

THE HIGH COURT

2007 No. 103 MCA

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000,
AND IN THE MATTER OF AN APPLICATION BY CORK COUNTY COUNCIL**

BETWEEN

CORK COUNTY COUNCIL

APPLICANT

AND

SLATTERY PRE-CAST CONCRETE LIMITED, PATRICK SLATTERY, ROSE SLATTERY AND DECLAN SLATTERY

RESPONDENTS

AND

THE HIGH COURT

2007 No. 5661 P

BETWEEN

BRIAN FROGGAT, WILLIAM CASHIN AND DENNIS DALY

PLAINTIFFS

AND

SLATTERY PRE-CAST CONCRETE LIMITED, ROSE SLATTERY, DECLAN SLATTERY AND PATRICK SLATTERY

DEFENDANTS

Judgment of Mr. Justice Clarke delivered on the 19th day of September, 2008

1. Introduction

1.1 Slattery Pre-Cast Concrete Limited ("Slatterys") was, in many respects, a company whose fortunes mirrored the boom in the construction industry associated with the Celtic Tiger. From very small beginnings in the late 1990s Slatterys' business grew to a very great extent. That business, as it developed, was concerned largely with the supply of ready-mix concrete although, in its initial stages, it had been principally concerned with the supply of pre-cast concrete products.

1.2 The business was conducted at a rural site about 2.5 kilometres north-west of Rathcormac village near Fermoy in County Cork. It is the growth and extension of that business that gives rise to these proceedings. In the first above named proceedings the applicant ("Cork County Council") alleges that Slatterys are in breach of planning law in that it is said that a planning permission given in respect of the relevant concrete business related to a much smaller enterprise so that much of the physical structures and use carried out on the site are said to be unauthorised. Statutory orders under s. 160 of the Planning and Development Act 2000, ("the 2000 Act") are sought in that regard. The allegations largely turn on what is said to have been an impermissible extension of both the scale and extent of the business.

1.3 In the second above named proceedings the various individual plaintiffs also seek orders under s. 160 of the 2000 Act, on the same basis as that asserted by Cork County Council. However, in those proceedings an additional claim is made in respect of an alleged nuisance which in turn stems from what is said to be the consequences of a significant extension in the scale of the business operation.

1.4 Against that general background it is appropriate to turn to the issues which arise in somewhat greater detail.

2. The Issues

2.1 I propose addressing the planning issues first.

2.2 Both Cork County Council and the individual plaintiffs claim that there has been a breach of the 2000 Act under two broad general headings. Firstly, it is said that certain physical works were carried out by Slattery's which are not the subject of planning permission. Secondly, it is said that there has been a material intensification of use without an appropriate permission. It will be necessary to analyse the precise components of both of those allegations in due course. However, in general terms, and without necessarily conceding each and every element of the respective claims, Slatterys accept that the operation currently in progress near Rathcormac does not have the benefit of a planning permission sufficient to allow it to be conducted in the manner to be observed on the ground.

2.3 However, it is argued that all (or at least some) of the planning claim is statute barred. A number of issues, both legal and factual, arise under this heading.

2.4 Firstly there is an issue between the parties as to whether, properly construed, the limitation period in question is one of five years or seven years.

2.5 Secondly, there is a question of fact as to the precise stage of development which the business had reached at various points in time and in particular, (in the event that seven years is the appropriate limitation period) at the time which was seven years prior to the commencement of both of these proceedings.

2.6 Thirdly, there is a question as to the proper approach which the court should adopt in relation to an incremental development of a business in circumstances where the limitation period starts to run in the course of that incremental development. While it will be necessary to address the legal principles by reference to which a material change of use is to be assessed later in the course of this judgment, it is clear that not every increase in the use to which a property may be put can amount to a material change in use. Therefore, questions will inevitably arise as to the point in time at which it can be properly said that there were any breaches of the 2000 Act. This question has obvious relevance to the limitation point given that it is only breaches which had occurred more than seven or five years prior to the commencement of the relevant proceedings which can be said to be statute barred. In an extreme case if there were no breach prior to whichever of those periods is found to be applicable, then the limitation period could have no application.

2.7 However, in addition, questions arise as to the proper approach of the court in circumstances where it is shown that there had been a material change in use, at a time prior to the operation of the relevant limitation period but where there continued, thereafter, to be a further intensification of the use concerned.

2.8 Fourthly, and finally so far as the planning aspects of the case are concerned, Slattery's adopt a fall-back position in the event that I am not persuaded by their primary argument to the effect that any breach of the planning laws is no longer enforceable by virtue of the expiry of the relevant limitation period. In those circumstances it is suggested, correctly so far as it goes, that the court retains a discretion to decide what should be done. On that basis I am asked to consider an alternative approach to imposing an immediate prohibitory order which would have the effect (depending on the extent to which I was satisfied that the current activities being carried out at the site are in breach of planning permission and are capable of being enforced notwithstanding the limitation period), that some or all of the business would have to close. In those circumstances it is suggested that an appropriate order should be made so as to permit an application to regularise the planning situation to be progressed.

2.9 So far as the nuisance aspect of the claim brought by the individual plaintiffs is concerned same is based on the same factual material. It is suggested that the level of use of the property gives rise to nuisance under a number of headings, most particularly noise, dust and damage to roadways. It is suggested on behalf of Slattery's that the complained of activities do not amount to a nuisance, or at least no longer give rise to a nuisance.

2.10 Finally, in relation to both matters, Slattery's point to some remedial actions which have, undoubtedly, taken place in recent times and which, it is suggested, establish that, on their case, there is no continuing nuisance and which it is also suggested should be taken into account on the planning side, most particularly in relation to the exercise of any relevant discretion.

2.11 It is clear from the above that there are some issues of fact, most particularly the precise state of development of the site in the period seven years prior to the commencement of the respective proceedings, which are in dispute. However, much of the factual history is not in significant dispute. It is also clear that the planning history of the site is of some relevance to a number of the issues which I have identified. Against that background I propose to turn first to the uncontested history of events including the planning history of the site in question.

3 The Uncontested Facts

3.1 Slattery's business is conducted at a site in Coolnakilla, Rathcormac, County Cork. The site is owned and occupied by Slattery's. In 1997 permission was granted, under Permission N/96/4515, for a small scale pre-cast concrete production facility over an area of 0.9 acres of the site.

3.2 The site is in a rural area comprising approximately 12.5 acres and is located some 2.5 kilometres north west of Rathcormac village at the western end of a minor rural road. On the 16th December, 1996, Cork County Council received an application (Ref. 96/4515) for retention permission by the second named defendant ("Patrick Slattery") for a change of use of part of a farm yard and existing farm buildings to a pre-cast concrete products production facility, compound and ancillary work. The application states that the acreage of the site was 0.9 acres approximately and that Patrick Slattery was the owner of the site. The application was accompanied by a covering letter dated the 12th December, 1996, by Barry & Partners on behalf of Patrick Slattery, which states that during the past year Patrick Slattery carried out conversion works to existing cattle houses within a farm yard and commenced the production of pre-cast paving slabs, window sills and lintels and concrete post and rail fencing in July of that year.

3.3 The letter states that the business employed Patrick Slattery, his son and two operatives and was a modest private operation. The letter further states that the traffic generated by the pre-cast facility comprised an average three to four deliveries to site of sand/gravel aggregates per week (five tonne loads) and three to four deliveries of finished products to clients per week. The letter further suggests that a small volume of private individual collection of products also took place mainly at weekends.

3.4 By decision dated the 12th May, 1997, Cork County Council issued a notification of its intention to grant retention permission for the relevant development subject to ten conditions. Among the conditions of permission were:-

Condition 5

"Noise levels emanating from the proposed development when measured at the site boundaries shall not exceed 55 dBa (15 minute Leg) between 08.00 hours and 20.00 hours Monday to Fridays inclusive and shall not exceed 45 dBa (15 minute Leg) at any other time..."

Condition 6

"All operations on-site shall be carried out in such a manner as to ensure that no odour or dust nuisance occurs beyond the site boundary because of such operations."

Condition 7

"The dust levels arising from the activities on the site shall be such that no visible deposition of dust from the site shall occur at any location off site."

3.5 It is clear that, from the late 1990s, Slattery's began to enjoy a significant increase in their business. It will have been seen that the original planning permission was in respect of a pre-cast concrete products production facility and ancillary work. While the precise extent and timing of the growth of a ready-mix concrete business alongside the pre-cast concrete business is a matter of some relevant dispute, it remains clear that from a relatively early stage some level of ready-mix concrete product was supplied alongside the pre-cast concrete products. It would appear that the reason for this practice stemmed from the fact that it was necessary to mix concrete as part of the process of making the pre-cast concrete products themselves. It was, therefore, relatively easy to provide customers who desired to obtain ready-mix concrete with that concrete mix which was, at the early stages, produced in the same manner whether it was designed for inclusion in Slattery's pre-cast concrete products or for sale as ready-mix to customers. On any view the ready-mix aspect of the business was small in scale in the early stages. There is equally no doubt but that, in general terms, the dramatic growth in the business of Slattery's stemmed from a huge increase in the ready-mix side of the business, so that it came to dominate the business by the middle years of this decade.

3.6 There is equally no doubt but that the physical extent of the lands in use for the purposes of the business increased significantly over the period between the late 1990s and the commencement of the respective proceedings.

3.7 It will be necessary to return to both the scale of the increase in the business, the scale of the increase in the lands utilised for it, and the effects of those increases on the environment generally and the position of the individual plaintiffs in particular, in due course.

3.8 Be that as it may from September, 2003 a number of complaints were made to Cork County Council in relation to the activities at the site, including in respect of what was said to be the deterioration of the road from Rathcormac to Coolnakilla Bridge and beyond and the increase in traffic on this road.

3.9 As a result, on the 9th February, 2005, Pdraig Moore, an official from Cork County Council carried out an inspection of the site where he concluded that the concrete production facility and the pre-cast concrete production facility had expanded to occupy a site approximately at least six times larger than the permitted development and further that this expansion was without planning permission. He concluded that conditions 1, 2, 6, 7, 8, 9 and 10 of permission 96/4514 had only partly been complied with or not complied with at all. He also noted that the public road leading to the site had been seriously damaged.

3.10 Cork County Council issued warning letters to the individual respondents/defendants on the 21st February, 2005. The relevant letters stated that it had come to the attention of the council that unauthorised development was being carried out on the lands which development was described as alleged unauthorised expansion and intensification of use of the concrete production facility. The relevant letters afforded the defendants/respondents a period of four weeks to make submission or observation by way of response.

3.11 A number of responses were received by the council from the defendants/respondents including a letter of the 23rd March, 2005, which referred to the history of the site and the 1997 permission stating that:

"Since then their business has grown in an unforeseen manner, thanks mainly to the economic boom and level of service they have provided to the Construction Industry and particularly the residential market in the North and East Cork areas."

3.12 A first retention application for the increased operation was submitted on behalf of Slattery's on the 5th August, 2005, but was declared invalid by Cork County Council on the 26th August, 2005, due to incomplete documentation. A second retention application was submitted on the 19th September, 2005, as planning application 05/6730, where Patrick Slattery applied for retention permission for:-

"Installation of a wastewater treatment unit, silt trap, interceptor unit, land drain and new bund around generator shed as well as retention of extension to concrete production facilities beyond permitted development boundaries (planning register reference number S/86/4514) to include enlarged site boundaries, prefabricated office and canteen accommodation units, aggregate/sand stockpiles, generator/LDO storage tank shed, water treatment shed, storage shed, "Dernasseer" concrete batching plant and control shed, weighbridge, truck cleaning and parking areas, water storage point and all other associated ancillaries at Coolnakilla, Rathcormac, County Cork."

3.13 The relevant application stated that the site comprised 12.5 acres and the application was accompanied by a document entitled "Development Description, Impact Assessment and Proposed Impacts Amelioration Report."

3.14 Further information was sought by Cork County Council which request was responded to by letter of the 16 February, 2006, which letter was accompanied by amended details and drawings. The response also provided clarification of the hours of operation which were stated to be 08.00 to 20.00 hours Monday to Friday with limited opening hours on Saturday and closed on Sunday with occasional hours outside these times to meet customer requirements. The response further stated that some 50/60 to 100 vehicle trips per day were carried out with carrying capacity of up to 250 tonnes per day. Upon receipt of the reply, further clarification was sought by Cork County Council. In a further response dated the 3rd May, 2006, the defendants/respondents stated trips involved some 50 to 150 HGV movements per day with 6 to 10 times per annum being exceeded. On the 6th June, 2006, the council issued a notification of decision to grant permission subject to 54 conditions. This decision was appealed to An Bord Pleanála ("the Board").

3.15 At the same time as this planning application 05/6730 was being considered, Cork County Council received numerous complaints from nearby residents (and in particular in October, 2005) regarding the activity of the defendants. By letter dated the 21st October, 2005, Cork County Council issued a further warning, pursuant to s. 152 of the 2000 Act, to Patrick Slattery claiming alleged non-compliance with the terms of permission 96/5414. The letter allowed for the making of submissions in writing within four weeks.

3.16 Pdraig Moore carried out a further inspection of the site on the 5th September, 2006, which revealed that the site boundaries had been extended from those which were the subject of the notice of intention to grant permission 05/6870. The topsoil had been removed from an extended area and a clay bank erected along the realigned northern and western side boundaries. Part of the area was being used for the storage of wrapped bales and there were old lorry tyres laid along the previous site boundary. Furthermore a mobile concrete batching plant had been set up on the site. There was also a second entrance to the site located at the north eastern corner and accessing onto a narrow lane currently serving one house. A concrete drive had been laid from the lane through the entrance. This entrance had not been shown on the site layout submitted with permission 05/6870.

3.17 There also appeared, in Mr. Moore's view, to have been an increase in the amount of sand and aggregate stored on the site since his last inspection on the 9th February, 2005. Furthermore, a series of concrete internal roads had been laid through the site. A number of mobile homes and portacabins were located in the north east corner of the site which appeared to be for the use of human habitation.

3.18 Two third party appeals were lodged in respect of the decision of Cork County Council to notify an intention to grant retention permission, namely an appeal by the second named individual plaintiff ("Mr. Cashin") and an appeal by the Quarry and Concrete Family Alliance. The appeal of Mr. Cashin claimed, *inter alia*, that there was excessive HGV traffic on an inadequate road network, unacceptable working hours, noise, environmental pollution, dust levels etc. He stated in his covering letter of the 29th June, 2006, that he had been forced to recently vacate his home because of the noise, dust and round the clock working hours. The appeal of the Quarry and Concrete Family Alliance stated that there was a history of unauthorised development, that the pattern of HGV movements was unsustainable, the road networks were inadequate and the level of traffic was underestimated.

3.19 On the 16th January, 2007, the Board issued its decision refusing retention permission stating as the reasons:-

"1. The site is located in an undulating attractive rural landscape identified in the current Fermoy Electoral Area Local Area Plan as 'Broad Fertile Lowland Valley', valued locally for its scenic amenity. Having regard to the location and topography of the site and that of the surrounding landform, the scale and nature of the uses including the associated activity, external storage of vehicles, plant and equipment, materials and external lighting, it is considered that the proposed development and development proposed for retention would interfere with the character of the landscape and seriously injure the visual amenities, character and appearance of this rural area, and would, therefore, be contrary to the proper planning and sustainable development of the area.

2. Having regard to the proximity to established residential property, the nature and scale of the development and the associated noise, activity and disturbance on and around the site, it is considered that the proposed development and development proposed for retention would seriously injure the amenities, and depreciate the value of, property in the vicinity. The proposed development and development proposed for retention would, therefore, be contrary to the proper planning and sustainable development of the area.

3. Having regard to the location of the site on a minor road which is seriously substandard in terms of its width and alignment it is considered, notwithstanding, proposals to upgrade the road, that the traffic generated by the development proposed for retention, including a large number of HGV vehicle movements would endanger public safety by reason of traffic hazard and obstruction of road users and would, therefore, be contrary to the proper planning and sustainable development of the area."

3.20 The Board's inspector, Philip Green, had also recommended a refusal of permission and in his report on his visit of the 22nd and 23rd October, 2006, he stated, at para. 9.31:-

"I have considered the implication of the previous permission granted on this site. However this appears to me to have allowed for a different scale and nature of activity being a pre-cast concrete product production facility alone on a smaller site. The expansion and regularisation of the site in the manner now sought, including its uses as a ready mix concrete batching plant, is materially different in its nature and scale and raises a number of further significant environmental considerations and implications. Clearly the condition of the site as it exists today (which I believe, on the information available, to be outside of the scope of that previous retention permission) is impacting unacceptably on the amenities of the area."

3.21 Also at para. 9.32, he stated:-

"I consider fundamentally that this is not a site suitable for the nature and scale of development applied for. Other than providing employment the submission available do not, in my view, demonstrate an overriding or continuing strategic argument of this development on this site. There is no substantial supporting evidence demonstrating that there is a significant shortage of (authorised) sites supplying such goods or product or in the supply of pre-cast concrete goods and concrete generally."

3.22 By letter dated the 24th January, 2007, Barry & Partners wrote to the council concerning the refusal of permission by the Board. The letter states, *inter alia*, that Patrick Slattery respected the Board's decision and would endeavour, in the first instance, to scale down his immediate operation so as to revert to the 1996 planning permission (96/5414). The letter stated that this would involve removing raw materials currently stock piled on site and went on to suggest that the most efficient manner of doing this was to convert same into concrete product. The letter suggested that this would be achieved in a matter of weeks.

3.23 By letter dated the 8th February, 2007, Cork County Council wrote to the defendants/respondents stating that, as a first step towards compliance with the Board's decision, a written undertaking should be submitted by Slatterys to the effect that no further importation of raw materials would take place in relation to any activities on the overall site. By response dated the 2nd February, 2007, Patrick Slattery stated that the defendants/respondents were not in a position to give any such undertaking as it would involve laying off staff. This letter said that Slatterys would limit activity on the property to the minimum level necessary to service their ongoing contracts. The letter also stated that Slatterys had engaged a solicitor and were working with Barry & Co consultants with a view to making a revised planning application.

3.24 By letter dated the 6th March, 2007, Barry & Partners engineers wrote to Cork County Council stating that they would be preparing a new planning application for a reduced scale facility. Cork County Council engaged Fehily Timoney & Co., to carry out an assessment of the site. The representatives of Fehily Timoney were initially refused access to the site but were subsequently allowed to carry out inspections in March, 2007. Fehily Timoney produced a number of reports which were compiled in April and June, 2007. The respective proceedings commenced in July and August, 2007

3.25 As indicated earlier it will be necessary to return in some more detail to the precise extent and timing of the expansion of the business. However, it seems to me to be appropriate to address certain of the legal issues before returning to those facts which are, at least to some extent, in controversy. I, therefore, turn firstly to the question of the precise length of the limitation period.

4. The Length of the Limitation Period

4.1 Each of the proceedings, insofar as they relate to the planning aspects of the case, are, of course, brought under s. 160 of the 2000 Act. It will be necessary to return to the provisions of that section concerning unauthorised development in due course. However, for present purposes it is necessary to refer to subs. (6) which states as follows:-

"(6) (a) An application to the High Court or Circuit Court for an order under this section shall not be made—

(i) in respect of a development where no permission has been granted, after the expiration of a period of 7 years from the date of the commencement of the development, or

(ii) in respect of a development for which permission has been granted under Part III, after the expiration of a period of 7 years beginning on the expiration, as respects the permission authorising the development, of the appropriate period (within the meaning of section 40) or, as the case may be, of the appropriate period as extended under section 42 .

(b) Notwithstanding paragraph (a), an application for an order under this section may be made at any time in respect of any condition to which the development is subject concerning the ongoing use of the land."

4.2 While certain other aspects of that subsection will require consideration in due course, for the purposes of the current point it is important to note that the limitation period of seven years provided for in the subsection amounted to a change from the previous limitation period which was one of five years. Part VIII of the 2000 Act was commenced on the 11th March, 2002. By that time, on any view, the business at Rathcormac had expanded significantly. In that context the question of whether the relevant limitation period is one of five years or seven years arises.

4.3 As is, correctly in my view, pointed out in Simons on *Planning and Development Law* (2nd Ed.), the transitional provisions of the

2000 Act are silent as to whether the possibility of enforcement action could be said to have revived in respect of development which would otherwise have become immune under the previous legislation. That precise issue, however, does not arise on the facts of this case. There is no evidence to suggest that there was any unauthorised development for at least some period after the retention permission had been granted in 1997 (with the obvious exception of the fact that the development itself was undoubtedly unauthorised prior to the grant of the retention permission). There is no question, therefore, of any enforcement action having become statute barred by virtue of the previous legislation as of the time of coming into force of the 2000 Act. On the facts of this case I am not, therefore, dealing with the undoubtedly difficult question of what the situation would be in respect of an unauthorised development enforcement which had become statute barred by virtue of the previous legislation but which might, arguably, have been said to have been re-opened to enforcement for a further period by virtue of the amendment given effect to by s. 160(6) of the 2000 Act.

4.4 On any view of the facts of this case, any unauthorised development which was in being as of March, 2002 was still well within the limitation period for enforcement proceedings. The only effect of the change brought about by virtue of s. 160(6) of the 2000 Act would have been, therefore, to extend by two years the period during which any such enforcement proceedings could be brought.

4.5 It does not seem to me that any such amendment can properly be characterised as being retrospective in nature. Unauthorised development is unlawful. It is open to enforcement. When a limitation period expires there may be an argument as to whether the re-opening of such a limitation period might amount to a retrospective measure. It is, of course, the case that Article 15 of the Constitution prohibits retrospective criminal legislation. Furthermore it has consistently been held, as a matter of construction, that the courts will lean against a construction creating retrospective effect in respect of civil matters. However, there is no prohibition as such on retrospective civil legislation although obviously, on the facts of an individual case, there might be a constitutional infirmity resulting from an express and disproportionate retrospective element to legislation. That the ordinary presumption against retrospective effect in civil matters is also applicable in the planning field can be seen from *Kenny v. An Bord Pleanála (No.1)* [2001] 1 I.R. 565.

4.6 It seems to me that there can be no question of it being said that there has been retrospective interference with the rights or entitlements of an individual whose wrongful actions remained capable of being subject to enforcement proceedings as of the date of a statutory amendment, where the effect of the amendment concerned is simply to prolong the period during which enforcement proceedings could be taken. Such a change brings about no alteration in any rights or entitlements. The relevant amendment simply extends the period during which enforcement proceedings, which were capable of being brought as of the date of the amendment concerned, can be maintained. There is no right or entitlement to have those proceedings brought within any particular period of time, subject only to the existing statute law. A change in that statute law which has the effect of extending the time within which such "live" proceedings can be brought is, in my view, not properly characterised as retrospective at all.

4.7 In those circumstances I am satisfied that the relevant limitation period applicable to the facts of this case is one of seven years. I would leave to a case in which the issue arises the question of the relevant limitation period in a case where, under the previous legislation, the limitation period had already expired prior to the coming into force of the 2000 Act in March, 2002.

4.8 Against that background it is clear that the relevant period that needs to be considered occurred in the latter part of 2000. The enforcement proceedings commenced by Cork County Council were issued on the 17th August, 2007, and served immediately thereafter. The plenary summons issued on behalf of the individual plaintiffs had been issued some three weeks earlier, on the 26th July, 2007, and had been served within a short number of days. Thus both sets of proceedings were commenced in late July/early August, 2007. Having regard to my finding concerning the limitation period, the precise state of the business being conducted by Slattery's as of July/August, 2000 comes into sharp focus.

4.9 Before passing on to that question, I should note in passing that Slattery's initially made a point concerning whether it was appropriate to commence s. 160 applications by means of a plenary summons, but did not pursue same. Nothing, therefore, turns on that question. For the purposes of these proceedings it must be taken, therefore, that both sets of proceedings were well in being and had, for the purposes of s. 160(6) been commenced, by the middle of August, 2007.

5. The Situation as of July/August, 2000

5.1 While there remains some legal issues (to which I will have to turn) concerning the consequences of any findings relating to the scale of the Slattery's operation at Rathcormac in mid 2000, it is clear that the precise scale of the operation at that time is of considerable relevance in determining both whether there had been unauthorised development prior to the commencement of the relevant limitation period and also, in assessing the extent to which it can properly be said that there has been further unauthorised development since the commencement of that limitation period.

5.2 In both proceedings what is sought, under the planning heading, to be restrained is unauthorised development. Section 2 of the 2000 Act defines unauthorised development as including unauthorised use and unauthorised works. As will become clear the unauthorised use alleged in this case comes under three headings. Firstly, it is said that certain lands have been incorporated into the site which is being used for concrete purposes in respect of which no planning permission for any change of use has been obtained. Secondly, it is said that, irrespective of the land in use, there has been such an intensification of the use of the property so as to give rise to a material change of use. Thirdly, it is said that the production of ready-mix is unauthorised except to the extent that it is an ancillary activity to the production of pre-cast. It is said that this is no longer the case.

5.3 Separately there is an allegation that there has been unauthorised development by the placing of certain structures on the land without any planning permission. In respect of each of those four categories of potential unauthorised development questions as to the precise application of the limitation period apply. It is in that context that the scale of Slattery's business as of July/August 2000, becomes significant.

5.4 I, therefore, turn to the question of the extent of the operation at Rathcormac as of July/August, 2000.

6. The Business in July/August, 2000

6.1 There can be little doubt but that 2000, as it happens, was a very important year in the development of Slattery's business. That is not to say that the business had not grown prior to mid 2000 or that it did not continue to grow thereafter. However, in the course of 2000 and 2001 a major development in relation to the ready-mix side of the business occurred with the installation of a so called batching plant. On all of the evidence it is clear that, up to this time, ready-mix concrete was produced in relatively small quantities in mixers which were used to produce concrete for both the pre-cast business and for sale to those who wished to purchase ready-mix. The batching plant permitted the production on a much larger scale of ready-mix and, in particular, permitted larger loads to be sold to purchasers.

6.2 Some general indication of the growth in the scale of the business can be gleaned from an analysis conducted by Slatterys' auditors (A.T. Blackley and Company) of the company's accounts for the relevant period. Slatterys' accounts were prepared on the basis of a financial year ending on 30th April in each year. The accounts for the year ended 30th April, 2000 show total sales of IR£170,278. Using an analysis based on differing V.A.T. rates (which I accept gives an accurate breakdown of those sales as and between pre-cast and ready-mix), it was calculated that the pre-cast aspect of the business in that year amounted to 22.42% of the total business. Thus, converting into euro, the sales of ready-mix at that time appeared to have been approximately €50,000 per annum. Over the following two years the ready-mix aspect of the business grew significantly so that it represented almost double the percentage of the total business in the year ending 30th April 2002, and amounted to in excess of €350,000 in volume.

6.3 It appears on all the evidence that this growth was achieved, at least to a significant extent, by establishing the fixed batching plant to which I have referred.

6.4 The availability of that batching plant allowed for an almost exponential growth in the ready-mix business, such that by the year ending 30th April 2005, ready-mix amounted to just under 71% of the business and had a total value of approximately €2.2m. Thereafter the business increased further such that over the three years ending on the 30th April 2008, the ready-mix aspect of the business averaged over 85% of the total business and gave rise to sales averaging in excess of €5.5m per annum.

6.5 While no detailed specific figures were produced for the change in unit price (price per tonne) of ready-mix over the relevant period, the evidence suggests that there was a slow steady but unspectacular increase in price such that only a small proportion of the total growth in sales in money terms outlined in previous paragraphs could be explained by a change in price rather than an increase in volume.

6.6 In addition to the increase in volume of sales which I have just described, the amount of land utilised for the purposes of the business underwent a similar expansion. There were produced in evidence a series of photographs (including very helpful aerial photographs) taken at different times over the last eight to ten years. In addition the Ordinance Survey carried out a periodic revision of the mapping of the area in 2000 which contains an outline of the then extent of the boundary of the operation. An examination of both that map and the aerial photographs for the relevant period, seem to convey a consistent picture as to the extent of the lands then in use.

6.7 As the commissioning of the batching plant was, in itself, a most significant aspect of the growth of the business, it is of particular importance to analyse the state of play in relation to that plant as of July/August, 2000. On Slatterys' evidence the physical plant was in place and in the course of being commissioned during 2000. There is certainly evidence to support this contention. The aerial photographs for the relevant period seem to show a structure very similar to the existing batching plant (although excluding some extensions to that plant which, on all the evidence, were included at a much later date). Likewise the ordinance survey map to which I have referred appears to show structures at the relevant location which are broadly of the same scale as the existing batching plant (again with the exception of the extensions to which I have referred).

6.8 On that basis it seems to me that, on all the evidence, it is necessary to conclude that the physical structure of the batching plant was, at least to a very large extent, in place prior to July/August, 2000.

6.9 Slatterys again gave evidence that use was made of the batching plant from a relatively early stage after its construction. It was accepted that the plant was in the course of being commissioned for some time, although it was suggested that while it was in the course of being so commissioned, it was capable of some production which was in fact sold.

6.10 The supporting evidence for this contention is not, however, very strong. As indicated earlier one of the important advantages of the batching plant was that it was able to produce much larger loads of ready-mix concrete. In that context it is clear on the evidence that Slatterys purchased a number of ready-mix lorries which were done up in a red and white-striped livery with the Slatterys logo and which were capable of delivering seven or eight tonne loads. Prior to that, smaller ready-mix lorries had been in use. However Slatterys' accounts make it clear that the relevant larger lorries were only purchased either in the early months of 2001, or at the very earliest in December, 2000. In those circumstances it is clear that the expanded level of business capable of being achieved by the use of those lorries did not commence until, at the very earliest, the very end of 2000. It is true that the overall level of Slatterys' business grew significantly between its financial years ending the 30th April, 2000 and the 30th April, 2001 respectively, with the ready-mix business increasing from approximately €50,000 in the former year to about €188,000 in the latter. However, the ready-mix business grew again to approximately €375,000 in the following year. Importantly the aerial photographs do not show a significant development of the internal roadways around the batching plant until after 2000. Evidence was produced on behalf of Slatterys of various sales invoices which do support the fact that there were occasional sales from the middle of 2000 onwards of amounts of ready-mix which were consistent with a scale of deliveries likely to suggest that the ready-mix concerned had been produced by the batching plant. However, those sales seem to have been very sporadic in nature. On balance it seems to me to be appropriate to conclude that any such sales may have resulted from ready-mix produced in the course of the commissioning and testing of the batching plant rather than as a result of a systematic operation of the batching plant itself.

6.11 On the balance of probabilities, I, therefore, conclude that the physical extent of the operation as of July/August, 2000, was as appears on the relevant ordinance survey map as represented by a dotted line. The physical structure of the batching plant (with the exception of the extensions to which I have referred) was in place. However, the batching plant was not in any significant or substantive sense operational, although it was capable of producing some product in the course of its commissioning. It seems to me unlikely that the batching plant was in any proper sense fully operational and capable of ordinary production until, at the very earliest, the last few months of 2000.

6.12 There is no real dispute but that both the scale of the business and the area occupied by it continued to increase to a very significant extent indeed after July/August, 2000. As is clear from the sales figures to which I have referred earlier there was an approximately twelve fold increase in the value of ready-mix sales between the year ending 30th April, 2002, and those years between 2005 and 2008 when the business reached sales exceeding, in one year, €6m. A number of estimates of the amount of journeys in and journeys out from the site were made (that is to say journeys in delivering raw materials and journeys out bringing ready-mix and, to a lesser extent as a proportion of the whole business as time went on, pre-cast concrete). Both from the expert evidence, the evidence of the individual plaintiffs, and an analysis of the volume of sales over the last number of years, it seems to me that the evidence leads to a conclusion that there would have been well in excess of one hundred such trips per day in recent years and indeed that the volume may have approached 75 round trips. The peak ready-mix sales in 2006/07 suggest over 10,000 loads in that year which would have come close to 40 round trips per day for the ready-mix deliveries alone. When the trips necessary for the continuing pre-cast business and deliveries of raw materials are added a figure of 75 round trips per day seems a reasonable estimate. This volume needs to be contrasted with the six to eight round trips per week identified in the original planning application. A whole range of other measures could be adopted to show the scale of the increase.

6.13 Before leaving the question of the increase in scale, it also needs to be noted that there appears to have been a further significant increase in the scale of the operation between that described in the application (05/6780) for retention permission in 2005, and that carefully documented in the various surveys conducted on behalf of Cork County Council in 2007. The differences between the position as described in the original planning application of the late 1990's, the retention permission to which I have referred, and the 2007 survey were summarized in written submissions filed on behalf of Cork County Council. I am satisfied that the factual material set out in the points and tables contained in those submissions are more than borne out by the evidence. I, therefore, reproduce that aspect of the submissions and find it to be an accurate statement of the relevant facts.

Table A

- There are 25 no. distinct stockpiles on site, while the drawings in 2005 did not show 12 of these areas.
- A 15m container on site used for storage is now shown on the drawings
- There is a car parking area to the right of the office portacabins. Trucks are parked along the northern boundary, central southern boundary and beside the mobile concrete batching plant. In contrast the drawings show a dedicated truck and car parking area on the southern boundary and truck parking area on the south western side of the site.
- Trucks are cleaned between stockpiles 16 and 17 and beside the settlement pond on the south western boundary. The drawings show one truck cleaning area between stockpiles 16 and 17.
- There are two batching plants, a permanent and mobile batching plant, while the drawing shows only one batching plant.
- There are 3 no. portacabins on site, while the drawing shows only 2 no. portacabins.
- There are 2 no. mobile homes and 2 no. portacabin offices, while the drawings show 4 no. mobile homes which according to the drawings were to be removed.
- There are two settlement pools on ponds on site, while there is one pond shown on the drawing.

Table B

The Growth of the Site and Expansion of Uses

	96/4514	05/6780	2007 Survey
Area	c. 09a/.027ha	c. 12.5a/4.6ha (including green area of .8ha)	c. 12.5ha/4.6ha (part of green area incorporated into site)
Gross Floor Area of all Buildings on Site	224m ² comprising pre-cast concrete production facility temp. store portacabin office	534m ² comprising 96/4514 buildings truck maintenance and pre-casting sheds 2 portacabin offices 3 mobile homes	598m ² comprising 96/4514 buildings 05/6780 buildings storage container portacabin office (possibly 1 of the mobile homes)
Plant and Ancillary Activities	3,000 gallon water storage tank septic tank and percolation area water pump abstraction from river (off site)	All 96/4514 plant etc. 1 concrete batching plant & control shed generator/LDO storage tank shed weighbridge roads hardstanding water storage pond 3 wells	All 96/4514 and 05/6780 plant 1 additional concrete batching plant additional hard standing (part of 'green area')
HV Vehicles	None Stated	32	47
Stockpiles	finished goods area stated max. total 50 tonnes of raw materials held on site	finished goods area concrete block area 12 stockpiles of raw materials (stated max. total 5,000 tonnes)	expanded finished goods area 25 stockpiles (estimated total 45,000 tonnes)
Production Rate of ready-mix concrete	n/a	248m ³ (stated in submission lodged with PA on 10/05/06)	440m ³ (estimated from results of traffic survey)
Traffic Generation	8 trips per week	65 trips per day	100 trips per day
Employees	4	35	35 (according to letter to Cork County Council of 26/2/07)

All and all that description makes clear that there was a relatively continuous growth in the operation from 2000 up to the commencement of proceedings and that, notwithstanding its application for retention permission in 2005, Slatterys continued to grow the scale of the business beyond that envisaged in that planning application without seeking any further planning permission.

6.14 Against the background of those factual findings it is necessary to return to the specific allegations concerning unauthorised development. I turn firstly to the question of intensification of use.

7. Intensification of use

As Keane C.J. noted in *Butler v. Dublin Corporation*, [1999] 1 I.R. 565 at p.593:-

"A particular use could be so altered in character by the volume of activities or operations being carried on that the original use must be regarded as having been materially changed."

7.2 More recently Charleton J. in *Lanigan and Benghazi Ltd v. Barry*, (Unreported, High Court, Charleton J., February 15th, 2008) adopted a passage from Simons on *Planning and Development Law* (2nd Ed, 2007) at para. 2-64, as accurately stating the law in this jurisdiction to the effect that, in principle, the intensification of the use of a development which is already subject to planning permission can give rise to a material change in use. Charleton J. also approved, at para. 34, of the following passage from the same work in which it is stated that:-

"To a large extent this turns on the nature of the development permitted under the planning permission, and in particular, as to whether or not a particular use has been specified under s. 39(2) of the Planning and Development Act, 2000. Even if the use has not been formally specified, it may be that the documentation accompanying the application suggests the level or a scale at which the development is to be carried on. In this regard, it is important to note that it is almost a universal condition of all planning permission that the development be carried out in accordance with the plans and particulars lodged with the application, or as part of a response to any request for further information."

7.3 In *Molumby and Ors v. Kearns*, (Unreported, High Court, O'Sullivan J., January 19th, 1999) this court had occasion to consider the factors that should be taken into account in assessing whether there had been an intensification of use sufficient that it could amount to a material change of use.

7.4 In that context O'Sullivan J. said that:-

"I consider that one must have regard to the effects in planning or environmental terms of such intensification in order to assess whether there has been a material change for planning purposes... I would consider that the impact of an intensification of the heavier commercial vehicles is likely to be more significant in planning terms than the impact of an intensification of smaller or private vehicles."

7.5 The general principles are, therefore, clear. A sufficient intensification of use can amount to a material change of use which can, in the absence of an appropriate permission, result in the intensified use being unauthorised. However, it is equally clear that not every increase in, or intensification of, use amounts to a material change of use. The assessment of whether an intensification of use amounts to a sufficient intensification to give rise to a material change in use must be assessed by reference to planning criteria. Are the changes such that they have an effect on the sort of matters which would properly be considered from a planning or environmental perspective? Significant changes in vehicle use (and in particular heavy vehicle use that might not otherwise be expected in the area) are one such example, changes in the visual amenity or noise are others.

7.6 There can be little doubt but that counsel for Slatterys was correct in conceding, substantially, that there have been a material change in use such that the use to which the property is currently put is materially different from that in respect of which the original planning permission was given. A fifty to seventy five fold increase in the volume of heavy goods vehicles on an essentially rural road would, of itself, possibly be sufficient. While there was some dispute as to the extent to which the undoubtedly very large stockpiles of raw materials were visible from the surrounding area, there is no doubt but that at least from some locations along the neighbouring public roadways, those extremely high stockpiles are visible in what is otherwise an essentially rural area. The huge change in the volume of the business and the intensification of use of the lands caused by it has, therefore, also had an effect on the visual amenity. Furthermore, both the evidence of the individual plaintiffs (which I accept) and the expert evidence concerning noise levels show that the increased volume of business has generated a significant increase in noise emanating from the site which would again be material in planning terms.

7.7 While I accept the evidence of Slatterys that certain ameliorating works have been carried out which have reduced the extent to which dust may have left the site, I am nonetheless satisfied that the increase in the volume of business has also generated an amount of dust which would be material in planning terms and would also be a factor to be taken into account.

7.8 For all of those reasons, it is manifestly clear that there has been a very significant and highly material intensification of the use of the property over the relevant period such that its current use is materially changed and, therefore, that use is clearly unauthorised and, subject to the considerations which arise in relation to the limitation period, amenable to enforcement. There are, however, as I have indicated, other ways in which it is contended that unauthorised development has taken place. I propose dealing later with the contentions which stem from the assertion that the current use of the site is unauthorised by virtue of the assertion that ready-mix is now the dominant part of the business even though it is not mentioned in the original permission. I now turn to those allegations which relate to the size of the site now in use and the presence of certain structures on the extended site.

8. Extensification and Structures

8.1 As to the area covered, it is clear that the original planning permission was in respect of an area of 0.9 acres only. The overall site in the ownership of Slatterys exceeds 12 acres. While no exact measurement of the amount set out on the relevant ordinance survey plan, which I have found to represent the boundaries of the portion of the site in use as of July/August 2000, was given in evidence, the area there described appears to be approximately one half of the total site and it is reasonable to assume, therefore, that the site in use as of July/August 2000, had grown to somewhere between 5 and 7 acres or by a factor of approximately 6. As of that time (that is July/August 2000) the remainder of the site was still under grass. However, as the aerial and other photographs make clear, there were further incursions into that green area, such that, at its peak, only a very small area (perhaps of the order of 1 acre) remained under grass. It does, however, appear that some of the area previously incorporated into the ready-mix business is now in the course of being returned to grass.

8.2 This process was described by counsel for the individual plaintiffs as an "extensification" of the site to contrast with the intensification of the use. In my view this is a useful distinction. The planning permission authorised concrete related works on 0.9

acres. Even if the volume of the business had not increased so that there could not have been said to have been an intensification of the use, the incorporation of additional lands into the concrete business would, in itself, have been unauthorised. Thus, in addition to the intensification of use giving rise to a material change in use which was unauthorised, so did the extensification of the land in use amount to an unauthorised use per se, given that there was no authority for the use of the relevant lands into which the business had been extended for any purposes other than their previous agricultural ones.

8.3 The third key element of the alleged unauthorised nature of the current state of the business stems from the presence of a significant number of additional structures in respect of which no planning permission has been obtained. The relevant structures are specified in para. 4 of the originating motion in the Cork County Council proceedings and it is unnecessary to set them out in detail here. However, the structures concerned include both the fixed batching plant to which I referred together with a second movable batching plant. It is worthy of some note that this second movable batching plant was said to have been a back up to ensure the continuance of supply in the event of a problem with the fixed batching plant. Be that as it may that plant appears on all the aerial photography evidence to have given rise to a further and significant incursion into previously grassed lands. Furthermore the very large number and scale of the stockpiles again appeared to be unauthorised.

8.4 I am, for those reasons, fully satisfied that there are, *prima facie*, unauthorised developments to be found in the current operation of Slattery's business under at least three general headings. These are:-

(a) The material change of use resulting from the extremely large increase in the volume of business with its consequent effects on planning relevant matters such as the volume of heavy goods traffic, visual amenity, noise and dust;

(b) The material change of use by the incorporation into the operation of a large amount (perhaps of the order of 10 acres) of land in respect of which no permission to conduct concrete related business on same had been obtained; and

(c) The erection of the various structures set out in the notice of motion to which I have referred.

I will address the question of the alleged dominant use for ready-mix later (see para. 9.8).

8.5 In the light of those findings it is necessary to go on to consider the extent to which enforcement proceedings in relation to any of those unauthorised developments may be barred by virtue of s. 160(6) of the 2000 Act.

9. The Effect of the Limitation Period

9.1 As is clear from the terms of s. 160(6) of the 2000 Act, which I have cited earlier (see para. 4.1 above), the limitation period precludes an application such as that with which I am concerned from being made after the expiration of a period of seven years from the date of commencement of the relevant development (where there is no permission) or from the end of the period within which the planning permission was to be carried out (where there is a permission). Against that statutory background it is obviously important to start by considering what development is said to be unauthorised. It was for that reason that I sought to analyse, in general terms, the nature of the unauthorised development which is sought to be subjected to enforcement.

9.2 I propose starting with what is probably the easiest consideration, that is to say the case in respect of the unauthorised structures. It seems to me that the relevant structures are ones in respect of which it can properly be said that there is no planning permission. While the relevant structures are connected with the business in respect of which the original planning permission was granted, those structures are on lands not included in the site by reference to which that permission was determined. Likewise the structures are of a wholly different character to those contemplated by that permission. It seems to me to follow that the relevant limitation period must be determined as a case where there is no permission. There is an insufficient nexus between those structures and the existing planning permission to hold that the structures concerned are a development where a permission has been granted so as to apply s. 160(6)(a)(ii) and thus have time only begin to run at the expiry of that permission. It follows that the consequences of the limitation period are clear. If the relevant structure was in place more than seven years prior to the commencement of the proceedings, then enforcement proceedings in relation to that structure is clearly precluded by the operation of s. 160(6)(a)(i). If the structure was not in place seven years prior to the commencement of the proceedings then, *prima facie*, (and subject to a further line of defence raised by the Slattery's to which I will have to return in due course) such structure is not only unauthorised but remains capable of being the subject of enforcement proceedings.

9.3 Like considerations seem to me to apply to what I have described as the extensification of the lands incorporated into the concrete business. No permission existed for a change of use of any of those lands from their previous agricultural use to any form of use in connection with the concrete business. To the extent, therefore, that any such lands were incorporated into the business more than seven years prior to the commencement of the proceedings then it is clear that the relevant development in the shape of the change of use concerned had occurred more than seven years prior to the commencement of the proceedings and is no longer capable of enforcement.

9.4 However it seems to me that more difficult considerations seem to arise in respect of those aspects of the unauthorised development which stem from intensification of use. Such difficulties will be particularly so where, as here, there was not one single discreet material change of use by virtue of an individual intensification, but rather a gradual process whereby the relevant use increased on an irregular but more or less continuous basis.

9.5 As pointed out earlier, not every intensification of use will be sufficient to give rise to a material change of use. The first point for consideration has to be, therefore, as to whether, as of July/August 2000, there had been a sufficient intensification of use, such as would have, on that ground alone, enabled enforcement proceedings to be brought at that time.

9.6 While the batching plant had, as I have already found, been physically installed at that stage, it was not, as I have also found, properly operational. While there had been a change in the business between that identified in the original planning permission and that which was then currently ongoing, the intensification was far short of that which ultimately took place. While there had been a growth both in the absolute scale of the business and in the percentage of the business attributable to ready-mix, the growth in neither of these areas approached in its scale the growth in the succeeding period.

9.7 Against that background the first question that needs to be addressed, is as to whether, based on intensification of use alone, it could be said that there had been a material change of use as and between the use for which planning permission was given in the original retention application and the use as of July/August 2000. The overall scale of the business would appear, in that period, to have grown from one which operated at a monetary value of approximately €215,000 to €430,000. Within the business there had been a shift towards ready-mix which represented, by mid 2000, slightly over 40% of the total business as against a figure of approximately 22.5% in 1999/2000. Some of the increase in the business as a whole could, of course, be attributable to inflation although, as I have

already pointed out, the rise in price per unit does not appear to have been significant at that time.

9.8 In addition the evidence of the individual plaintiffs, or at least those of them who were present to observe conditions back in the early 2000s, does not suggest that the extent of the increased business had a particularly noticeable effect in terms of traffic volumes, noise, dust or visual amenity until later. This is corroborated by the fact that Cork County Council started receiving complaints in 2003. That some effect on traffic volumes must have been present is obvious from the turnover figures. However, it does not appear to have been such as particularly impinged on those living in the surrounding area.

9.9 All in all, I have come to the conclusion that while there was an appreciable increase in the volume of business (particularly on the ready-mix side) between that envisaged at the time of the grant of the original retention permission and the July/August 2000 period, same was not of the type or degree that would give rise to a material change of use. One further aspect of this matter concerns the fact that the original planning permission was given in respect of the making of pre-cast concrete products. The question, therefore, arises as to whether the making of ready-mix concrete was an authorised use at any scale. In that regard I accept the evidence and submissions of Cork County Council to the effect that, by virtue of the fact that the production of concrete was a by-product in the course of the manufacture of pre-cast concrete products, it can properly be said that ready-mix activity of a certain scale was an ancillary activity to the main pre-cast concrete operation. However, it is clear from *Trio Thames v. Limited, the Secretary of State for the Environment and Reading Borough Council* [1984] J.P.L. 183, and *Jillings v. Secretary of State for the Environment* [1984] J.P.L. 32, that an increase in an ancillary use may occur to such an extent that the use concerned can no longer be properly regarded as ancillary and becomes an independent use. While the relevant activity, as it long as it remains an ancillary use, is not unauthorised, same may become unauthorised where it becomes a significant independent use. However, it is clear that, as of the commencement of the relevant limitation period in July/August 2000, ready-mix, while it had increased in scale, had not yet reached the point where it came to replace pre-cast concrete as the principal business being conducted at Rathcormac by Slattery's. No cause of action would have been maintainable, therefore, as of the commencement of the limitation period based on a contention that ready-mix production use had ceased to be an ancillary use. While the question of whether a use has ceased to be ancillary such that it is a separate use in itself thus requiring permission is not one of mathematics. I am satisfied on the facts of this case that ready-mix production exceeding 50% of the total production from the site would have required permission.

9.10 In those circumstances I am not satisfied that it would have been open to any party (including Cork County Council or the individual plaintiffs) to maintain enforcement proceedings as of July/August 2000, based upon the intensification of the use of the property or the growth of the ready-mix aspect of the business. Any such proceedings would, therefore, have been required to have been confined to enforcement arising out of the extensification of the area in use and the placing of unauthorised structures on the land. It follows that the only enforcement proceedings which are barred by the provisions of s. 160(6) are those proceedings which could have been commenced at the relevant time. I am satisfied, therefore, that any proceedings are statute barred which seek to enforce unauthorised development which is either:-

(a) In respect of a structure which was in place as of July/August 2000; or

(b) which is based on the use of the property designated on the ordinance survey map to which I have referred as being in use as of July/August 2000, other than the property in respect of which the original planning permission had been granted.

9.11 In my view any further development which has occurred (that is to say structures put in place after that time, the further extensification of the area under use for concrete production purposes after that time, the entirety of such of the intensification of use as amounts to a material change of use and use for ready-mix production which exceeds 50% of the total production on site), are not caught by the limitation period and are, *prima facie*, amenable to enforcement proceedings. This leads to the final point (save for that which concern discretion) raised by Slattery's.

10. A Further Defence?

10.1 Slattery's draw attention to certain authorities where the courts have accepted that, to a greater or lesser extent, an existing permission carries with it the natural evolution of the business for which permission had been granted. For example Slattery's referred to a number of authorities in which the court found that intensification of use of land did not necessarily amount to a material change of use in land. In *Galway County Council v. Lackagh Rock Limited* [1985] I.R. 120, Barron J. found that a quarry operation which had increased from the extraction of a maximum of 144 loads of six tons of rock each day to the extraction of 1,000 tons did not constitute an intensification amounting to a material change of use. In determining whether or not there had been a change of Barron J. stated that the principle of change of use rested not so much in the intensification of use but whether such use imposed burdens on the local authority or otherwise infringed upon the proper planning for the area in a materially different manner. At p. 127 of his decision Barron J. stated:-

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

Murphy J. in *Waterford County Council v. John A. Wood Ltd* [1999] 1 I.R. 556, did implicitly accept that works being conducted could be brought to their natural conclusion. This view was, however, based in significant part on the proper construction of the statutory provisions in relation to use then in force. I will touch on this question again in early course.

Slattery's also relied upon the decision of Murphy J. in *Dublin County Council v. Carty Builders & Co. Limited* [1987] I.R. 355 in which was found that a doubling of the number of caravans on a caravan site did not amount to a material change of use. Murphy J. stated at p. 362 of the decision that:-

"It may be that the amount or extent to which lands are used for a particular purpose will be indicative of a change of user but it is the change and not the quantum of use which is decisive. If the lands at Corballis in the present case were used as a caravan park on the operative date — and I am satisfied on the evidence that they were — the fact they were used more extensively or that the business was operated more successfully in the years following the acquisition of the lands by the respondent could not constitute a change in use."

Murphy J. went on to quote from the late Judge Walsh in his book on *Planning and Development Law* (1st Ed. at p. 17) where it was stated that:-

"Many businesses expand and grow with the passage of time but, of course, it could not be seriously contended that a

material change of use had taken place when some additional machines are installed in premises to cope with increasing demands. In such a case the use remains the same but it becomes intensified."

10.2 These and other authorities establish that the natural growth of a business does not of itself render use unlawful. However, it is of some considerable importance to note that all of those authorities concern activity which was at all times lawful. The cases which are related to the proper interpretation of planning permissions themselves are concerned more with the question of what is, on a proper interpretation, to be the permitted activity which a planning permission carries with it. As is clear from many authorities the appropriate approach to the construction of a planning permission is that it be construed in a non-technical way and thus that planning permissions should be interpreted as an ordinary reader of the permission concerned would construe it. The non technical approach to interpretation of planning documents was approved in the case of *In the matter of the claim of XJS Investments Ltd. v. Dun Laoghaire Corporation* [1987] I.L.R.M. 659. McCarthy J. speaking for the Supreme Court, found that planning documents are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training, as well as by developers and their agents, unless such documents read as a whole indicated some other meaning.

10.3 Where the planning permission does not contain an express limitation on the scale of the business (likely, if present, to be included by condition), it may be necessary to infer the scale of the business for which permission has been granted from what might be said to follow naturally from the underlying circumstances such as the scale of the physical facilities which are permitted to be constructed, or information included with the planning application itself. As a matter of construction it will then be necessary to determine whether the planning permission imposes any limits on the scale of business which has been permitted. If there are such express limits then they must, of course, be applied. If there are no such express limits then it would only be in the event that there was such a significant change in the scale of the operation concerned, from that envisaged in the planning application, so that the intensification of the use of the property thereby caused might be regarded as a material change of use, that any question of the use of the property being unauthorised might arise.

10.4 The important point is, however, that the authorities to which I have referred are concerned with defining the parameters of what is lawful by reference to the proper interpretation of the planning permission itself.

10.5 Likewise, those authorities which are concerned with what is often referred to as "pre-1963 use" are equally concerned with use which is lawful. One of the basic principles behind the Local Government (Planning and Development) Act 1963, was to regard the use of property as of that time as being lawful but, subject to exempted development provisions and the like, to require planning permission for any material change in use thereafter. It follows that use as of the relevant time was lawful use. It further follows that it was necessary, in the relevant case law, for the courts to consider the precise parameters of that lawful use having regard to the precise way in which the property was in use in 1963.

10.6 In both cases the court was required to determine what form of use was lawful having regard either to the proper interpretation of a relevant planning permission or a consideration of the use to which the property concerned was being put as of 1963. The situation with which I am concerned in this case is, however, different. The use of the property as of July/August 2000, is such that certain developments which were, at that time, unauthorised (that is certain of the structures and the extensification of the land area used) can no longer be the subject of enforcement proceedings by virtue of the limitation period. The fact that enforcement is no longer possible does not, however, render those developments lawful. They remain unlawful even though it is not, in practice, possible to bring enforcement proceedings in respect of them.

In *The Right Honourable the Lord Mayor Aldermen and Burgesses of Dublin v. Herbert Mulligan carrying on business as Francis X. Mulligan & Son* [1980] W.J.S.C. – H.C. 980, Finlay P. found that the lapse of time since the authorised development of the land concerned, although a bar to enforcement proceedings under s. 31 of the Local Government (Planning and Development) Act 1963, did not make the development lawful or authorised. At p. 976 of his decision Finlay P. stated that:-

"There are, particularly in relation to summary criminal offences a great number of instances in our statute law where the institution of proceedings in relation to such an offence is limited in time and whereafter the lapse of that time in the absence of the institution of proceedings a person who may have committed such an offence is immune from prosecution. That does not, it seems to me, in any way alter the unlawful nature of the act first committed. In the same way I can see no grounds for holding that the restrictions imposed by s. 31 of the 1963 Act upon the institution of enforcement proceedings under that section to a period of five years from the unlawful development in any way makes the development lawful."

10.7 It does not, however, seem to me that similar questions concerning permitted development, such as would apply in relation to a valid planning permission or a pre-1963 use, apply in the case of an unlawful structure or an unlawfully established use. If a person is granted planning permission for a factory then, subject to any relevant conditions, it may well be that, as a matter of construction, the person ought to be permitted to carry on the level of use which that structure would naturally carry with it. This is because the proper interpretation of a planning permission enabling one to build the structure of a factory must be taken to imply (in the absence of any indication to the contrary) that the factory will be capable of normal use to the scale of operation of which the factory would ordinarily be capable. It is, however, a very different thing to suggest that because there is an unauthorised structure, which was built (but was not in use) outside a relevant limitation period, a person concerned has an entitlement to carry on an unauthorised use of that structure, even where the unauthorised use concerned begins after the limitation period commenced. There is nothing, in my view, in s. 160 of the 2000 Act, which would lead to such a consequence. The enforcement which is prohibited by that section is enforcement in respect of unauthorised development which was existing at a relevant time (i.e. the commencement of the limitation period by reference to the date of commencement of the proceedings). If a structure is completed (in whole or in part) but not in use at the relevant time, then the only form of unauthorised development that has occurred at that time is the building of all or the relevant part of the structure concerned but not its use for even the natural purpose of the structure. It follows that it may not, by virtue of s. 160 of the 2000 Act, be possible to maintain enforcement proceedings in respect of the structure. There is nothing, in my view, however, to prevent enforcement in respect of use of such a structure. It would only be if the structure was actually in use for the relevant purpose as of the commencement of the limitation period that enforcement proceedings in respect of that use would also be statute barred. Likewise an unauthorised development in place before the commencement of the relevant limitation period may not be amenable to enforcement but it remains unauthorised and cannot be used on a legitimate base for further expansion.

10.8 Applying those general principles to the facts of this case I am, therefore, satisfied that, so far as intensification (as opposed to extensification) of use is concerned, it is necessary to determine the point at which there would have been a material change in the use of the property by virtue of the intensification of the use concerned. For the reasons I have already indicated I am satisfied that that occurred after July/August 2000. Any proceedings concerning the material change of use which would have occurred when the use became so intensified as to amount to a material change of use, are not statute barred and can now still be the subject of appropriate enforcement proceedings.

10.9 In round terms the sales attributable to ready-mix concrete in the period immediately up to July/August 2000, appear to have been operating at a level of the order of €50,000 per annum. By the period commencing in May 2002, those sales had increased to a sum of approximately €940,000 per annum. It follows that the significant effects of a substantial increase in heavy vehicle traffic, noise, dust and, indeed, visual amenity would necessarily have become significantly more acute during that period. As already indicated the availability of a significant number of large ready-mix lorries operated by Slattery's was a key factor which allowed this increase in sales to occur. Those lorries came on stream in the early part of 2001, and it seems likely, therefore, that there was a then very significant increase in the various elements of the business which contributed to a material change of use after 2000.

10.10 Determining whether there has been a material change of use is, of course, not a matter subject to detailed calculation but rather involves a broad judgment taking into account a range of factors. The rough price, at the relevant time, of a load of ready-mix concrete would have been approximately €250 to €300 (based on IRE50 per tonne and based on the smaller loads then in use). The pre-July/August 2000 level of operation, therefore, suggests something of the order of four ready-mix loads being sold from the premises per week which, when added to deliveries and sales of other concrete products, might be said to give rise to, perhaps, fifteen heavy goods round trips per week. While that is, undoubtedly, an increase on the level envisaged at the time of the planning permission it nonetheless would be doubtful, for the reasons which I have analysed, that such an increase, of itself, could have amounted to a material change of use particularly when coupled with the fact that the other relevant factors such as noise, dust and visual amenity did not seem to have given rise to any appreciable concern from neighbouring properties at that time. However, in the immediate aftermath of the commissioning of the batching plant and the purchase of the significant fleet of larger ready-mix lorries, the sales of ready-mix grew rapidly, so that it is likely that heavy goods vehicle round trips soon well exceeded 100 per week. For example the ready-mix sales for the year ending the 20th April, 2002, of approximately €375,000 suggest, even with bigger loads, 16 to 20 ready-mix sales per week which when added to deliveries and other products suggest total movements of the order of at least 50 round trips per week. A similar exercise for the year ending the 20th April, 2003, suggest well in excess of 100 round trips per week. It is hardly surprising that it was at that stage that Cork County Council began to receive letters of complaint. The evidence suggests that increasingly there were movements at unsociable hours but nonetheless the vast majority of the movements concerned occurred during a twelve hour day from approximately seven in the morning to seven in the evening. While the spread of vehicle movements would not have been even, those figures suggest an average of not much less than one every twenty minutes, with a greater degree of frequency at busy periods.

10.11 100 round trips equates to 200 movements per week or just under 40 per day on a 5½ day week basis. On a twelve hour day this equates to the 20 minutes average to which I have referred.

10.12 I am satisfied that by that time the intensification of use had become such as would have permitted proceedings to be brought for enforcement. Taking the best estimate I can on all the evidence, I am satisfied that the scale of the business reached the point where the intensification of use engendered by it gave rise to a material change of use when the number of heavy goods vehicle round trips came to exceed 15 per day. That represents well over ten times that originally envisaged and relates to an environmentally sensitive aspect of the operation of the business.

10.13 Therefore, so far as intensification of use is concerned, I am satisfied that any volume of use of the property such that it would have generated more than 15 heavy goods vehicle round trips per day, amounts to a material change of use from the use in respect of which permission was originally granted and is, therefore, unauthorised.

11. Unauthorised Development – Summary

11.1 For all of those reasons I am, therefore, satisfied that the following unauthorised developments amenable to enforcement proceedings have been established.

A. All structures not in place as of July/August 2000. I am satisfied that the original batching plant (that is the batching plant as currently exists but without the extensions added) was physically in place as of that time, and while it remains an unauthorised structure it is not, so far as the structure is concerned, amenable to enforcement proceedings. It also follows that the second or mobile batching plant is also unauthorised and no limitation problems arise in respect of enforcement in relation to it. I will hear the parties further on the precise list of the structures set out in para. 4 of the originating motion, which are amenable to enforcement proceedings in the light of this ruling.

B. Any works outside the boundary of the site as delineated on the Ordnance Survey map to which I have referred. The incorporation of any further areas into the operational site occurred after July/August 2000 and was, therefore, not only unauthorised but no limitation problems exist in relation to enforcement in that regard.

C. Any use of the property which would involve more than 15 heavy goods vehicle round trips per day. I am satisfied that any use above that level would amount to a material change in use from that in respect of which planning permission had been granted, is unauthorised, and, by virtue of the fact that that threshold was reached less than seven years prior to the commencement of the relevant proceedings, no limitation problems arise.

D. Similarly any use where the production of ready-mix exceeds 50% of total production is, for the reasons already analysed, unauthorised and is not affected by the limitation period.

11.2 Subject to the exercise of any discretion it follows that orders prohibiting any such unauthorised development (and in the case of structures or the intensification of use, orders requiring the appropriate restoration of the property so as to remove the consequences of the construction of unauthorised structures or the carrying on of unauthorised use) should be made. I now turn to the question of discretion.

12. Discretion

12.1 It is agreed that the court retains a discretion as to what should be the appropriate course of action to adopt in circumstances where it is established that there has been an unauthorised development. The discretion is to be sparingly exercised. See *Henchy J. in Morris v. Garvey* [1982] ILRM 177. In practice there have been some cases where the court has delayed, rather than refrained from, making an order so as to afford a party an opportunity to regularise the situation relating to an unauthorised development by giving a reasonable opportunity to the party concerned to make a retention application. Section 162(3) of the 2000 Act makes clear that a retention application does not operate as a stay. The precise circumstances in which a court should, therefore, exercise its discretion in such cases does require some consideration. Obviously it is no part of the function of a court to grant planning permissions or, indeed, to pre-empt the decision of the relevant planning authorities (including the Board) as to what matters ought to be the subject of planning permission. On the other hand there may well be cases where it might appear that making an order requiring, for example, the demolition of a building or a portion of a building in circumstances where there was every reason to believe that there was good chance that retention permission would be obtained (for example where there was a minor technical failure to comply with a planning

permission) might be disproportionate. At the same time the starting point has to involve a recognition that unauthorised development is unlawful and that a court should be slow to tacitly accept the unauthorised nature of a development by giving any undue leeway to the party who has been guilty of the unauthorised development in the first place.

12.2 An important starting point has, therefore, to be to consider the nature of the unauthorised development and the history of the actions of the person who now seeks the exercise of the courts discretion.

12.3 Witnesses for Slattery's gave evidence to the effect that it was only in recent times that Slattery's became aware that they needed a planning permission for the extraordinary increase in the scale of their business. While this may well be so, I am constrained to the view that if Slattery's did not know of their breach of the Planning Acts they were reckless as to the circumstances in which they permitted such a large development to go ahead without planning permission. As pointed out earlier planning permissions are interpreted in a way consistent with what an ordinary person would read them to be. If any one in Slattery's had taken the trouble to take out their original planning permission it would have been clearly seen that their operations were confined to 0.9 acres (not a site twelve times that big), and were described in modest terms which would have at least raised very serious questions as to whether an increase in the scale of operations of the size which occurred (even leaving aside the site area) would have been permissible. There was no evidence of Slattery's taking any professional advice as to their planning status. In those circumstances, even if Slattery's did not actually know that they were in serious and flagrant breach of the Planning Acts, they should have known and would have known had anyone taken the trouble to read the planning permission or taken even cursory professional advice on the matter.

12.4 I must approach the exercise of discretion, therefore, on the basis of this being a case where there was a reckless and very significant breach of the Planning Acts.

12.5 Secondly, I must have regard to the fact that the Board rejected Slattery's application for retention arising out of the 2005 application. It is not for me to indicate whether it might have been possible for a less ambitious application to have succeeded. It is obviously possible that the Board might be persuaded that within certain parameters a permission might be possible. However, that is a judgment for the Board. It cannot be the case that a party should be given indulgence by the court to make a series of successive retention applications in the hope that one day it will tailor its requirements in a manner that persuades the relevant planning authorities to give a permission. At the end of the day the only reason why the party is in difficulty in the first place is that it carried out the development concerned without planning permission. The proper way to do things is to get planning permission first and then carry out the development. If a party puts the cart before the horse it may, in certain circumstances, be able to persuade the court to give it one chance at structuring an appropriate retention application. It would, in my view, require very considerable extenuating circumstances for a court to have sympathy for a party who has already failed on a retention application and, who wishes to continue on with an unauthorised development in the hope that a second and more modest retention application might succeed.

12.6 Thirdly, it has to be said that the conduct of Slattery's subsequent to issues arising between it and Cork County Council in 2005, do not reflect any great credit on Slattery's. In particular, the correspondence between Slattery's and its advisers on the one hand and Cork County Council on the other, contains, up to the early part of 2007, many clear expressions of a desire on the part of Slattery's to bring the operation at Rathcormac into line with planning permission. This was initially expressed in terms of the retention application. When the retention application was finally turned down on appeal by the Board, it was indicated that Slattery's were looking at retrenching the operation to within the parameters of the original permission. However, even while giving expression to those views and pursuing the retention application, it is clear on the evidence which I have analysed in some detail (and in particular the two Tables set out earlier) that far from even confining itself within the boundaries of the retention application, Slattery's continued to expand their operation. What happened on the ground was entirely inconsistent with the protestations being made on behalf of Slattery's to the effect that they wished to bring their operation within the bounds of planning permission.

12.7 Fourthly, the unauthorised development in this case has clearly given rise to substantial profits and this is also a significant factor to be taken into account. *Dublin Corporation v. Maiden Poster Sites* [1983] ILRM 48 and *Dublin Corporation v. O'Dwyer Bros* (Unreported, High Court, Kelly J., 2nd May, 1997).

12.8 Finally, Slattery's suggest that the court ought properly take into account what is said to be a delay in the commencement of these proceedings. There is undoubtedly a delay between the time when initial correspondence took place and the proceedings commenced. However, that delay has to be seen against the background of the protestations which I have already noted and the fact that Slattery's were pursuing a retention application. While delay might, in an appropriate case, be a factor that could be taken into account, this case is not such a case.

12.9 For all of those reasons it does not seem to me that it is appropriate to exercise any discretion in favour of Slattery's. If it were not for the limitation period difficulties which I have sought to analyse it would have been my intention to make an order strictly confining Slattery's within the boundaries of the original planning permission, unless and until some subsequent permission is obtained which would allow a more extensive operation. However, I am prevented by the provisions of s. 160(6) of the 2000 Act, from enforcing any aspect of the claim made in these proceedings which is statute barred. However, it is my intention to make orders which will enforce all aspects of the claim which are not statute barred.

13. Conclusions on Planning

13.1 In those circumstances it seems to me that, in general terms, orders along the following lines require to be made:-

1. An order requiring the immediate removal of any structure which is unauthorised and which was not actually in place as of July/August 2000. I have already expressed my findings in respect of both the fixed and mobile batching plants. I will hear counsel further as to a comprehensive list of the structures which should be ordered to be removed. I would hope that the parties will be able to agree, by reference to the relevant photographic evidence, as to what structures were, in fact, in place at the relevant time. To assist in that process I would wish to make it clear that unless there is evidence that an unauthorised structure was actually in place as of July/August 2000, it is my intention to make an order requiring its removal.

2. An order prohibiting the use of any portion of Slattery's overall site which is outside the boundaries marked on the relevant ordnance survey plan (which will be annexed to the order of the court appropriately coloured) for uses connected with the concrete business. Appropriate orders will be put in place to require, at the earliest possible stage, the restoration of the remainder of the site to its previous use as open ground under grass. I further intend to direct that Slattery's attempt to agree with Cork County Council as to the means which should be adopted for the restoration of the site in that manner in a way which minimises environmental consequences, both for the area and neighbouring property owners. It is my intention that there will be an immediate order prohibiting any work to be carried out on the balance of that site, save in accordance with an agreement reached with Cork County Council, which agreement must be directed

solely towards the restoration of the site rather than towards any continuing use of the site for commercial purposes. Obviously the moving of materials from that portion of the site outside the boundary to which I have referred, to a portion of the site within the boundary so defined may, if Cork County Council agree it to be appropriate, be permitted. It is also my intention that there should be liberty to apply in case any insurmountable difficulties are encountered in those negotiations.

3. Irregardless of what part of the site is being used, it is my intention that there will be an order prohibiting any use of the site which involves more than 15 heavy goods vehicle round trips per day. While the range of factors properly taken into account in determining the point at which a material change of use occurred are more extensive than the number of heavy goods vehicle journeys, it nonetheless seems to me that the easiest way of placing a limit which would prevent a continuance of the material change of use to which I have referred, is by imposing such a limit. Similarly use for ready-mix production which exceeds 50% of the total production on the site will be prohibited.

4. I propose hearing counsel further on the modalities to be adopted to give rise to a clear and precise order. However, it is my intention that there should, with immediate effect, be orders put in place limiting any works on the part of the site outside the boundary which I have specified without the agreement of Cork County Council, or any activity which gives rise to more than 15 heavy goods vehicle round trips per day. The balance of the more detailed terms of the order can await counsel having had the opportunity to consider this judgment, consult with their clients, attempt to reach agreement, and if necessary, make submissions on the precise form of the order.

14. Nuisance

14.1 It was, in practice, more or less conceded by counsel on behalf of Slattery's that there had been a nuisance in the past in the form of dust, noise, and certain other factors. It follows that the individual plaintiffs are entitled to damages for that nuisance, but it was agreed at the hearing before me, that any question of damages should be postponed until a future date. I, therefore, find the individual plaintiffs entitled to damages but leave over the question of the quantum of those damages to a further hearing.

14.2 However the real issue which arose at the hearing under this heading was as to whether the individual plaintiffs were entitled to an injunction restraining nuisance, independent of their claim under s. 160 of the 2000 Act. Had it been conceded that nuisance was continuing then it would almost certainly have followed that an injunction to restrain the relevant nuisance would need to have been crafted in a manner designed to prevent that nuisance continuing. However, it was clear that certain remedial measures had been put in place by Slattery's in the immediate past which, it was said, prevented nuisance from continuing. In particular it was said (and there was indeed evidence to support this), that various measures had been put in place which had had a significant effect on the amount of dust emanating from the site. Furthermore, a bund or bulky concrete wall was constructed along part of the northern perimeter of the site which, it was said, and again there was some evidence to support this, had had a significant effect on the reduction of noise emanating from the site. The problem is, however, that that structure was itself unauthorised, of recent origin and will, in accordance with the order which I have already made under the planning aspect of this case, require to be removed unless a permission for its continuance can be obtained in a very short period of time.

14.3 However, it seems to me that it would be inappropriate at this stage to make any order in the nature of an injunction under the nuisance heading. As a result of the orders which I have already indicated will be made under the planning aspect of this case, there will have to be a radical change in the business to be conducted by Slattery's at the site in question. It must be assumed that Slattery's will obey any orders made under that heading. It is not, at this stage, possible to predict whether the operation of the site within the parameters of the orders to be made under the planning heading, might or might not give rise to any nuisance. It is, of course, the case that the mere fact that a party operates in accordance with a valid planning permission does not give that party the right to commit a civil wrong to neighbouring properties. Therefore, the mere fact that Slattery's might operate in accordance with a valid planning permission does not, of itself, preclude the possibility that there might nonetheless be a nuisance actionable at the suit of neighbouring property owners. *A fortiori*, it follows that where Slattery's are enabled to continue the partial operation of their business, not by reason of having a valid planning permission in that regard, but simply because action on foot of an enforcement under s. 160 of the 2000 Act is, in certain respects, statute barred, same does not mean that Slattery's may not, nonetheless, be guilty of a nuisance.

14.4 However, it seems to me that the best course action to adopt is to put in place the final orders that are required to ensure such enforcement of the Planning Acts as are not statute barred in accordance with the general indications which I have already given and to see how the site operates under those conditions. In those circumstances I will give the individual plaintiffs liberty to apply for injunctive relief in the event that they are advised that they are able to maintain that, notwithstanding operation within those parameters, the conduct of the business at the site in question continues to amount to a nuisance.