and, when Mr Jones had effected service of the documents upon him, made a deeply tasteless and offensive comment concerning Mr Jones' son, who it was well known in the locality had died in tragic circumstances at a very young age some years previously. In his sworn evidence to the court, Mr Sherlock denied making that comment.

83. Mr Jones gave evidence that, in November 2016, he was again requested by the solicitors for Nutgrove to effect service of further documents on Mr Sherlock. Because of the difficulties and unpleasantness that he had experienced on the preceding occasion, Mr Jones asked both Paul Ryan, another retired member of An Garda Síochána, and Mr Ryan's adult son to accompany him and they agreed to do so.

84. On 12 November 2016, the three men drove to Mr Sherlock's house in Paul Ryan's car. On opening the door to Mr Jones, Mr Sherlock attempted to slam it in his face. Mr Jones observed Mr Sherlock Jnr in the hallway immediately behind Mr Sherlock. Mr Jones managed to wedge his foot in the door and to effect service. The Sherlocks followed Mr Jones back to Mr Ryan's car, where they behaved extremely aggressively, shouting threats and vulgar abuse and banging on the car's roof and side panels. Mr Jones testified that each of the Sherlocks used the camera on his mobile phone to take a number of photographs of the vehicle and its occupants. Both Mr Jones and Mr Ryan stated in evidence that the level of hostility displayed by the Sherlocks was unprecedented in their experience.

85. The solicitors for Nutgrove requested Mr Jones to effect personal service of legal documents on Mr Sherlock for a third time on 15 November 2016 and he once again attended at Mr Sherlock's house on that date, accompanied by Mr Ryan. On that occasion, although Mr Sherlock again attempted to avoid service, it was effected without incident from Mr Jones' perspective as Mr Sherlock was running from his car to the door of his house.

86. In cross-examination, counsel for Mr Sherlock put it to Mr Jones that he had been the aggressor on each occasion and that he had an agenda against Mr Sherlock. Mr Jones denied that claim, pointing out that he had previously served legal documents on Mr Wisely on behalf of the council and that, in relation to both men, he was simply doing his job. It was put to Mr Jones that he had twice assaulted Mr Sherlock: first, by pushing the door against him on 12 November; and second, by attempting to shoulder him to the ground on 15 November. Mr Jones denied those allegations. It was put to both Mr Jones and Mr Ryan that, on 12 November, Mr Ryan had driven over the foot of Mr Sherlock Jnr. Both men denied that allegation.

87. Very significantly it was put to Mr Ryan that the suggestion that Mr Sherlock had used the camera on his mobile phone to photograph the occupants of Mr Ryan's car on 15 November 2016 was demonstrably false because Mr Sherlock would say that he did not have a camera phone. Mr Ryan remained steadfast in his evidence. In his evidence in chief, Mr Sherlock did indeed testify that there was no camera on his mobile phone. Under cross-examination, he repeated that he had never had a phone with a camera on it. Mr Sherlock was then shown a number of date-stamped photographs, taken at or in the vicinity of the lower field quarry site, in which, as he was forced to admit, he is clearly depicted using his mobile phone to take photographs on 29 May and 9 June 2014. Mr Sherlock had no explanation to offer for his earlier sworn evidence to the contrary.

88. Nonetheless, Mr Sherlock remained unembarrassed in his evidence that he had been twice assaulted by Mr Jones, requiring hospital treatment on each occasion, and Mr Sherlock Jnr persisted in his evidence that Mr Ryan had driven over his foot, necessitating medical treatment and leaving him on crutches. No medical evidence whatsoever was adduced in support of any of those allegations.

*xi. Mr Sherlock's objection to remediation works at the lower field quarry site*

89. I have already described how Mr Sherlock had installed a locked barrier preventing access to the quarry site in 2014. On 2 July 2015, Gilligan J made an order, on consent between the parties, amending the heads of agreement between them to permit Nutgrove to enter the lands to effect compliance with any council enforcement notice. Through their respective solicitors, Nutgrove informed Mr Sherlock by email on Wednesday, 26 October 2016 that the necessary works were to commence on Tuesday, 1 November 2016. But, when Mr Wisely Jnr went to Mr Sherlock's house on the morning of 1 November 2016 to collect the keys to the barrier, Mr Sherlock refused to provide them. Later that morning, Mr Sherlock's solicitor wrote to Nutgrove's solicitor, requiring, both in that letter and in subsequent correspondence, that each of a list of documents be provided in a form satisfactory to Mr Sherlock as a condition precedent to permitting the necessary works to be carried out. Through his solicitor, Mr Sherlock argues that the conditions precedent for which he contends, though nowhere apparent on the face of the order made by Gilligan J on 2 July 2015, are implicit in it. Mr Sherlock's legal representatives have never suggested that any such condition precedent was agreed between the parties and have never applied to this court to speak to the terms of the order to make explicit what they contend is somehow implicit in it.

90. Mr Sherlock contends that it is implicit in the order of Gilligan J that Nutgrove was not to re-enter the lower field quarry site to effect compliance with the council's enforcement notice until Mr Sherlock was satisfied with: (a) the nature and extent of Nutgrove's insurance cover, which must indemnify him; (b) Nutgrove's restoration plans; (c) Nutgrove's health and safety statement; (d) Mr Shiels' professional indemnity insurance as Nutgrove's consultant in respect of the necessary works; (e) the council's agreement to the restoration works that it had required in the enforcement notice; (f) the proposed start date for those works; and (g) the identity and qualifications of Nutgrove's quarry manager.

91. On 8 September 2016, on foot of a complaint made by the council, summonses issued against both Mr Wisely, as a director of Nutgrove, and Mr Sherlock, as the owner of the lower field quarry lands, charging each with failure to comply with the second



enforcement notice, contrary to s. 154 of the 2000 Act and s. 156(1)(b) of that Act, as amended by s. 46 of the Planning and Development (Amendment) Act 2010. Those summonses were made returnable to Portlaoise District Court on 16 December 2016.

*xii. the payments due to Mr Sherlock for limestone extracted by Nutgrove*

92. Mr Sherlock makes a number of complaints about Nutgrove's performance of the lower field quarry agreement. The first and most significant such complaint is that Nutgrove failed to pay Mr Sherlock the agreed rent for the site and failed to properly pay him for the stone extracted from it.

93. There is a clear conflict of evidence between Mr Wisely and Mr Sherlock on whether the payment of rent ever formed part of the agreement.

94. On the payments due for stone extracted, Mr Sherlock alleges that the Wiselys or Nutgrove still owe him approximately €260,377.

95. In his counterclaim, Mr Sherlock calculates that figure in the following way: 385,477 tonnes of stone has been extracted from the quarry, for which he was entitled to €385,477 (representing €1 per tonne), yet he has only received an aggregate payment of €125,100, implying an outstanding payment due to him of €260,377.

96. Peter Kinghan, who is both a chartered minerals surveyor and a chartered geomatics surveyor, gave evidence on behalf of Mr Sherlock that 132,137 m<sup>3</sup> of material (excluding topsoil and overburden) has been extracted from the permitted quarry area, of which 115,630m<sup>3</sup> has been removed from the site. A colleague of Mr Kinghan's, John G. Kelly, who holds a doctorate in geology, gave evidence on Mr Sherlock's behalf that the lower field quarry is a typical Waulsortian limestone one. Dr Kelly testified that the *in situ* density of Waulsortian limestone is typically 2.65 to 2.75 Mg/m<sup>3</sup> (*i.e.* megagrams - or metric tonnes - per cubic metre). Taking an average density of 2.7 Mg/m<sup>3</sup>, as Dr Kelly suggests, would result in an estimate of 312,201 tonnes of stone removed from the site, as Mr Kinghan points out.

97. Mr Sherlock acknowledged in evidence that he had received payments from Nutgrove or the Wiselys amounting to approximately €169,000, although he sought to characterise approximately €44,000 of that sum as comprising separate payments from them for loads of clay, rather than loads of stone. Mr Wisely was quite clear in his evidence that there had been no separate payments for clay and that Nutgrove had made payments to Mr Sherlock of €169,920.

98. In support of his contention that he had been underpaid by Nutgrove or the Wiselys, in deliberate and dishonest breach of the agreement between them, Mr Sherlock called a gentleman named Peter McDonald as a witness. Mr McDonald gave evidence that he worked as a lorry driver for Mr Wisely for approximately two years between 2008 and 2010. Mr McDonald claimed that, on occasion, he delivered loads of sand for cash without a docket from sand pits operated by Nutgrove in Clonaslea and Clara at the direction of Mr Wisely and, on two occasions, Mr Wisely Jnr. Under cross-examination, Mr McDonald sought to clarify that he had also been referring to loads of stone from the quarry in the lower field. Mr McDonald acknowledged that he had been laid off by Nutgrove in 2010 in circumstances that left him unhappy. Mr McDonald conceded that there had been incidents involving collisions between his lorry and other vehicles and concerning disputed deliveries before he was let go, Mr McDonald confirmed that is good friend and neighbour of the Sherlock family and had attended every day of the trial in that capacity.

99. Mr Sherlock himself testified that, at a time in the year 2010 that he could not specify, he observed Ms Hurley 'drafting up a docket which she then placed into a bundle of such dockets bound for [the council] with a view to recovering monies from the council' on foot of that invoice. This was plainly intended as an allegation that Ms Hurley had participated in a fraud upon the council by the Wiselys or Nutgrove. In her evidence, Ms Hurley denied that allegation, pointing out that the council required all dockets to be signed by one of its representatives at the point of delivery of the load concerned.

100. Mr Shiels, the planning consultant retained by Nutgrove, is also a chartered mineral surveyor, as well as a qualified mining engineer. He conceded that, in its planning permission application, Nutgrove had used an estimate of 2.6Mg/m<sup>3</sup> for the density of the limestone rock it proposed to extract from the lower field quarry, but testified that that figure had turned out to be unduly optimistic due to the presence of areas of deep overburden at the south end of the quarry site and of significant levels of clay infill there. Nutgrove also called a gentleman named Eddie Hogan as a witness on its behalf. He is a civil engineering contractor with 50 years experience in drilling and blasting. Mr Hogan carried out the drilling and blasting operations at the lower field quarry site on behalf of Nutgrove. He testified that there was a heavy clay seam at the south of the site, giving rise to unusual levels of contamination in the quarry.

101. Mr Shiels gave evidence that the estimated void space (volume of material extracted from the quarry) was 131,006m<sup>3</sup>, to which he applied a margin of error of 10%, suggesting a figure, at the lower end, of 117,905m<sup>3</sup>. From that figure, Mr Shiels suggested it had been agreed that the following deductions should be made: 12,058m<sup>3</sup> for waste deposited in the old quarry; 4,400m<sup>3</sup> for overburden; and 9,022m<sup>3</sup> for stone remaining stockpiled at the quarry, leaving a residual figure of 92,425m<sup>3</sup> of stone extracted from the quarry.

102. Allowing for the unusual amount of clay infill that had been found to be present in the quarry and the process of karstification (the dissolution of soluble rock such as limestone by weathering), Mr Shiels proposed 2.3Mg/m<sup>3</sup> as the average bulk density of the limestone in the quarry. In his view that is a more appropriate measurement than that of its particle density, which was relied upon by Dr Kelly. That would imply that a total of 212,577 tonnes of limestone had been extracted.

103. Further assuming an average lorry load of 23 tonnes, 212,577 tonnes of limestone would have provided 9,242 loads. At €20 per lorry load, that would entitle Mr Sherlock to a maximum potential payment of €184,840 from Nutgrove, as against which Nutgrove has already paid Mr Sherlock €169,000; holds another €6,000 to his account; and claims a deduction for the material extracted from the quarry by Mr Sherlock for his own use. Thus, Nutgrove contends, Mr Sherlock has been fully and properly paid in accordance with the terms of the agreement between them.

104. Under cross-examination, Mr Shiels acknowledged that, in a report that he had prepared for Nutgrove in January 2012, the estimated figure that he had provided for the tonnage of limestone extracted from the quarry was 263,510 tonnes, significantly higher than the estimate of 212,577 tonnes that he was now relying upon, but expressed the view that this simply demonstrated the extraordinary difficulty in making, and drawing inferences from, a retrospective survey of the volume of quarried material.

*xiii. Nutgrove's compliance with planning law as an implied term of the agreement*

105. Nutgrove obtained a final grant of planning permission for the lower field quarry development on 20 January 2009. That permission was subject to 19 specified conditions.

106. Mr Sherlock pleads that it was an implied term of the agreement between the parties that Nutgrove would apply for planning permission for the lower field quarry 'and would operate the quarry in accordance with the said planning permission and the conditions attached thereto.' Thus, Mr Sherlock contends that the public law obligations assumed by Nutgrove simultaneously became private law obligations owed to him, with the result that any breach of a condition of the planning permission was a breach of the agreement between the parties. Mr Sherlock goes further by pleading that compliance with some or all of the conditions of the planning permission was a fundamental term of the agreement between the parties, any breach of which by Nutgrove amounted to a fundamental breach of the agreement, giving Mr Sherlock the right to terminate it.

107. Quite separately, Mr Sherlock pleads that Nutgrove unlawfully sought to conceal its fundamental breach of the lower field quarry agreement from him, by signing for and failing to deliver a letter from the council addressed to him, dated 18 July 2011, warning him as landowner of a breach of Nutgrove's planning permission for the lower field quarry development.

108. Confusingly, Mr Sherlock averred in an affidavit that he swore on 21 March 2014, that he had received a warning letter from the council on 17 July 2011 concerning a breach of the planning permission for the quarry. Mr Wisely gave evidence that he could not recall receiving any such letter on behalf of Mr Sherlock and that the signature in his name on the recorded delivery receipt for that letter was not his. Ms Hurley, Nutgrove's office manager, testified that she did recall Mr Wisely informing her in passing that he had received a warning letter from the council at about that time but that she also recalled Mr Sherlock coming into the site office with a similar letter that he had received during the same period.

109. It is clear from correspondence produced in evidence without objection that, on 12 July 2011, the council wrote to Nutgrove concerning its failure to provide the cash or bond required under condition no. 17 of its planning permission for the lower field quarry. Under that condition, Nutgrove was to lodge either cash or a bond in the sum of €100,000 with the council within three months of the grant of planning permission on 20 January 2009 to ensure completion of the development or, if necessary, restoration of the lands. On 10 October 2011, the council again wrote to Nutgrove to confirm its agreement to Nutgrove's proposal to provide five cash payments of €5,000 *per annum* (amounting to an aggregate payment of €25,000) instead. David O'Hara, a town planner in the planning department of the council, gave evidence that it had sent a separate warning letter to Nutgrove in July 2011, concerning a leak that had occurred from barrels of oil or diesel at the site, but there was no suggestion that the council ever took any further action in relation to that issue.

110. I have already described (at paragraphs 36-38 above), the service upon Nutgrove of a second enforcement notice, dated 5 November 2015, requiring it: first, to refrain from quarrying outside the permitted area; second, to provide a restoration plan for the lands quarried outside that area by 26 November 2015, with agreed restoration works to be completed by 7 January 2016; third, to provide a restoration plan to restore the quarry floor above the level of the water table by 26 November 2015, with agreed restoration works to be completed by 7 January 2016; fourth, to submit both a landscaping plan and a restoration plan for the quarry by 26 November 2015; and fifth, to provide a stock and trespass proof fence around the full perimeter of the site before 7 January 2016.

111. There was a dispute in evidence about whether Nutgrove's acknowledged extension of the quarry beyond its north and north-east boundary occurred with the permission or acquiescence of Mr Sherlock and whether, if it did, that was a *quid pro quo* for the sowing of crops by Mr Sherlock or a conacre tenant of his that had 'hemmed in' the quarry to the south and west. There was a protracted controversy in evidence about whether Nutgrove had quarried beneath the water table in breach of its planning permission or the water table had risen, due to exceptional weather conditions, above the excavation depth permitted under that permission. There was a controversy about whether the location of both the site-office and weighbridge, which were not those indicated in the site drawings by reference to which planning permission had been obtained, breached that permission or amounted to a permissible exempted development.

112. I have described earlier in this judgment how, after lengthy exchanges between Nutgrove and the council, extending well beyond the deadline in the enforcement notice, the council confirmed in an e-mail dated 24 October 2016 that it was happy for the necessary works to commence in accordance with the plans that had been agreed between them, and how Mr Sherlock refused to permit those works to be carried out.

113. Mr Kinghan, as Mr Sherlock's planning consultant, testified that Nutgrove had been, and remained, in breach of its planning permission for the lower field quarry development in a number of respects. Mr Sherlock also called as a witness David O'Hara, a town planner in the planning department of the council, to offer a view about Nutgrove's failure to comply with that permission by reference to the terms of the enforcement notices that the council had issued against it. On behalf of Nutgrove, Mr Shiels, its planning consultant, disputed certain asserted breaches of its planning permission and, in acknowledging the remainder, testified that they were capable of being remediated quickly and easily, if Nutgrove was permitted to do so. In his evidence, Mr O'Hara also expressed the view that the asserted breaches of Nutgrove's planning permission that were the subject of the second enforcement notice could be easily fixed by carrying out the remediation works that the council had agreed with Nutgrove.

## **Analysis**

114. It is common case that the agreement at the heart of the present proceedings, the lower field quarry licence agreement, was one made orally between the parties and never reduced to writing. There is a direct conflict of evidence between Mr Wisely and Mr Sherlock concerning what precisely they agreed. Much turns on the credibility of each as a witness.

115. Mr Sherlock was an argumentative and evasive witness, more than once caught out in a demonstrable lie, the most obvious - though not the only - example of which was his unwavering insistence, both on affidavit and in his testimony to the court, that he had never owned a mobile phone with a camera on it, until confronted with photographs clearly showing him using the camera on his mobile phone on more than one occasion. I regret that I am unable to accept his evidence on any point in controversy between the parties.

116. On the balance of probabilities, I find the following facts proved.

117. At all material times, Mr Sherlock represented himself to Mr Wisely as the owner of the old quarry lands. To apply to register the quarry development with the council or to seek planning permission from the council for it, incurring significant outlay in the process, would not have made financial sense for Nutgrove or the Wiselys, had they known or suspected at the material time that Mr Sherlock was not the undisputed owner of those lands. Mr Sherlock was the occupier of those lands and believed that he had obtained title to them by adverse possession, although he did not disclose that to Mr Wisely.

118. The title deeds that Mr Sherlock provided to Nutgrove as proof of his ownership of the lands do record one James Sherlock as the owner of them. Of course, that James Sherlock was Mr Sherlock's father and namesake, whose estate - remarkably - has remained unadministered since his death in 1972. The fact that the conveyance to James Sherlock occurred as long ago as 28

October 1944, would have given pause to anyone carefully scrutinising those deeds for confirmation of Mr Sherlock's direct personal ownership of those lands but, as Mr Sherlock must know, there was no reason for Nutgrove, the Wiselys or, indeed, the council to engage in that level of scrutiny of those documents until Mr Sherlock's brother challenged his entitlement to consent to Nutgrove's planning application as the owner of them. Mr Sherlock's repeated assertion that the Wiselys knew that the lands remained part of the unadministered estate of his father is both uncorroborated and implausible in those circumstances.

119. I am satisfied that Mr Sherlock was aware of the existence and role of Nutgrove no later than 9 January 2006, having signed a letter to the council on that date in which those facts were made plain. In asserting that he did not contract with Nutgrove, Mr Sherlock relied on his purported ignorance of its existence, rather than on any practical or principled objection to contracting with it as Mr Wisely's designated vehicle. Thereafter, every payment cheque he received was written on the account of Nutgrove, and was encashed by him without objection or reservation. Thus, I find that the parties to both the old quarry field and lower field quarry licence agreements were Mr Sherlock and Nutgrove.

120. I find that Nutgrove expended approximately €135,000 in developing a quarry operation at the quarry field on the basis of its agreement with Mr Sherlock and of Mr Sherlock's representation that he was the owner of those lands, and I accept that Nutgrove later spent approximately €150,000 on the development and operation of the lower field quarry site on an equivalent basis.

121. Urging the court to adopt the analysis set out in *Halsbury's Laws* (4th edn, 2003) vol 31, para 351, that a quarrying licence which is merely oral may be effectual if the licensee incurs expense in working on the faith of it, Nutgrove submits, and I accept, that it obtained an effectual licence from Mr Sherlock in just that way. A right to work a quarry is more than a mere licence - it is a profit *à prendre* lying in grant (ibid, para 349). Where a profit *à prendre* to quarry has been granted by licence only, it is thus a licence coupled with an interest, irrevocable until its subject-matter has been exhausted or the term for which it was granted has expired; see Power, *Intangible Property Rights in Ireland*, 2nd edn. (Dublin, 2008) (at para 12.41).

122. It follows that I must reject Mr Sherlock's submission that Nutgrove merely obtained from him a bare licence, or a licence without an interest, comparable to that which was at issue before the old Irish Court of Appeal and the House of Lords in *David Allen and Sons Billposting Ltd v King* [1915] 2 IR 213, [1916] 2 AC 54 and, in consequence, one that was revocable at will. As Power explains (at para 17.34):

'A licence coupled with an interest exists when the right to be enjoyed is not a mere privilege or entertainment, but an interest in land, usually a profit *à prendre*, such as a fishing right or a right of mining or quarrying. A licence coupled with an interest is, in conventional parlance, "irrevocable".'

123. Even if that were not so, following the observations of Murphy J for the Supreme Court in *Sweeney v Duggan* [1997] 2 I.L.R.M. 211 at 216, I would imply into the agreement a term that it was one for the life of the quarry or the duration of the planning permission, whichever ended sooner, as reflecting the presumed intention of the parties under the officious bystander test. That must follow from the time and money that Nutgrove was anticipated to spend, and did spend, seeking and obtaining the necessary planning permission and developing and operating the quarry, if the agreement was to have business efficacy.

124. Insofar as it may be argued that the contract is unenforceable as one for the sale of an interest in land that is not in writing or evidenced in writing, I would not hesitate to direct specific performance of it as one captured by the equitable doctrine of part performance in respect of which, as Barron J explained in *Mackie v Wilde and Longin* [1998] 2 IR 578:

'[W]hat is essential is that

- (1) there was a concluded oral contract;
- (2) that the plaintiff acted in such a way that showed an intention to perform the contract;
- (3) that the defendant induced such acts or stood by while they were being performed; and
- (4) it would be unconscionable and a breach of good faith to allow the defendant to rely upon the terms of the Statute of Frauds to prevent performance of the contract.'

125. While I do not think Mr Sherlock put up any argument to the contrary, I accept that the facts of this case and, hence, the nature of the licence granted here are consistent with those that were in issue in *Atkinson v King* (1877) IR 11 CR 536; (1878) 2 LR Ir 320 and *Stanley v Riky* (1892) 31 LR Ir 196, while clearly distinguishable from those that were before the Supreme Court in *O'Reilly v S Holmes & Sons (Dublin) Ltd* (Unreported, Supreme Court, July 28, 1967).

126. I accept, as Mr Sherlock did under cross-examination, that the licence to quarry was an exclusive one, although I am satisfied that it belonged to Nutgrove, rather than Mr Wisely personally. I find, in accordance with the evidence of Mr Wisely, which I accept, that Mr Sherlock was to receive a payment of €20 *per* lorry load of limestone extracted from the lower field quarry (without reference to the weight of that stone) and that no rent or other payment was due to Mr Sherlock under the licence agreement.

127. I have been unable to attribute any weight to the evidence given in these proceedings by Ms Scott, Mr Sherlock Jnr, Mr Sherlock's daughter Sarah Sherlock, or Mr McDonald, wherever it came into conflict with that adduced on behalf of Nutgrove, as none of those persons was unaffected by either obvious self-interest; natural love and affection for, or longstanding friendship with, Mr Sherlock; an established animus towards Mr Wisely; or some combination of those factors.

128. I do not accept that it was reasonable for Mr Sherlock to remove the entrance barrier to the quarry in January 2012; to block that entrance with a combine harvester on 3 or 4 January 2012; or to block that entrance again with a tractor and slurry tanker on 1 February 2012. I do not accept Mr Sherlock's uncorroborated evidence that he received legal advice that he should leave that tractor and slurry tanker blocking that entrance, or that it would have been reasonable or appropriate for him to follow such advice if it had been proffered. I find, as he admits, that Mr Sherlock did make allegations to Mr Wisely Jnr of immoral behaviour on the part of Mr Wisely and Ms Hurley. I am satisfied that he did so in order to intimidate Mr Wisely into abandoning or renegotiating the lower field quarry agreement and that this constituted reprehensible behaviour on Mr Sherlock's part. I find that Mr Sherlock's actions in placing a copy of the solicitor's correspondence he subsequently received in his front window and in attaching another copy of that correspondence to the fence in front of his house was done for the same purpose, and represented equally discreditable behaviour.

129. I am, thus, satisfied that Mr Sherlock breached the lower field quarry licence agreement by interfering with Nutgrove's quarrying activities in January 2012 and by effectively bringing those activities to a halt in February of that year. Further, Mr Sherlock remained

in breach of that agreement right up to the trial of these proceedings.

130. I find that Mr Sherlock broke into Nutgrove's site office at some time in or before the month of February 2014 and I reject his assertion that he had some justification or an innocent explanation for doing so. I am satisfied that Mr Sherlock, either in person or through Kilmainham Quarry Ltd (a company owned or controlled by him), has sold limestone rock and other material from the lower field quarry in breach of the lower field quarry agreement between Nutgrove and Mr Sherlock. I am satisfied, on the balance of probabilities, that Mr Sherlock was responsible, directly or indirectly, for the damage to the signs that Nutgrove erected at the quarry in 2015 and that this represents a further breach of the said agreement.

131. I accept without reservation the evidence of Mr Jones and Mr Ryan concerning the incidents that occurred on the three occasions when Mr Jones served legal documents on Mr Sherlock. I reject the conflicting evidence of Mr Sherlock and of Mr Sherlock Jnr on those incidents in its entirety. I find that any injury sustained by either Mr Sherlock or his son in the course of any of those incidents was the result of their own misadventure.

132. I find that Mr Sherlock's refusal to permit Nutgrove to access the lower field quarry site in November 2016 in order to carry out the appropriate remediation works agreed with the council amounted to a breach of both the lower field quarry agreement and the interlocutory order of Murphy J made on 19 June 2012, restraining Mr Sherlock from locking Nutgrove out of those lands. I reject the assertion made by Mr Sherlock's legal representatives in correspondence on his behalf that it was an implied term of the order made by Gilligan J on 2 July 2015, amending the heads of agreement between Nutgrove and Mr Sherlock previously made a rule of court, that the implementation of the new head of agreement thereby inserted was subject to Nutgrove's taking various steps to the satisfaction of Mr Sherlock as a condition precedent. There was no basis for that assertion in law or in fact.

133. Mr Sherlock has failed to satisfy me, on the balance of probabilities, that he was underpaid by Nutgrove for the lorry loads of limestone that it extracted from the lower field quarry. I conclude that there are simply too many variables and acknowledged uncertainties in the method of estimating the tonnage of limestone extracted from the quarry that Mr Sherlock seeks to rely upon, although in doing so I do not disparage in any way the evidence of either Mr Kinghan or Dr Kelly on that issue.

134. I reject Mr Sherlock's argument that it was an implied term of the agreement between Nutgrove and Mr Sherlock that Nutgrove would operate the quarry in accordance with the planning permission for it, thus duplicating a public law duty as a private law obligation. On the evidence before the court, there was not a scrap of discussion about the significance of the conditions that might attach to the anticipated planning permission for the quarry development when Mr Wisely (on behalf of Nutgrove) and Mr Sherlock were striking their bargain. Hence, if a term were to be implied into their agreement, imposing upon Nutgrove a contractual duty to Mr Sherlock to strictly comply with every condition of whatever planning permission it might obtain, it is one that would have to be cut out of whole cloth. While the argument that a term should be implied into every private law agreement, including this one, that the parties will comply with all relevant public law obligations upon them is, perhaps, a superficially plausible one, it does not stand up to careful scrutiny. In *Meridian Communications v Eircell Ltd* [2002] 1 IR 17, O'Higgins CJ summarised the principles that govern the identification of an implied term in an agreement as follows (at 40):

- ' - before a term will be implied in a contract it must be necessary to do so, and not merely reasonable;
- the term must be necessary to give business efficacy to the agreement;
- it must be a term that both parties intended, that is, a term based on the presumed common intention of the parties;
- the court will approach the implication of terms into an agreement with caution;
- there is a presumption against importing terms into a contract in writing and the more detailed the terms agreed in writing the stronger is the presumption against the implication of terms;
- if the term sought to be implied cannot be stated with reasonable precision, it will not be implied.'

135. In my view, the implication into the agreement of the term contended for by Mr Sherlock would run counter to several of the foregoing principles. First, it is entirely unnecessary to do so in order to give business efficacy to the agreement. In the event of a breach of its planning permission by Nutgrove in a manner inimical to Mr Sherlock's business interests, he had available to him at all times the entire panoply of public law procedures and remedies under the 2000 Act, without the necessity to create a parallel private law right derived from the implied duplication of all of the conditions of Nutgrove's planning permission as conditions of the lower field quarry agreement.

136. Second, the reasonableness of the implication of such a broad and unnecessary implied term into the agreement between Nutgrove and Mr Sherlock is, to say the least, open to question on public policy grounds. Is it desirable, as a matter of public policy, to automatically duplicate public law duties as private law obligations by operation of law, when the enforcement of the former involves a legal procedure entirely separate from that used in the enforcement of the latter, creating an obvious risk of procedural confusion and, worse still, irreconcilable judgments? This case provides a perfect illustration of the obvious problems with such an approach, in that, in the present private law action, Mr Sherlock invites the court to consider at length - and, ultimately, to adjudicate upon - the public law issue of whether there has been a breach of various conditions of Nutgrove's planning permission, in circumstances where substantially the same issue was, at the time of trial, before the District Court in proceedings brought under ss. 154 and 156 of the 2000 Act and may, at any time - at the instance of the council, Mr Sherlock or any other person - be the subject of any other appropriate application under that Act.

137. Further, it is important to bear in mind that Mr Sherlock does not contend that it was an implied term of the lower field quarry agreement that Nutgrove abide by the requirements of the planning code *i.e.* comply with any declaration of the council under s. 5 of the 2000 Act; or any enforcement notice issued by the council under s. 154; or any order made by the court under s. 160; and so on. That prompts two further questions. First, where is the evidence of any common intention that Nutgrove should be bound under its agreement with Mr Sherlock to strictly comply with each and every condition attached to its planning permission as opposed to, say, a common intention that Nutgrove should be bound to strictly comply with any declaration given, notice issued, or order made concerning it under the 2000 Act or, indeed, a common intention that the public law rights and obligations of the parties should be kept quite separate from their reciprocal private law rights and obligations under the agreement between them? Second, and following on from the first question, on what basis could the officious bystander possibly intervene to observe that it went without saying that the parties shared the common intention first described, to the exclusion of any other possible common intention?

138. The requirement upon Nutgrove under condition 17 of the planning permission to provide a completion or restoration bond in the

sum of €100,000 within three months, provides a practical illustration of the problems faced by an officious bystander attempting to assert an intention on its part to be contractually bound to Mr Sherlock to strictly comply with each and every planning permission condition imposed upon it by the council, including that one. At the height of the financial crisis, Nutgrove fell into breach of that condition, before successfully renegotiating it. On Mr Sherlock's case, Nutgrove's initial failure to provide that bond, before renegotiating it, amounted not merely to a breach of the implied term of the lower field quarry licence agreement for which he contends, but to a breach of that term as a fundamental term of that agreement, thus permitting him to terminate it. I do not accept that the officious bystander could fairly or reasonably impute an intention on the part of Nutgrove to be bound in that way.

139. For the reasons I have given, I find that it was not an implied terms of the lower field quarry agreement between Nutgrove and Mr Sherlock that Nutgrove would at all times operate the quarry in strict compliance with each and every condition of its planning permission.

140. In addition, I find on the balance of probabilities that many, if not most, of the asserted breaches of Nutgrove's planning permission - such as its quarrying activity to the north of the permitted area; and the placing of both the quarry entrance and the site office and weighbridge at the wrong location - occurred either with Mr Sherlock's acquiescence or with his active agreement or consent. While that does not justify or excuse any breach by Nutgrove of its planning permission, if that is what has occurred, it does further militate against Mr Sherlock's argument that Nutgrove's strict compliance with every condition of that planning permission was both an implied term and a fundamental condition of the lower field quarry licence agreement between the parties.

141. For completeness, I should add that, even if I could be satisfied of the existence of the implied term contended for (and I cannot), it would be nigh on impossible to accept it as a fundamental term or condition of the lower field quarry licence agreement. Even if Mr Sherlock were permitted to pick and choose, by acknowledging that not every breach of a condition of Nutgrove's planning permission amounted to a repudiatory breach of that agreement while arguing that certain breaches should be categorised in that way, he would still have to contend with the evidence of Mr O'Hara from the council (Mr Sherlock's own witness) that, in his view, all of the outstanding asserted breaches of Nutgrove's planning permission are easily remediable, should Nutgrove be permitted to carry out the necessary works.

142. I conclude by observing that the appropriate way for Mr Sherlock to raise any genuine concerns he may have had about his financial entitlements under the lower field quarry agreement, or about the safety or planning compliance of Nutgrove's quarry operations, was by dialogue with - and, if necessary, complaint to the appropriate authority about, or legal action against - Nutgrove. It was not by direct physical interference with, or obstruction of, its quarrying operations, still less by the scurrilous abuse of Nutgrove's directors and staff, or of process servers going about their lawful activities.

## **Conclusion**

143. Based on the findings I have made, I will make the following orders.

144. I grant Nutgrove the permanent injunctions that it seeks in its statement of claim, subject to whatever submissions there may be concerning the appropriate terms of those orders.

145. I dismiss Mr Sherlock's counterclaim in its entirety. In that regard, it is perhaps superfluous to note that no relief under s. 160 of the 2000 Act could, in any event, be granted in proceedings other than those taken properly in accordance with the requirements of that Act.

146. I do not believe that there is the necessary evidence of loss or damage before the court to permit an award of damages to Nutgrove for Mr Sherlock's breach of the lower field quarry licence agreement, subject to whatever submissions the parties may wish to make on that issue.

147. I have come to the conclusion that Nutgrove's application for the attachment and committal of Mr Sherlock for his alleged contempt of the order made by Gilligan J on 2 July 2015 is legally misconceived. The order concerned is one permitting the variation or amendment of heads of agreement that had been previously made a rule of court. As McDermott J pointed out in *DL v ML* [2013] IEHC 441, the making of a clause of a settlement agreement a rule of court does not have the same effect as making an order in terms of the clause. For that reason, it seems to me that the relevant complaint is that Mr Sherlock is in breach of the heads of agreement made a rule of court, rather than in breach of an order of the court, which does not provide the necessary platform for an application for attachment and committal. Had Nutgrove sought Mr Sherlock's attachment and committal for breach of the order of Murphy J made on 19 June 2012, the position might well have been different, but it would be inappropriate to express a concluded view on that point and I do not purport to do so.

148. I will hear the parties on whether the interlocutory injunctions sought by Nutgrove to facilitate the restoration works agreed with the council are necessary or appropriate in view of the permanent injunctions I have granted.