Neutral Citation Number: [2011] IEHC 453

THE HIGH COURT

2011 861 P

BETWEEN

KEEGAN QUARRIES LIMITED

PLAINTIFF

AND

MICHAEL MCGUINNESS AND MARIE MCGUINNESS

DEFENDANTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 9th day of December, 2011

1. The plaintiff's claim against the first named defendant ("Mr. McGuinness") is for damages for fraudulent, or, in the alternative, negligent misrepresentation and/or damages for breach of warranty in a contract dated 24th January, 2007, between them for the purchase and sale of lands at Hilltown Little, County Meath ("the Lands").

2. The plaintiff's claim against the first and second named defendants is for an order pursuant to s. 74 of the Land and Conveyancing Law Reform Act 2009, declaring void the transfer by Mr. McGuinness to the second named defendant ("Mrs. McGuinness") in 2010, of his interest in lands at Bellewstown, County Meath, comprised in Folios 24022F and 16421F of the Register of Freeholds, County Meath.

Background

3. Mr. John Keegan ("Mr. Keegan") is the managing director of the plaintiff ("Keegan Quarries"). He has worked in the quarry industry for approximately thirty years, initially as a sole trader, and then incorporated Keegan Quarries in 1994. Its business is quarrying and the manufacture of ready-mix concrete. Its head office is located in County Meath.

4. Mr. McGuinness and his brothers purchased Hilltown farm in 1986, comprising approximately 365 acres which had previously formed part of the estate of the Boylan family. Mr. McGuinness went to live on the lands in 1989 and bought out his brothers in 2001. He farms primarily in grain.

5. On 26th April, 2005, Mr. McGuinness made contact with Mr. Keegan to see if he was interested in purchasing a quarry on part of his lands at Hilltown Little ("the Quarry"). They met at the Quarry on that day.

6. On 27th April, 2005, Mr. McGuinness lodged an application to Meath County Council pursuant to s. 261 of the Planning and Development Act 2000, for registration of the Quarry. In that application, he stated, *inter alia*, that the Quarry had been in operation prior to 1st October, 1964.

7. By letter of 14th October, 2005, Mr. McGuinness was notified by Meath County Council of the registration of the Quarry and sent a copy of the proposed public notice.

8. In November 2005, Keegan Quarries and Mr. McGuinness entered into a conditional contract for the purchase and sale of the Quarry and adjacent lands at Hilltown Little. The price was €2.7 million. A deposit of €50,000 was paid and released to Mr. McGuinness. The contract for sale was conditional upon the plaintiff obtaining planning permission for an operational quarry, the erection of a ready-mix concrete plant and block yard; and a specified new entrance on the public road, together with a roadway to service the quarry on or before 1st November, 2007.

9. Keegan Quarries did not apply for planning permission and, as it was entitled to do, in April 2006, rescinded the 2005 contract. In May 2006, Mr. McGuinness returned the deposit of €50,000.

10. On 19th December, 2006, Mr. McGuinness received a letter dated 15th December, 2006, from Meath County Council informing him of its decision to impose conditions on the Quarry pursuant to s. 261(6)(a)(i) of the Act of 2000. A draft schedule of conditions was enclosed and he was informed submissions might be made on same within six weeks.

11. There was renewed contact between Mr. McGuinness and Mr. Keegan in relation to the Quarry after receipt of the letter in December 2006 or January 2007. There is a dispute as to precisely how this occurred. Save in relation to credibility, nothing turns on this.

12. Meetings were held between Mr. Keegan and Mr. and Mrs. McGuinness at their home on the evenings of 11th and 16th January, 2007. It is primarily during those meetings that the alleged misrepresentations are said to have been made. Oral agreement on a sale for €6.8m was reached on 16th January, 2007. The terms were revised to €7.0m on 22nd January, 2007.

13. On 24th January, 2007, Keegan Quarries and Mr. McGuinness entered into a contract for the purchase and sale of approximately 30 acres at Hilltown Little, including the Quarry ("the Lands"), in consideration of €7 million. Special condition 9 provided that the Lands were sold with the benefit of Meath County Council's letter dated 15th December, 2006.

14. On 9th February, 2007, the sale of the Lands was completed. Keegan Quarries as it was entitled to do pursuant to the Contract made submissions to Meath County Council on the draft conditions in the letter of 15 December 2006. Final conditions were imposed by Order on 23rd April 2007.

15. Keegan Quarries commenced works on the Lands and commenced quarrying in purported compliance with the conditions specified by Meath County Council pursuant to s. 261 of the Act of 2000. There is significant dispute as to whether the quarrying operations

were in compliance with such conditions.

16. On 11th February, 2008, Mr. Jonathan Pierson and others, nearby residents, issued proceedings against Keegan Quarries, seeking an order pursuant to s. 160 of the Act of 2000, restraining Keegan Quarries from using its lands at Hilltown Little as a quarry and other consequential relief. The applicants contended, *inter alia*, that the lands at Hilltown Little were not used as a quarry prior to 1964; in planning terms, that it did not have a pre-1964 use as a quarry.

17. On 27th March, 2008, Mr. McGuinness swore an affidavit in support of Keegan Quarries, setting out his knowledge of the history of the use of the Quarry.

18. On 8th December, 2009, Irvine J. gave judgment on a preliminary issue in the *Pierson* proceedings [2009] IEHC 550, in favour of the applicants.

19. In May 2009, Mr. McGuinness suffered a serious accident when he fell from a height and broke both his legs. This required protracted treatment, including several operations which appears to have lasted until June 2010. He gave oral evidence in the *Pierson* proceedings in July 2010.

20. On 5th September, 2007, Mr. McGuinness had transferred the Hilltown farm from his sole name to the joint names of himself and Mrs. McGuinness. On 15th July, 2010, he transferred his remaining interest in the Hilltown farm to Mrs. McGuinness.

21. In the judgment in the *Pierson* proceedings [2010] IEHC 404, 7th October, 2010, Irvine J. decided that Keegan Quarries' lands at Hilltown Little were not used as a quarry prior to 1964, and that the applicants therein were entitled to an order pursuant to s. 160 of the Act of 2000, restraining Keegan Quarries from using its lands at Hilltown Little as a quarry. Pursuant to the judgment, the Court, on 21st December, 2010 made a formal restraining order to that effect, an order requiring Keegan Quarries to restore the lands to the condition they were in as of February 2007, and an order for costs against Keegan Quarries.

22. Keegan Quarries commenced these proceedings on 28th January 2011. They were admitted to the Commercial List on 7th February 2011.

Agreed Statement of Facts

23. The above background is a chronology of the major facts giving rise to these proceedings which, save where indicated, are not in dispute. The parties agreed on the following written statement of facts for the purposes of these proceedings.

"1.There was no quarry on the lands the subject matter of these proceedings (the "Lands") and quarrying was not carried out on the Lands or on any adjacent lands prior to 1st October 1964.

2. The First Defendant did not carry out any quarrying of any significance on the Lands prior to 1989.

3. The First Defendant quarried rock on the Lands in or about 1989.

4. The First Defendant did not carry out any quarrying of any significance on the Lands between 1990 and 1995.

5. Quarrying was carried out by Mr. John Gallagher on the Lands between the end of 1995 and the end of 1996 on foot of an agreement entered into with the First Defendant and ceased thereafter.

6. The First Defendant did not carry out any quarrying of any significance of the Lands between the end of 1996 and the end of 2000.

7. Some quarrying took place on the Lands between September, 2003 and April, 2005 but on an intermittent basis and not at the level of intensity of the quarrying operation carried out by Mr. Gallagher.

8. No quarrying took place on the Lands between April, 2005 and February, 2007

9. On 27th April, 2005, the First Defendant applied to Meath County Council (the "Planning Authority") for registration of a quarry on part of the Lands pursuant to Section 261 of the Planning and Development Act, 2000. In that application, the First Defendant stated that a quarry had been in operation on the Lands since 1958 (the "Quarry") and gave details of the quarry operation on the Lands.

10. The Planning Authority registered the quarry and informed the First Defendant by letter dated 14th October, 2005, that it intended to publish a public notice that it was considering imposing conditions on the operation of the Quarry. Subsequently, by letter dated 15th December, 2005, the Planning Authority informed the First Defendant that it had decided to impose conditions set out in a schedule of conditions enclosed with the letter. Pursuant to special condition No. 11 of the contract of sale dated the 24th January, 2007 made between the Plaintiff and the First Named defendant, the First Named Defendant authorised the Plaintiff to immediately correspond with the planning authority in the name of the First Named Defendant in the matter of the registration of the quarry. By letter dated the 30th January, 2007, a submission prepared by the Plaintiff was made in the name of the First Named Defendant to the planning authority relating to the said decision of the 15th December, 2006. An Order was subsequently made by the Planning Authority on 23rd April, 2007 to impose conditions on the operation of the Quarry pursuant to section 261. The Plaintiff appealed that decision to An Bord Pleanála on 18th May, 2007 but withdrew that appeal on 22nd June, 2007.

11. The operations carried out by Mr. Gallagher in 1996 and 1997 did not involve blasting or the erection of any structures on the land or any mechanised crushing of stone or any significant traffic movement in or out of the site in circumstances where Mr. Gallagher was limited to using two trucks. Mr. Gallagher's operations did not have significant implications for the living conditions of the local residents. On the other hand, the Plaintiff's operations were highly mechanised. Rock was excavated and crushed. Blasting took place, albeit infrequently. These processes generated substantial noise and dust. Large volumes of trucks came to and from the premises."

Alleged Fraudulent Misrepresentation

23. Keegan Quarries' primary claim is that Mr. McGuinness fraudulently represented to Mr. Keegan on its behalf that the Quarry was operated as a quarry prior to 1964, which is now agreed to be untrue. It is further claimed that Mr. McGuinness intended Keegan

Quarries be induced to enter into the purchase contract by the representation; that Keegan Quarries relied upon the false representation and was induced by it to enter into the contract in January 2007, and has suffered damage as a result.

24. Keegan Quarries also claims that Mr. McGuinness fraudulently made other false representations in relation to the Quarry and its operation which were intended to and did induce Keegan Quarries to enter into and complete the contract for the purchase of the Lands. These include the quarry operations set out in the s.261 application, quarrying carried out by Mr McGuinness, a Mr Gallagher and a Mr Fallon and the replies given to certain requisitions on title, allegedly on the instructions of Mr. McGuinness.

Applicable Law

25. The parties are in substantial agreement on the applicable law. It is agreed that the matters which Keegan Quarries must establish are those set out by Shanley J. in *Forshall and Fine Arts Collection Ltd. v. Walsh* (the High Court, 18th June, 1997, Unreported), where he stated:

"(a) A Plaintiff seeking to establish the commission of the tort of fraud or deceit must prove:-

> (i) the making of a representation as to a past or existing fact by the Defendant
>
> (ii) that the representation was made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false
>
> (iii) that it was intended by the Defendant that the representation should be acted upon by the Plaintiff
>
> (iv) that the Plaintiff did act on foot of the representation and
>
> (v) suffered damages as a result.

Where fraudulent misrepresentation is alleged it must be established that the representation (as defined above) was intended to and did induce the agreement in respect of which the claim for damages arises."

Defences

26. In relation to the alleged fraudulent misrepresentation, that the operation of the Quarry commenced prior to 1964, the principal defences are:

> (i) The admitted untrue representation was made innocently. Mr. McGuinness was relying on information given him by the late Major Boylan.
>
> (ii) Keegan Quarries did not rely upon and was not induced to enter into the contract for sale by the representation made by Mr. McGuinness of pre-1964 use. Rather, it relied upon the registration of the Quarry by Meath County Council pursuant to s. 261 and the imposition of conditions on its operation pursuant to s. 261(6)(a) of the Planning and Development Act 2000.
>
> (iii) The loss and damage claimed by Keegan Quarries was not caused by the false representation that the Quarry had a pre-1964 use. Rather, it was by reason of the carrying on by Keegan Quarries of its intensive quarry operations which were materially different to the pre-1964 use as represented without planning permission, and, inter alia, in breach of the conditions imposed on the use of the Quarry by Meath County Council pursuant to s. 261 of the Act of 2000.

Section 261 of the Planning and Development Act 2000

27. Section 261, and the application made in relation thereto, forms part of the context in which the alleged false representations were made and a contract for sale entered into. It is central to the issues to be decided. Section 261 was brought into operation on 28th April, 2004. The date is of some significance. It provides a scheme for the control of certain quarries by local authorities. The section applies to all quarries in respect of which planning permission was granted more than five years before 28th April, 2004, and all quarries in operation on or after that date in respect of which planning permission has not been granted (sub-section (11)). This latter criterion includes a quarry which was in operation prior to 1st October, 1964, for which planning permission has not been granted provided it was also in operation on or after 28th April, 2004. This was the provision relied upon in the application for registration of the Quarry.

28. Section 261(1) imposes an obligation on the owner or operator of a quarry to which the section applies within one year of 28th April, 2004, to provide information "relating to the operation of the quarry at the commencement of this *section*" (*i.e*. 28th April, 2004) and provides that on receipt of such information, the planning authority shall enter the quarry in the register.

29. Section 261(2) requires the information provided under sub-section (1) to specify the following:-

> "(a) the area of the quarry, including the extracted area delineated on a map,
>
> (b) the material being extracted and processed (if at all),
>
> (c) the date when quarrying operations commenced on the land (where known),
>
> (d) the hours of the day during which the quarry is in operation,
>
> (e) the traffic generated by the operation of the quarry including the type and frequency of vehicles entering and leaving the quarry,
>
> (f) the levels of noise and dust generated by the operations in the quarry,

(g) any material changes in the particulars referred to in paragraphs (a) to (f) during the period commencing on the commencement of this section and the date on which the information is provided,

(h) whether—

(i) planning permission under Part IV of the Act of 1963 was granted in respect of the quarry and if so, the conditions, if any, to which the permission is subject, or

(ii) the operation of the quarry commenced before 1 October 1964,

and

(i) such other matters in relation to the operations of the quarry as may be prescribed."

In submission, much emphasis was placed on the requirement in sub-section (1) to provide the information specified at paras. (a) to (f) above, as at 28th April, 2004, and then pursuant to para. (g) to provide information in relation to any material changes between that date and the date on which the information was provided, which was, in the case of the application made by Mr. McGuinness, the 27th April, 2005.

30. The planning authority is then obliged to publish notice of the registration within six months (sub-section (4)(a)) and the minimum information to be provided is specified.

31. In relation to a quarry which commenced operation before 1st October, 1964, the planning authority has the option of either imposing conditions on the operation of the quarry pursuant to sub-section (6)(a), or, where certain criteria are met, including the likelihood that it would have significant effects on the environment, it may, within one year of the date of registration of the quarry, require the owner or operator to apply for planning permission and to submit an Environmental Impact Statement to the planning authority (sub-section (7)). The notice published under sub-section (4) must specify which of those courses the planning authority proposes to take.

32. The consequences of non-compliance with s. 261 in relation to a quarry to which it applies are set out in sub-section (10) which provides:

"(a) A quarry to which this section applies in respect of which the owner or operator fails to provide information in relation to the operations of the quarry in accordance with subsection (1) or in accordance with a requirement under subsection (3) shall be unauthorised development.

(b) Any quarry in respect of which a notification under subsection (7) applies shall, unless a planning application in respect of the quarry is submitted to the planning authority within the period referred to in that subsection, be unauthorised development."

The section does not specify any express consequence for non-compliance with a condition imposed pursuant to s. 161(6)(a) on a quarry which commenced operation before 1st January, 1964.

Section 261 Application

33. The evidence of Mr. McGuinness is that on 27th April, 2005, he contacted Mr. Frank Burke, consulting engineer, about registering the Quarry. Mr. Burke is a person who had been advising Mr. McGuinness for some time in relation to planning matters. Mr. Burke did not give evidence. For reasons set out below I find that Mr. McGuinness spoke to Mr Burke about a s.261 registration at latest on 26th April 2005. I accept the evidence that Mr. McGuinness completed the application form downloaded from the Meath County Council website on 27th April, 2005, at Mr. Burke's office, with his assistance. I find that Mr. McGuinness provided the factual information in the s. 261 application which is in his name as owner/operator and signed by him as the owner. The information provided appears to follow headings on the form which in turn derive from the particulars required to be specified by section 261(2). The Quarry is identified by reference to a map, the total site area stated to be 5 hectares and the extraction area 2 hectares. In addition, the following information was provided on the downloaded form which appears to have had the required headings in bold:

"• **Planning Permission**

None - Quarry has been in operation since the late 1958, as such the operation of the quarry would predate October 1964.

• **Pre-October 1964**

My client has acquired the quarry in 1985, prior to his acquisition the quarry was worked by the Boylan family. We enclose a letter from the owner confirming that the Boylan family worked the quarry on an occasional basis for some 50 years. We understand that some material from the quarry may have been supplied to stonewalls, buildings etc in Hilltown House & associated lands.

My client has continued the use mainly for supplying the haul roads on his farm and associated lands, as well as other farmers in the area. We enclose a copy of the 25-inch OS map of the area (1958 revision), which shows the existence of quarry workings in the area.

. . .

• **Materials being extracted**

The operation currently involves the extraction of pit run materials manufactured from the bedrock for use as general filing. The materials produced at the quarry cover the following range of products:- stone products from quarry run, 75mm down, 150mm down to single size.

• **Date of Commencement of Operation**

Circa 1958

• Quarry Operation Hours (when operational)

Plant - Weekdays 8am to 5pm

Saturday 8am to 2pm

Sunday - not opened

Loading/Haulage - Weekdays 8am to 5pm

Saturday 8am to 6pm

Sunday - 8am to 1pm

• Traffic generated by the quarry

Current demand is variable depending on the requirements of the owner ranging from 0 to 20 loads per day or 0 to 100 loads per week. In this regard, we would estimate traffic varies from 0 movements per day to 40 movements depending on the demand of the owner.

. . ."

34. The letter referred to is a letter dated 26th April, 2005, from Mr. McGuinness to Meath County Council on his headed notepaper and signed by him in which he states, under a heading 'Quarry History':

> **"**This quarry was first opened in 1958 by the Boylan Family of Hilltown. Stone from the quarry was used for road maintenance and building stone walls on the Hilltown Estate. The quarry was used periodically up until 1985. Michael mc Guinness acquired the property in 1985**.**
>
> In 1989 the quarry was used to supply stone for road ways and farm yards around the residence. Stone from the Quarry has also been used to repair stone walls locally."

35. Whilst that part of the form under heading 'Pre-October 1964' and the letter refer to Mr. McGuinness in the third person, as owner or as "my client", he signed both the application form and the letter and both are in his name.

Credibility of Witnesses

36. Prior to setting out my findings in relation to the alleged representations and other facts upon which the claims are based, it is necessary to consider the credibility of certain of the witnesses who gave evidence as there are facts in dispute between them, and also because the only evidence for some important facts is the oral evidence of one or more of the witnesses.

37. Two solicitors gave evidence. First, Mr. Paul Moore of Malone & Martin, solicitors. Mr. Moore has been a long-standing solicitor to Keegan Quarries and Mr. Keegan. He acted in the 2005 contract for sale, the 2007 contract for sale and for Keegan Quarries in the *Pierson* proceedings. Much of his contemporaneous file was produced in evidence, including certain documents over which Keegan Quarries waived its right to legal professional privilege. I found Mr. Moore to be a totally honest and credible witness. He gave his evidence in a measured way. His evidence was consistent with his contemporaneous notes and documents.

38. The second solicitor who gave evidence was Ms. Niamh Mulligan from the firm Branigan Berkery, solicitors. Ms. Mulligan was the solicitor who, from September 2005, principally dealt with the 2005 contract for sale to Keegan Quarries on behalf of Mr. McGuinness. She also was the solicitor who principally dealt with the 2007 sale on behalf of Mr. McGuinness. She also acted in the transfer of the Hilltown Farm in 2007, from Mr. McGuinness to Mr. and Mrs. McGuinness as joint tenants. Likewise, she dealt with the transfer, in July 2010, by Mr. McGuinness of his 50% interest in the Hilltown Farm to Mrs. McGuinness. The file of Ms. Mulligan was produced in evidence to the Court. Ms. Mulligan was called as a witness by Keegan Quarries. There are third party proceedings in the present proceedings by Mr. and Mrs. McGuinness against Ms. Mulligan and Branigan Berkery. The third party issues have not been set down for trial and were not litigated before me.

39. I also found Ms. Mulligan to be a totally honest and credible witness. The evidence she gave was measured and consistent with her contemporaneous notes and documents prepared by her. She gave evidence of her practice of recording attendances with her clients and the instructions given to her, in handwritten notes, which she then dictated promptly after the meeting or telephone call and had typed up.

40. Mr Keegan was the principal witness for Keegan Quarries. My assessment of Mr. Keegan as a witness is that he is not a totally reliable witness of fact. He appeared to have a poor recollection of precisely what occurred in the course of the negotiations leading to the contract and completion of the sale in 2007. So far as his evidence related to his own knowledge or approach at any time, I have concluded that his current subjective assessment is made with the benefit of hindsight which has been affected by the events which have taken place since the completion of the sale. However, I have concluded that Mr. Keegan did not give evidence to the Court which he knew or believed to be untrue. Nevertheless, in reaching my findings of fact herein, in relation to any disputed issue, prior to accepting the oral testimony of Mr. Keegan, I have considered whether it is consistent with an objectively verifiable fact or, in some instances, with the oral testimony of Mr. Moore, which I accept in its entirety.

41. Mr. McGuinness was the principal witness for the defendants. Regrettably, in my judgment, he was not a credible or truthful witness. On a number of important issues, I find that he gave evidence which was not true and which in my judgment he cannot have believed to be true. Certain of his evidence was inconsistent with his own witness statement dated 21st June 2011 delivered in these proceedings and with his earlier contemporaneous diaries. Mr. McGuinness kept detailed diaries in which he recorded "anything that was relevant". In relation to certain crucial matters, he appeared to develop or change his evidence in the course of the hearing, and, in particular, in response to evidence given on behalf of the plaintiff he did so only in the course of his subsequent cross-examination.

42. My assessment of the credibility of Mr. McGuinness as a witness is based upon my overall assessment of him in the witness box and the evidence given by him in these proceedings. Whilst I am aware of the assessment made of him by Irvine J in her judgment in

the *Pierson* proceedings, I have made my own assessment on the evidence before me. I have noted Mr McGuinness's contention that his accident and subsequent medical treatment affected his memory and, in particular, his preparation for his oral evidence in the *Pierson* proceedings. I have also taken into account, as submitted on behalf of Keegan Quarries, the fact that the affidavit sworn in the Pierson proceedings predated his accident. The following are a limited number of specific examples for which I have reached my conclusion on Mr McGuinness's lack of credibility.

43. First, there are the explanations offered in relation in the course of his evidence in these proceedings for the now admitted untrue evidence given by him in the Pierson proceedings. The *Pierson* proceedings commenced in February 2008. Mr. McGuinness agreed to give evidence on behalf of Keegan Quarries. It appears that an initial meeting was held between Mr. Moore, Mr. Keegan and Mr. and Mrs. McGuinness at their home on 23rd February, 2008, at which instructions were taken and Mr. McGuinnesss handed over certain documents to be used in the proceedings. A draft affidavit for Mr McGuinness was prepared. On 26th March, 2008, there was a three-hour meeting attended by Mr. McGuinness at Mr. Moore's office, during which the draft affidavit was reviewed with Mr. McGuinness. On 27th March, 2008, the final version of the affidavit was sent to Mr. McGuinness, and, on that evening, Mr. Moore attended at his home and Mr. Keegan brought a Commissioner of Oaths, before whom Mr. McGuinness swore the affidavit.

44. Mr. McGuinness, in his present evidence, states that some portions of the affidavit are untrue and he knew them at the time to be untrue. In particular, he exaggerated the extent of the quarrying operations. His initial explanation for doing this was that he wished to assist Mr. Keegan in the proceedings brought against him. However, under cross-examination, he also then asserted that he had been pressurised both by Mr. Keegan and Mr. Moore to so exaggerate and that he had told Mr. Moore before swearing the affidavit on 27th March, 2008, that he could not stand over it in Court. Further, that if it was to be lodged in Court, there were a couple of matters he needed to address. These allegations were never put to Mr. Moore when giving his evidence. This was so, notwithstanding that Mr. Moore, in his cross-examination, had given evidence that this was an affidavit that Mr. McGuinness "had given great thought to and that had been sent to him in advance for his consideration". Mr. Moore also then stated in evidence, "I am satisfied that it represented his very, very considered and careful view".

45. I find as a fact that Mr. McGuinness did not inform Mr. Moore prior to the swearing of his affidavit of any reservation concerning the content of the affidavit. Regrettably, I have concluded that this was a deliberate untruth told by Mr. McGuinness to the Court during this hearing.

46. The second matter also relates to Mr. Moore. In the course of cross-examination, for the first time, Mr. McGuinness sought to explain alterations made by him to invoices used in the *Pierson* proceedings, and what he now appears to state was untrue evidence given by him in relation to such alterations in the course of his oral evidence in the *Pierson* proceedings, by making a further allegation against Mr. Moore. The invoices in question were two invoices from a Mr. Chambers for "agri-contracting". In his witness statement to the Court, Mr. McGuinness explained that Mr. Chambers had carried out digging and hauling work [from the Quarry] in the period 2001/2002. When asked if he could furnish documentation in support of the defence of the *Pierson* proceedings in early 2010, he could not find Mr. Chambers' invoices relating to that work. However, he then stated at para. 20 of his witness statement:

> "*However, at that time, I did manage to find two of Mr. Chambers' invoices for agri-contracting. These two invoices dated from broadly the same period as some of the works described above. In circumstances where I could not lay my hands on the invoices for the extraction work but knew that they existed and that Mr. Chambers had been paid on foot of them, I altered the two invoices for agri-contracting by adding the words "digging and hauling rock at Hilltown" on one of them and "digging rock at quarry" on the other."*

47. Under cross-examination before me, Mr. McGuinness asserted, firstly, that Mr. Moore was aware at the time that he had altered the invoices, and also that he had asked Mr. Moore not to use them as evidence in the *Pierson* proceedings. This was the first occasion upon which such allegations were made and as a result Mr. Moore has had no opportunity of dealing with them. Notwithstanding that Mr. McGuinness was cross-examined in the course of his oral evidence in the *Pierson* proceedings about the altered invoices (and gave an explanation in evidence in relation thereto different to the evidence now given), no complaint was ever made subsequent to that evidence in July 2010 to Mr. Moore nor was any allegation that Mr Moore was aware of the alteration at the relevant time or was asked not to use them at any point in time until cross examination before me.

48. I find as a fact that Mr. Moore was never made aware by Mr. McGuinness at the relevant time that he had altered the invoices, and that Mr. McGuinness never requested Mr. Moore not to put them into evidence in the *Pierson* proceedings. Again, I am forced to the conclusion that this is an untruth now told by Mr. McGuinness to this Court for the purpose of explaining his prior wrongdoing.

49. A third reason for the view I have formed in relation to Mr. McGuinness's overall credibility is the evidence given by him in relation to what is alleged to have occurred at a meeting with Mr. Keegan, which it is agreed took place in the car park of the Balreask Arms, which was then a public house close to Navan. The resolution of the disputed factual issue is not relevant to any issue in the case, other than to the credibility of Mr. McGuinness and Mr. Keegan.

50. Mr. McGuinness, in the witness statement furnished in these proceedings, made this allegation for the first time in the continuing saga relating to the Quarry. It is not in dispute that on the morning of 22nd January, Mr. McGuinness, who had received maps from his engineer the previous Friday, brought these into Branigan Berkery, solicitors. He had also been asked by Mr. Keegan to leave a copy with Mr. Moore in Trim. In Branigan Berkery, he was given an envelope with the draft contract for sale and he took it and the map to Malone & Martin in Trim.

51. It is again not in dispute that he met with Mr. Keegan at the end of a morning in the car park of the Balreask Arms. There is a serious dispute about how the meeting was arranged and what took place at the meeting. In his witness statement, Mr. McGuinness at paragraphs 69 and 70 stated:

> "69. On the way home from Trim I got a phone call from John Keegan. Mr. Keegan said that he had just passed me on the road and he asked me if I would pull in at the Balreask Arms now called Teach an tSamhraidh. Mr. Keegan said he wanted to talk to me about something. Mr.Keegan turned his jeep and I met him in the car park of the Balreask Arms. I got out of my *own jeep and sat into the passenger seat of Mr. Keegan's Toyota land cruiser jeep. Mr. Keegan had a folder in his hand, he opened the folder and showed me my application for the quarry registration, completed by Frank Burke, taken from the Meath County Council file. Mr. Keegan said that he had been in the offices of Meath County Council that morning and that he had taken the quarry registration application out of the file that was held by Meath County Council. Mr. Keegan pointed out on the application for registration that the number of loads stated per day was 0-20. He said that this was of no use to him. Mr. Keegan said that he would ideally need 100 loads a day, but that 40 loads a day might be ok.*

70. Mr. Keegan said that it would be easier to change the 20 to a 40 (than to '100' for example) on the application and that he could slip it back into the file in Meath County Council later in the day. I was shocked to think that Mr. Keegan had gone into the Meath County Council offices and taken away paperwork belonging to the file. I told Mr. Keegan to go back straight away to the Meath County Council offices and return the documents. Mr. Keegan then asked me if Meath County Council would have scanned the original application that was submitted in April 2005. I said that of course Meath County Council would have a copy on their system of the original application. I again told Mr. Keegan not to alter the application in any way but to return it. Mr. Keegan said that he had heard about other files being altered. When Mr. Keegan realised that I was not going to have anything to do with changing the application details he apologised for asking me to partake in altering the number of loads on the application for quarry registration. Mr. Keegan went on to use words to the effect that that they were a reputable company. At this point Mr. Keegan indicated that he would return the application for the quarry registration unaltered to the file in Meath County Council. I got out of Mr. Keegan's jeep and drove home. There was never any further discussion about this with John Keegan. On returning home, I immediately told my wife, Marie, about the meeting with John Keegan in the pub car park."

52. Mr. Keegan, in his direct evidence, vehemently denied the above alleged content of the meeting at the Balreask Arms. He agreed that there was a meeting at the Balreask Arms. He could not remember the precise date, but did not dispute that it may have been on 22nd January. Mr. Keegan was unable to give evidence of the matter to which the meeting related. He said that in that period, he had had several meetings and contacts with Mr. McGuinness about different issues including an increase in purchase price and a right of way. Mr. Keegan also gave a number of reasons for which he would not have taken away the original s. 261 application form and sought to change it by reference to his knowledge of the practice of Meath County Council in relating to taking copies of planning applications.

53. Mr. Keegan, importantly, also disputed that he had phoned Mr. McGuinness to arrange the meeting at the Balreask Arms. During his direct evidence, he produced to the Court the phone records of his mobile phone for the month of January 2007. This was the phone he said he used in this jeep. The records show five phone calls made on the mobile phone between 11.00am and 1.00pm on 22nd January, 2007. It is agreed that none were made to Mr. McGuinness's phone. On that day, there were two phone calls made from the phone to Mr. McGuinness's phone, one at 16.23 hours, which lasted 19 seconds, and one at 18.53 hours which lasted 46 seconds. Those records were produced and such evidence given by Mr. Keegan on day two of the trial.

54. When Mr. McGuinness gave direct oral evidence on this issue on day four of the trial, he stated:

*"Coming into Navan, I recall getting a phone call from John Keegan. Now, his name didn't come up on the phone. Now, I don't know if there is any significance in that or not, but I had his number in my phone but on that particular call -- but that wouldn't be altogether that uncommon because sometimes he may ring me from a different phone, but I didn't [have] any other phone numbers printed into my phone***."**

55. Regrettably, it appears to me that the above evidence given by Mr. McGuinness is totally disingenuous. In effect, he was seeking to imply to the Court that he had received a phone call from Mr. Keegan from a phone other than Mr. Keegan's regular mobile phone, which number Mr. McGuinness had entered in his own phone. Mr. McGuinness had been present in Court during Mr. Keegan's evidence and cross-examination. Mr. Keegan was never cross-examined upon the basis that he made the alleged phone call to Mr. McGuinness from his jeep on 22nd January from a phone other than his mobile phone. No explanation was given by Mr. McGuinness as to how he suddenly recalled this detail in excess of four years after the date upon which this meeting took place. In my judgment, this was a detail created by Mr. McGuinness in response to the objective evidence of Mr. Keegan's mobile phone records. I have concluded, as a matter of probability, that Mr. Keegan did not make a phone call to Mr. McGuinness while driving in the late morning of 22nd January, 2007, asking to meet him at Balreask Arms, as alleged by Mr. McGuinness.

56. I have also concluded on the evidence that the content of the meeting was not as contended for by Mr. McGuinness. I have done so, primarily by reason of the fact that such a meeting is inconsistent with Mr. McGuinness's own diary entry for 22nd January, 2007.

57. Mr. McGuinness kept detailed diaries in which he recorded anything that was relevant and important matters , if not daily, then certainly ona very regular basis. On 22nd January, 2007, after three entries which are not relevant, the diary records in handwriting on a lined page in the following format:

"In Brannigan Berkery.

Left maps in with Joan.

Brought Contracts to Malone + Martin

in Trim.

Met John Keegan

Discussed Price. Agreed [amount blanked out on copy produced]

[Three lines left blank in diary]

John Keegan Called - Changed Contract

on Right of Way + Time of Essence

to be omitted."

58. It is commoncase that on 22nd January, 2007, Mr. McGuinness and Mr. Keegan agreed a revised price of €7m from the previously agreed €6.8 million. Objectively, the diary entry appears to me to record that when Mr. McGuinness met with Mr. Keegan, he discussed price and agreed on same. The juxtaposition of these entries with the morning events all lead to the conclusion that the price was discussed and agreed when Mr. McGuinness met Mr. Keegan at the Balreask Arms at the end of the morning. Mr. McGuinness, in evidence, sought to suggest that the line of "Discussed Price. Agreed" was a separate entry to the previous line and was something which occurred later in the day. Mr. McGuinness thought this might have been by telephone call from Mr. Keegan. The mobile phone records do not support this. The only phone calls are of too short duration. I do not accept that evidence. It is agreed

that Mr. Keegan called out in the evening and that Mr. McGuinness and he went to the Quarry site to discuss the right of way.

59. My rejection of Mr. McGuinness's evidence in relation to the content of the meeting by reference to his own diary entry inevitably leads to a conclusion that he has given untrue evidence of the alleged content of the meeting, the sole purpose of which is to discredit Mr. Keegan.

60. The fourth matter is evidence given by Mr. McGuinness of a meeting he had with Ms. Mulligan in the offices of Branigan Berkery on 18th January, 2007. Mr. McGuinness gave evidence that this was a meeting he attended with his wife. She also gave evidence to that effect. The importance of Mrs. McGuinness's attendance appears to be to enable her corroborate Mr. McGuinness's evidence of instructions which he allegedly gave to Ms. Mulligan in relation to the contract. Those instructions are not relevant to the issue between the plaintiff and defendants herein. They are relevant to the third party claim brought by Mr. and Mrs. McGuinness against Ms. Mulligan and Branigan Berkery.

61. Ms. Mulligan has a detailed attendance of the meeting of 18th January, 2007. As already stated, I accept her evidence of her practice of taking contemporaneous, handwritten notes during a meeting with a client and then dictating the note shortly thereafter for typing. Her typed note records only Mr. McGuinness as attending. When challenged on this, Ms. Mulligan arranged that the reception book from Branigan Berkery, which records those calling to the office, be produced. This also only records only Mr. McGuinness calling to see Ms. Mulligan on 18th January, 2007.

62. There was a meeting on 24th January, 2007, which both Mr. and Mrs. McGuinness attended with Ms. Mulligan. Ms Mulligan's attendance note of that day records both Mr. and Mrs. McGuinness attending, and also the Branigan Berkery reception book records both Mr. and Mrs. McGuinness as coming to the office.

63. I reject the evidence given by both Mr. and Mrs. McGuinness as to Mrs. McGuinness's attendance at Branigan Berkery on 18th January, 2007, as untrue. Further, I have concluded that it is not simply accidental confusion with the meeting of 24th January, 2007.

64. I have also formed the view that, regrettably, Mrs. McGuinness was not a credible witness. She appears to have been prepared to support the evidence of her husband in relation the meeting of 18th January, 2007, just referred to. She was also prepared to give evidence of what her husband is alleged to have told her of the alleged content of the meeting in the car park of the Balreask Arms on 22nd January, 2007, when he returned home at lunchtime which, I have concluded, as a matter of probability, is untrue.

Representation of Fact

65. The alleged representations fall into two categories. Those which were pre-contractual representations made by Mr. McGuinness to Mr. Keegan and the post-contractual but prior to completion representations made by the replies given to requisitions.

66. The pre-contractual representations are alleged to have been primarily made at two meetings held between Mr. and Mrs. McGuinness and Mr. Keegan on 11th and 16th January, 2007. There is much dispute between those persons as to what was or was not said at those meetings. It is not necessary to resolve all such disputes. I am confining the findings to the facts relevant to the issues to be determined. Certain of the representations are also relevant to the issues on causation of alleged loss.

67. The representations alleged to have been made at the meetings must be considered, both in the context of what had previously occurred between the parties, and the steps taken in relation to the Quarry and the then probable state of mind of Mr. McGuinness and Mr. Keegan. These include the 2005 conditional contract for sale and what was stated and done in the negotiations leading to that contract. In the course of the 2005 negotiations, Mr. McGuinness gave to Mr. Keegan a history of the Quarry, which included the pre-1964 use by the Boylan family; the quarrying by Mr. McGuinness and his brothers at differing levels of intensity since they acquired the lands; significant quarrying by Mr. Gallagher in 1995/1996, and quarrying by Mr. Fallon and others in conjunction with the landfill activities from 2003 to 2005. Mr. McGuinness and Mr. Keegan had met at the Quarry on 26th April, 2005, when Mr. Keegan had observed evidence of recent quarrying activity.

68. In June 2005, Mr Keegan had a report carried out on the Quarry and states he was satisfied that it contained substantial rock deposits.

69. In May 2006, the quarry across the road, "the Mullagh", was sold at public auction for €15m by John Gallagher to Kilsaran Concrete, a significant competitor of Keegan Quarries. Mr. Keegan states that he had misgivings about his decision not to go ahead with the purchase under the 2005 conditional contract, and throughout the second half of 2006, was increasingly of the view that he had missed an important opportunity in relation to the Quarry.

70. Mr. Keegan had previously registered three quarries pursuant to s. 261 of the Act of 2000. He stated he had done so with the assistance of his planning advisor, a Mr. Shields, in 2004. He was familiar with the particulars to be furnished and the procedure pursuant to section 261. In my judgment, at the time of the two meetings in January 2007, whilst Mr. Keegan may have understood that, technically, the decision of Meath County Council communicated in the letter of 15th December, 2006, to impose conditions on the Quarry was not a planning permission, he did consider that the practical effect of such letter was that at least as between Mr. McGuinness, as owner, and Meath County Council, as planning authority, the planning issues relating to the Quarry were settled. Mr. Keegan had not yet had the benefit of the detailed advice given him by Mr. Moore on 23rd January, 2007, in relation to the effect of a s. 261 registration. Mr. Keegan, on 11th and 16th January, 2007, appears to have been of the belief that he would be entitled to operate the Quarry in accordance with the operating particulars furnished on the s. 261 application and the final conditions imposed by Meath County Council. It is commoncase that Mr. Keegan's queries at the meetings focused on what had been put down by Mr McGuinness on the s. 261 application. Mr. Keegan had not seen the application prior to these meetings. Mr. Keegan was aware of the draft conditions and the entitlement to make submissions within six weeks and thereby influence the final conditions. Mr. Keegan was keen to reach a deal to purchase the Quarry at the meetings of 11th and 16th January, 2007.

71. In my judgment, Mr. and Mrs. McGuinness, at the meetings of 11th and 16th January, 2007, believed, at least, that the letter from Meath County Council of 15th December, 2006, enhanced the planning status of the Quarry. Mr McGuinness's evidence was that he did not understand the meaning of the letter when he received it. Even if that was so, his diary records on 19th December, 2006, "Meath County Council have registered Quarry in top of Hilltown with conditions. Frank Burke says this means Planning may not be necessary. Will post copy to Frank over Xmas". Mr. McGuinness did not give evidence of any contrary advice received from Frank Burke prior to the meetings in January. In my judgment, Mr. McGuinness believed, in January 2007, that the value of the Quarry had been enhanced by the receipt of the letter from Meath County Council, and that it was now capable of being operated as a

commercial quarry in accordance with the conditions. Mr. McGuinness states that he sought a price of €7,500,000 on the basis that the Quarry was half the size of the Mullagh quarry, which both he and Mr. Keegan knew had been recently sold for €15 million. The Mullagh quarry was a commercially operated quarry. In addition, Mr. McGuinness's diary entries for 18th, 19th and 23rd January, 2007, indicate that he approached other quarry owners on those days to see if they would be interested in purchasing and asked a price of €10 million.

72. In summary, both Mr. McGuinness and Mr. Keegan, in the meetings of 11th and 16th January, 2007, believed that they were negotiating in relation to a quarry, which as far as planning was concerned, was capable of being operated as a commercial quarry in accordance with the particulars registered and the conditions imposed. Mr. McGuinness was keen to sell what he believed was now a valuable asset and Mr. Keegan was keen to purchase. It is against this probable approach that I assessed the alleged representations and other issues required in accordance with the principles set out by Shanley J. in the *Forshall* judgment referred to above.

73. I have also taken into account Mr. McGuinness's agreement in evidence that at the meetings he would have given Mr. Keegan a history of the Quarry as set out in the s. 261 application.

74. My conclusion as to the facts communicated or not communicated by Mr. McGuinness to Mr. Keegan at the meetings of 11th and 16th January, 2007, are as follows:

> (i)Mr. McGuinness did state that the Quarry had been operated from approximately 1958 by the Boylan family. He did expressly state it was operated as a quarry pre-1964.
>
> (ii)Mr. McGuinness did communicate a history of the Quarry since he and his brothers acquired the land which included different periods of significant quarrying by him and his brothers; quarrying at commercial levels by Mr. Gallagher in 1995/1996, and quarrying by Mr. Fallon and others in connection with the landfill operation in 2004/2005.
>
> (iii)Mr. McGuinness gave to Mr. Keegan the information he had provided on the s. 261 application form in relation to the operation of the Quarry, including daily and weekly loads. There was no discussion as to whether this was given as of April 2004 (as required by s.261(1)) or April 2005.
>
> (iv)I am not satisfied that Mr. McGuinness made any express representation that the Quarry had been in continuous use from 1964 to January 2007. I am not satisfied that there were any discussions about continuity of use.
>
> (v)Mr. and Mrs. McGuinness did not inform Mr. Keegan either of the letter received from Meath County Council of 13th April, 2005, in relation to the breach of the landfill conditions, or as stated in evidence by them, of the fact of protestors and complaints associated with the landfill operation. I reject their evidence on this issue as not credible in a context where they were attempting to sell the Quarry to Mr. Keegan.
>
> (vi)Mr. McGuinness did not inform Mr. Keegan that the letter of 13th April, 2005, from Meath County Council had requested that quarrying operations cease.
>
> (vii)Mr. McGuinness did not expressly inform Mr. Keegan that quarrying operations had ceased in 2005. Mr. McGuinness did inform Mr. Keegan that the landfill operations had ceased in April 2005. However neither did Mr. McGuinness represent that he or anyone else carried out quarrying operations between April 2005 and January 2007.

75. It is well established that the making of a representation as to a past or existing fact, in order to be actionable, must be an active misrepresentation. It may be made by words or conduct. In certain circumstances, silence or non-disclosure can constitute a misrepresentation if the matter that is not disclosed renders misleading a positive representation. In *Carey v. Independent Newspapers (Ireland) Ltd*. [2004] 3 I.R. 52, at p. 66, Gilligan J. summarised the position as follows:

> "In principle, the Irish courts have accepted that silence or non-disclosure regarding facts or changes in circumstance not known to the other party can give rise to an obligation to disclose such facts and circumstances and such failure to disclose will constitute a misrepresentation. In *Pat O'Donnell & Co. Ltd. v. Truck and Machinery Sales Ltd*. [1998] 4 I.R. 191 at 202, O'Flaherty J. remarked:-
>
> > 'In general, mere silence will not be held to constitute a misrepresentation. Thus, a person about to enter into a contract is not, in general, under a duty to disclose facts that are known to him but not to the other party. However, in certain circumstances, such a party may be under a duty to disclose such facts. A duty of disclosure will arise, for example, where silence would negate or distort a positive representation that has been made, or where material facts come to the notice of the party which falsify a representation previously made'."

76. In accordance with these principles, having regard to my conclusions as to the communications between Mr. McGuinness and Mr. Keegan at the meetings of 11th and 16th January, 2007, I have concluded that the following representations of fact, central to the claim of Keegan quarries for fraudulent misrepresentation were made:.

> (i)The Quarry had been operated from approximately 1958 by the Boylan family and the Quarry had been operated pre-1964; and
>
> (ii)That the operational history of the Quarry included the facts set out in the s. 261 application form.

77. As I have concluded that Mr. McGuinness did not make a positive representation that the Quarry had been continuously operated from 1964 to 2007, it does not appear to me that the failure to disclose that the Quarry had ceased to operate in April 2005 or, to put it another way, his silence on this issue can be held to constitute a misrepresentation.

78. Subsequent to the meetings, and before signing the contract , Mr Keegan obtained a copy of the completed s. 261 application form and accompanying letter. The pre-contractual representations include the facts in relation to the operation of the Quarry stated therein.

Falsity of Representation

79. On the agreed statement of facts, the representation that the Quarry had been operated from approximately 1958 and pre-1964 is false.

80. In the course of his evidence, Mr. McGuinness acknowledged that certain of the information provided to Meath County Council in relation to the operations of the Quarry on the s.261 application form was also false. I will return to this.

Knowledge of Falsity of Representations

81. The classic statement of what must be proved in relation to the knowledge of a representor who makes a misrepresentation is as explained by Lord Herschell in the House of Lords *in Derry v. Peek* [1889] 14 App. Cas. 337:

> "First, in order to sustain an action for deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think that the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

82. The onus is and remains on a plaintiff to prove the defendant's dishonesty, that is, his lack of honest belief in the truth of the statement. It is not for a defendant to prove his honest belief. The standard of proof is the civil one; the proof must be on the balance of probabilities. Nevertheless, in applying this test, a Court will take into account the gravity of the allegation in considering what evidence is sufficient to discharge the burden or proof. Cartwright, *'Misrepresentation, Mistake and Non-Disclosure'* (2th Ed. 2007) at para. 5.46, notes:

> "When it comes to the question which is at the heart of the claim in deceit - the fraudulent state of mind of the representee (sic) [representor] - the courts take a more cautious approach. There is no doubt that the burden of proof of the defendant's fraud lies on the claimant. Again, the question of whether the representee's (sic) [representor's] fraud is proved is tested by reference to the civil standard, but in applying this test, the courts take into account the consideration that the more serious the allegation is, the greater the proof needed to persuade a court that it can be satisfied that the allegation is established: the very gravity of an allegation of fraud is a circumstances which had to be weighed in a scale in deciding as to the balance of probabilities."

83. The primary defence is that the falso representation of pre-1964 operation was made innocently in reliance on what Mr McGuinness had been told by Major Boylan. The submission made on behalf of Keegan Quarries at the closing of the case was that it had discharged the onus of establishing, as a matter of probability, that Mr McGuinness had made the false representation that the Quarry had operated from approximately 1958 and pre-1964 either knowingly, or without belief in its truth or recklessly in the sense of being careless as to whether it was true or false. In support, it contended that, on the evidence, the Court should conclude that the alleged conversation with Major Boylan in relation to the operation of the Quarry from 1958 did not take place, and, as a matter of probability, was fabricated by Mr. McGuinness.

84. To establish this Keegan Quarries must, on the evidence adduced, satisfy the Court that it should conclude, as a matter of probability taking into account the gravity of the allegation in accordance with the above principle, that the alleged conversation with Major Boylan did not take place. As this is the only information relied upon by Mr. McGuinness in relation to his knowledge of a pre-1964 use of the Quarry if the alleged conversation did not take place, Mr. McGuinness must have made the statements of pre-1964 use at a minimum, without belief in their truth.

85. The only evidence of the alleged conversation with Major Boylan is the evidence given by Mr McGuinness. The onus is on the plaintiff to establish that such evidence is as a matter of probability untrue.

86. In my judgment, on the evidence adduced in these proceedings, Keegan Quarries have so satisfied the Court for the following reasons.

87. The first occasion upon which Mr. McGuinness made reference to the operation of the Quarry by the Boylan family from 1958 was about 26/27 April 2005. He must have told Mr Burke and he referred to the facts in the letter of 26th April 2005 to Meath County Council and in s. 261 application form completed by him with Mr. Burke on 27th April, 2005. He also gave such history to Mr Keegan at their meeting on 26 April 2005. There is no evidence of Mr. McGuinness disclosing such information to any other person prior to that date. Major Boylan had died in March 2005.

88. It is unclear when Mr McGuinness first said that such facts were based upon a conversation or conversations with Major Boylan. He did so in the Pierson proceedings. There is a significant difference between the evidence given by Mr. McGuinness in the Pierson proceedings and in these proceedings in relation to the alleged conversation or conversations with Major Boylan and information allegedly supplied to him by Major Boylan in relation to the operation of the Quarry.

89. In the affidavit sworn on 27th March, 2008, in the Pierson proceedings, Mr. McGuinness stated at para. 13, ". . . over the years, I had many conversations with Major Edward Boylan, a previous owner of the farm, who informed me that the quarry pits in the old wooded area had been excavated periodically from 1958".

90. In his oral direct evidence in the Pierson proceedings in July 2010, when asked to indicate "roughly, when do you say this conversation [with Major Boylan] took place?", Mr. McGuinness stated:

> "I would say it was the second year after we had purchased, which was probably '87/'88, roughly in that time. I would have met him on numerous occasions and he discussed the fact that they had quarried some rock on the location on our map periodically I would say, that was the way he just put it."

McGuinness was then asked how far back did Major Boylan say that had taken place, to which his response was, "what he said was in the late '50s, '58 onwards, basically, and that is the only year that comes to my mind, '58, but by that I am not sure . . ."

91. In the witness statement prepared in advance of these proceedings and confirmed in evidence to the Court as the truth, Mr. McGuinness states at para. 30:

> "On 23rd June 2004 I met with Major Boylan at his home. I was interested in buying a three acre wooded area surrounding a grotto, just up from my house on the Hilltown Road, which was owned by Major Boylan. He was interested in doing a deal with me but needed to tidy up the legal registration of the site. During our conversation I spoke with him about the landfill and what was happening with the local authority, as his house overlooks the quarry and the landfill area and he could see what was occurring there. Major Boylan told me that his family had occasionally quarried stone from the quarry for the vernacular walls on the estate. He also told me that he had returned home from the British Army to run the estate in 1958 because his father was unwell. Major Boylan's father, the Brigadier, died in 1959. On the basis of this conversation with the Major, I understood that there had been a small amount of quarrying on the lands since at least as far back as 1958. Major Boylan himself died on 20th March, 2005."

92. In his oral evidence in these proceedings, Mr. McGuinness stated that he recalled specifically the conversation with Major Boylan in 2004, on a date recorded in his diary. He placed that conversation at "the grotto" and explained that this was on a small area of approximately three acres adjoining his land which he had been attempting to purchase from Major Boylan. On this occasion, Mr. McGuinness said that Major Boylan had told him that, "it was a very occasional small quarry, used for the estate itself". He also said he had made particular reference to its use for stone for the repair and building of "vernacular walls" on the estate. He referred to the excavation of shale rock from two small pits in a three-acre site with trees around it which Major Boylan is alleged to have said that they did for fifty years. Mr. McGuinness made clear that he had assumed that the quarrying had taken place "possibly after 1958" as that was the year in which Major Boylan informed him he had come home. But he also pointed out that Major Boylan had told him that his family had quarried it, that he never said that he did it himself, and that Major Boylan did specify it was for fifty years. Major Boylan sold the lands to Mr. Coyle in 1975.

93. In cross-examination in these proceedings, Mr. McGuinness confirmed that the only conversation that he now remembers with Major Boylan in relation to "quarrying in 1958 or at any time before 1964" is the conversation in the grotto in June 2004. Later, in his cross-examination, when it was put to Mr. McGuinness that he said that Major Boylan had told him that his family had been quarrying since 1958, his response was:

> "No, he didn't say that, and I didn't say that either. It is quite specific, and I told you I would not misquote the man. He told me he came home from the British Army in 1958 to look after the estate . . . During the conversation he said that his family had quarried the area for some fifty years. I assumed that it may have been started in 1958, but of course that couldn't have happened because he only owned the land for, I think it was seventeen years after that. So it obviously was some period earlier . . . So when I stated in my registration application . . . that it was a pre '64 quarry, it was because of what Mr. Boylan had told me during his lifetime, and he told me that his family had used it for some fifty years, but which fifty I cannot precisely tell you."

94. Mr. McGunness's contemporaneous diary entry for 23rd June, 2004, states:

> "Met Major Boylan on Plot of land at Grotto
>
> He won't sell it at present
>
> It is O.K. to cut Hedge along road
>
> Entrance at 4 Peers is not Right of Way."

95. In my judgment, Mr. McGuinness gave no credible explanation as to why, if he had had a significant conversation with Major Boylan on 23rd June, 2004, in relation to the quarrying operation by the Boylan family, that he would not have recorded it in his diaries. Further, it appears from the diary entry of 24th June, 2004, that on the following day, he called to Mr. Frank Burke in relation to the zoning application for his lands at Minnistown. His evidence is that he did not discuss with Frank Burke the information he now alleges he was given by Major Boylan the previous day. This failure must be considered in the context that Mr McGuinness accepted in evidence (as recorded in his diaries) that he had previously discussed the question of applying for planning permission for the Quarry with Mr. Burke in January, 2004 and had obtained an indication of the cost and timing of such an application.

96. The second set of factors are the circumstances in which and purpose for which the s.261 application was probably made and the content thereof. There is some confusion in Mr. McGuinness's explanation as to why he decided to make a s. 261 application in April 2005. His evidence was that he met a Mr. Seamus Murphy on 25th April, 2005, who asked him if he had registered the Quarry, and that this put him in mind to do it, and thereafter, he made contact with Mr. Burke. There were inconsistencies in his evidence in relation to the alleged meeting with Mr. Murphy. The entry in his diary for 26th April, 2005, suggests that he contacted Mr. Burke in relation to the registration before he had contact with Mr. Murphy on that day.

97. However, the undisputed facts in relation to the Quarry in April 2005 include that Mr. McGuinness received a letter dated 13th April, 2005, from Meath County Council, primarily in relation to breaches of conditions in the adjacent landfill operations, but which also requested that quarrying cease on the site. Mr. McGuinness was in Dubai on business on that date and appears to have received the letter when he returned home some days later. Mr. Fallon, who was then operating the landfill and also doing some quarrying , appears to have ceased quarrying by that date.

98. At one point in his evidence, Mr. McGuinness stated that the purpose of making the s. 261 application was to "regularise" the position in relation to the Quarry. This appears a probable purpose. I do not accept as credible Mr. McGuinness's evidence that up to this date he was unaware of the importance of a pre-1964 (or, as was referred to by Mr. Burke, pre-1963) use for planning purposes. The evidence establishes that Mr. McGuinness had significant experience in relation to planning matters prior to April 2005. He had engaged in a planning application in relation to the landfill in 2003. In January 2004, he accepts that he discussed with Mr. Burke the question of applying for planning permission for the Quarry and received an indication of the cost and timing for such an application. He was also involved in a process of possible rezoning his lands at Minnistown, again with the assistance of Mr. Burke.

99. It makes no sense for Mr. McGuinness to have instructed Mr. Burke on 26th April, 2005, to register the Quarry pursuant to s. 261

unless he had, at least by that date, some understanding of what could be registered pursuant to s. 261 and the potential benefits of doing same. Mr. McGuinness's diary of 26th April, 2005, records:

> "Frank Burke: will submit application
>
> to register quarry
>
> Need maps etc."

I find as a fact that at latest, on 26th April, 2005, Mr. McGuinness understood the importance of a pre-1964 operation as a quarry for the purposes of a s. 261 application. He was aware that there was no planning permission for the Quarry and must have been aware that it could only be considered as authorised for planning purposes if it had operated prior to 1964. It is also of some significance that the letter referring to the operation by the Boylan family from 1958 intended to go with the s.261 application form is dated 26th April, 2005 which the Court must presume was prepared on that date and brought in to Mr Burke on 27th April.

100. The information contained in the s. 261 application form and accompanying letter is the first occasion upon which Mr. McGuinness communicated the information he allegedly had in relation to the operation of the Quarry by the Boylan family, save insofar as he may have communicated this to Mr. Burke in the days immediately prior to 27th April, 2005 and to Mr Keegan on 26th April. In that very same s. 261 application form signed by Mr. McGuinness, he stated significant facts which I find he knew at the time to be untrue. Such facts included the information furnished under the heading 'Materials being Extracted' and 'Quarry Operation Hours (when operational)'. It is unclear whether this information was being given as of 28 April 2004 (as required by s. 261(1)) or as at 27 April 2005. Nothing turns on this save that if, as appears, it purported to be current information as of April 2005, on the agreed facts the Quarry had ceased to operate. Regardless of which date applied, Mr. McGuinness accepted in evidence that, to his knowledge, no stone products of the types listed had been produced at the Quarry. Similarly, he accepted that the Quarry had not operated in accordance with the structured hours included in the application form. Further, in relation to the information furnished under the heading 'Traffic Generated by the Quarry', I am also satisfied that Mr. McGuinness knew that the estimate provided was not based upon the then operations of the Quarry (even prior to it ceasing). As Mr. McGuinness explained in cross-examination, "I tried to get the maximum loads".

101. Accordingly, it appears to me that it has been established that Mr. McGuinness, in completing the s. 261 application form, apart from the facts relating to pre -1964 use included facts in relation to the materials and operation hours which he knew to be untrue. He included information in relation to the traffic generated by the Quarry in relation to which, at minimum, he was careless as to whether it was true or false. In response to cross-examination, he sought, in relation to each of these matters, to offload the blame to Mr. Burke for the inclusion of the information. I do not accept that explanation. Mr. McGuinness was the person who signed the form, and in doing so, took responsibility for the truth of the information then being provided to Meath County Council.

102. In the letter of 26th April, 2005, which is typed on headed notepaper with the name and home address of Mr. McGuinness, he stated, "This quarry was first opened in 1958 by the Boylan Family of Hilltown". Mr. McGuinness in evidence accepted that he was not told this by Major Boylan. It is, of course, inconsistent with a 50-year use of the Quarry by the Boylan family, as allegedly said by Major Boylan, as Mr. McGuinness knew that he had sold the lands in 1975 to Mr. Coyle. The information on the application form itself also repeats that the Quarry has been in operation "since the late 1958". However, it also says, somewhat inconsistently, that a letter is being enclosed "confirming that the Boylan family worked the quarry on an occasional basis for some fifty years". The letter, in fact, does not so state.

103. The primary representation made by Mr. McGuinness to Meath County Council in the s. 261 application form and accompanying letter (and repeated to Mr. Keegan) was that this was a Quarry which commenced operations in 1958, and has been operated periodically since that date. Even on Mr. McGuinness's own evidence as to what he was allegedly told by Major Boylan, that was not a true statement, and known by Mr. McGuinness at the time not to be true. Cross-examined about this, he referred to the conversations with Major Boylan as being "brief" and "sketchy". At a very minimum, even if I were to accept Mr McGuinness's evidence of the alleged conversation with Major Boylan (which I do not) the categoric statements as to the date of commencement of operation of the Quarry were made recklessly, in the sense of being careless as to whether the information provided was true or false. It is also relevant that in the same letter of 26th April, 2005, it is stated, "the quarry was used periodically up until 1985". It is commoncase that that date was intended to be 1986 i.e. the date upon which the property was acquired by Mr. McGuinness and his brothers. Mr. McGuinness accepts that he had no information about any quarrying done by either Mr. Coyle or Mr. Lawlor during their periods of ownership collectively from 1975 to 1986 or a period of eleven years when he made that statement.

104. The third matter I have taken into account is the overall judgment on the credibility of Mr McGuinness as a witness. It does not, of course, follow that because I have already found him to be untruthful about certain matters that I should not accept his evidence in relation to the alleged conversation with Major Boylan. However, it is a factor which must be taken into account. Having regard to this and the other matters set out above, I have concluded that, as a matter of probability, Mr. McGuinness did not have a conversation with Major Boylan in May 2004, or on any other date during which Major Boylan informed Mr. McGuinness that the Boylan family had operated the Quarry from 1958 or for fifty years.

105. Accordingly, in my judgment, when Mr. McGuinness made the representations in the s. 261 application form and accompanying letter to Meath County Council, of the operation of the Quarry by the Boylan family before 1964, and in particular, from 1958, he did so fraudulently, either knowing the statements he made to be untrue or without belief in their truth or recklessly i.e. careless as to whether the statements he made were true or false.

106. The first representations made by Mr. McGuinness to Mr. Keegan in relation to the operation of the Quarry by the Boylan family prior to 1964 was also on 26th April, 2005. The substance of the representation was similar to that in the s. 261 application. In my judgment, he similarly made the representations at that time, fraudulently, for the same reasons.

107. Mr. McGuinness has confirmed in evidence that in 2007, at the meetings of 11th or 16th January, 2007, he gave Mr. Keegan a history of the Quarry which was, in substance, the same as that stated in the s. 261 application form. There is no evidence of Mr. McGuinness obtaining any information between April 2005 and January 2007, in relation to the operation of the Quarry by the Boylan family prior to 1964. It follows, therefore, that the same representations in relation to the pre-1964 operation of the Quarry and its operation by the Boylan family from 1958 were also made fraudulently in 2007.

108. The false representations of the current operations (as of April 2004 or 2005) set out in the s. 261 application form and repeated to Mr Keegan in January 2007 were also made fraudulently as Mr McGuinness knew them to be untrue.

Intention of Mr. McGuinness

109. On the facts herein, I am satisfied that Mr. McGuinness, in making the representations to Mr. Keegan in relation to the pre-1964 operation of the Quarry and its current operations in April 2004 or 2005 as set out in the s. 261 application form, did so in 2007 as part of the negotiations for the sale and purchase of the Quarry, and intended Mr. McGuinness and Keegan Quarries rely upon those representations in determining whether to purchase the Quarry.

Inducement and Reliance on False Representation

110. The case made by Keegan Quarries on this issue is that through Mr. Keegan, it relied upon the misrepresentation made by Mr. McGuinness in relation to the pre-1964 operation of the Quarry, both in deciding to enter into the contract for sale and in deciding to complete the purchase of the Lands.

111. The submission on behalf of Mr. and Mrs. McGuinness is that Mr. Keegan did not rely upon the representation made by Mr. McGuinness as to pre-1964 use, but rather, on the registration by the Council of the Quarry pursuant to s. 261 and upon its decision to impose conditions on the Quarry, as set out in the letter of 15th December, 2006. Counsel on their behalf in particular submitted that having regard to the nature of the use of the Quarry by the Boylan family as disclosed in the s.261application, that Mr. Keegan could not have relied upon such a pre-1964 use in deciding to purchase the Quarry for commercial use.

112. In my judgment, Mr. Keegan relied both on the representation made by Mr. McGuinness of pre-1964 use, and the fact that Meath County Council had registered the Quarry and imposed conditions on it as a pre-1964 quarry in deciding to contract to purchase the Quarry and complete the sale. I have reached this conclusion, primarily by reason of the advices given by Mr. Moore to Mr. Keegan on 23rd January, 2007, both orally and in writing. Those advices were given prior to the contract being signed. I have concluded that Mr. Keegan did have regard to the advices in making the decision that Keegan Quarries enter into the contract.

113. The evidence of Mr. Moore, which I accept, is that he had a lengthy meeting with Mr. Keegan on 23rd January 2007, during which they went through the provisions of s. 261, and a set of Guidelines for Planning Authorities issued by the Department of the Environment in April 2004. In the course of the meeting, they considered a flowchart of the registration process. Mr. Moore, following the meeting, gave written advices to Mr. Keegan in a letter dated 23rd January, 2007, which was put into evidence as privilege was waived. Mr. Moore had not seen the s. 261 application when he wrote the letter. Whilst detailed advices were given, it is sufficient to refer to two matters for present purposes. First, Mr. Moore stated, "that the site comprises an existing quarry which has been in operation since prior to 1st October, 1964". This is clearly information given to him by Mr. Keegan based upon the representations made. Having identified that he has not seen the application form, Mr. Moore stated, "clearly, the information contained in the Application is of great importance . . . *in my opinion, you ought to be satisfied that the information contained in the Application is substantially correct. If, for instance, Mr. McGuinness overstated the intensity of quarrying operations, and the volume of material being extracted, or if he in some other way misled the Planning Authority, this could well provide ammunition to third party objectors at a later stage*".

114. Secondly, Mr. Moore, later in the letter, quoted from the Guidelines:

> ". . . it should be noted that the registration of quarries under s. 261 does not confer planning consent for a quarry that is an unauthorised development. Therefore, an unauthorised development remains unauthorised, even after registering with the planning authority . . ."

115. The above advices expressly given to Mr. Keegan, both orally and confirmed in writing, corroborate Mr. Keegan's evidence, first, that prior to signing the contract he was aware that a s. 261 registration did not amount to planning permission and did not give planning consent for a quarry which was an unauthorised development, and, secondly, that his attention was specifically drawn to the importance of being satisfied that the information contained in the s. 261 application was substantially correct. When cross-examined as to how he had satisfied himself of the accuracy of the information in the application form, Mr. Keegan's evidence was that he relied upon what he had been told by Mr. McGuinness because he believed, at the time, that he and his wife were "honest, trustworthy people" This appears reasonable given their dealings up to that time. . Mr McGuinness had *inter alia* returned a cheque for €50,000.00 upon rescission of the 2005 conditional contract.

116. I am also satisfied that at this time, Mr. Keegan understood the importance of pre-1964 use for planning compliance. He was aware that the Quarry did not have planning permission and understood that a pre-1964 use was the only basis of authorisation. Having regard to the corroboration of his evidence by that of Mr. Moore, I accept the evidence of Mr. Keegan that he did rely on the representation of Mr. McGuinness that the Quarry was in operation prior to 1964 in making the decision that Keegan Quarries enter into the contract to purchase the Quarry.

117. However, in my judgment, Mr. Keegan also relied upon the fact of the registration of the Quarry and the process, including the public notice, leading to the County Council decision to impose conditions on the Quarry in deciding to purchase. Careful consideration was given by Mr. Moore as to whether, under the provisions of s. 261, it was still (in January 2007) open to Meath County Council to require an application for planning permission. His conclusion, inter alia, was that the time had passed during which this could be done. The registration and imposition of conditions were considered by Mr Moore and Mr Keegan as a practical endorsement by Meath County Council of the history and operations of the Quarry as stated in the application form.

118. I have also considered the submission made by Counsel for Mr. and Mrs. McGuinness that the Court should not conclude that Mr. Keegan and Keegan Quarries relied upon the representation of pre-1964 use by reason of the type of pre-1964 use by Boylan family disclosed in the s. 261 application and accompanying letter and the intention of Keegan Quarries to operate the Quarry as a commercial quarry. On the evidence , Mr. Keegan does not appear, prior to entering into the contract, to have had regard to the question as to whether the disclosed pre-1964 use authorised the Quarry to operate in April 2005 in accordance with the current operating particulars furnished in the s. 261 application form and even may have assumed that it did so. . Insofar as that misunderstanding or failure to address that question may have also influenced Mr. Keegan in determining that Keegan Quarries enter into the contract for sale and complete it, it was in my judgment an additional factor which influenced it in entering into the sale. However, it does not preclude what I have determined was also the reliance upon the pre-1964 use.

119. Counsel for Keegan Quarries submits that a representation to be effective in law need not be the sole or even dominant cause of

Keegan Quarries entering into the contract provided the false representation was one of the factors which induced Keegan Quarries to enter into the contract. Reliance is placed, in particular, upon the decision of the Court of Appeal in *Edgington v. Fitzmaurice* [1885] 29 CHD 459. In that case, the plaintiff purchased debentures, partly due to a misrepresentation in the prospectus, and partly because of a self-induced mistake that the debentures were secured so as to provide preferential creditor status should the company fail. The Court of Appeal held that in order to render the misrepresentation actionable, it was sufficient to show that it was one of the factors which induced the plaintiff to enter into the contract. Cotton L.J. at p. 481 stated:

> "It is not necessary to shew that the misstatement was the sole cause of his acting as he did. If he acted on that misstatement, though he was also influenced by an erroneous supposition, the Defendants will still be liable."

Fry L.J. at p. 485 stated:

> "The prospectus was intended to influence the mind of the reader. Then this question has been raised: the Plaintiff admits that he was induced to make the advance not merely by this false statement, but by the belief that the debentures would give him a charge on the company's property, and it is admitted that this was a mistake of the Plaintiff. Therefore, it is said that the Plaintiff was the author of his own injury. It is quite true that the Plaintiff was influenced by his own mistake, but that does not benefit the Defendants' case. The Plaintiff says: I had two inducements, one my own mistake, the other the false statement of the Defendants. The two together induced me to advance the money. But in my opinion if the false statement of fact actually influenced the Plaintiff, the defendants are liable, even though the plaintiff may have been also influenced by other motives. I think, therefore, the Defendants must be held liable."

120. The above principles are in my judgment applicable. The facts herein are also analogous. I am satisfied that Keegan Quarries was induced to enter into the contract for the purchase of the Quarry, by probably four inducements: the false representation that the Quarry had operated prior to 1964; the fact that Meath County Council had registered the Quarry pursuant to s. 261 and imposed conditions on it as a pre-1964 quarry and either a misunderstanding as to or failure to address the potential planning status of the current quarry operations disclosed in the s.261 application form. It was also induced by the operating particulars stated on the s.261 form.

121. Gilligan J. in Carey v. Independent Newspapers (Ireland) Ltd. [2004] 3 I.R. 52, at 70, considered the extent of the reliance required in order to ground a claim in misrepresentation. That was a case of negligent misrepresentation but the principles are the same. Gilligan J. identified four possible scenarios in relation to what is necessary to satisfy the requirement of inducement for the purposes of the tort, and in relation to the first stated:

> ". . . the significance of the truth to the plaintiff of what turns out to be a misrepresentation may be such that, if the plaintiff representee appreciated the true position, they would not have entered the contract at all (see *Horry v. Tate & Lyle* [1982] 2 Lloyd's Rep. 416 at p. 422, per Peter Pain J). This obviously meets the standard required for a legally effective inducement."

122. I am satisfied on the facts herein that if Mr. Keegan had understood that in truth, the Quarry had not been operated prior to 1964, and the Lands did not have a pre-1964 use as a quarry, that, having regard to the consultation with and advices received from Mr. Moore, Keegan Quarries would not have entered into the contract for the purchase of the Lands in January 2007. Mr. Keegan was aware that as there was no planning permission, for planning purposes, authorisation for use as a quarry depended on its pre-1964 use, and further, that the s. 261 registration did not confer planning consent for an unauthorised development.

123. Similarly, I have concluded that the false representations made by Mr. Keegan in relation to the current operations of the Quarry, as set out in the 2005 s. 261 application form, and repeated to Mr Keegan in negotiations including the number of daily and weekly loads, were made fraudulently; were intended to induce Keegan Quarries to enter into the contract for sale; that Keegan Quarries, through Mr. Keegan, did rely upon those representations and were induced thereby to enter into the sale. It is relevant to note in relation to the damages claimed that such representations of current operations in 2004/2005 are of the facts of the operation and not the lawfulness of same for planning purposes.

Post-Contract Representations

123. Counsel for Keegan Quarries submits that further false representations were recklessly made by Mr. McGuinness in the replies given on his behalf and on his instructions to the requisitions on title which induced Keegan Quarries to complete the sale.Mr. McGuinness, in evidence, initially denied that Ms. Mulligan had sought instructions for him in relation to the Requisitions in Title. Ultimately, he accepted that, at the meeting of 18th January, 2007, Ms. Mulligan may have gone through some requisitions on title. Her evidence is that she did go through a set of requisitions on title with Mr. McGuinness and obtained the requisite replies. This is confirmed by her contemporaneous note. I accept her evidence and find that Mr. McGuinness did give instructions on 18th January, 2007, in relation to the replies to be given to the requisitions on title in relation to those requisitions at no. 27 under the heading 'Local Government (Planning and Development) Act 1963' ("the Planning Act") next referred to. Whilst counsel for Keegan Quarries referred to a number of replies, certain of these appear to be either questions of law or mixed questions of law and fact and I do not propose referring to those, as any representation relevant to the claim must be a representation of fact. In my judgment there are only two relevant replies which include a representation of fact. They are the following:

> "7. What is/are the present use/uses of the property. 7. Quarry.
>
> 8. Has the property been used for each of the uses 8. Yes
>
> aforesaid without material change continuously
>
> since the 1st day of October 1964.

124. In accordance with para. 8 of the agreed Statement of Facts, no quarrying took place on the lands between April 2005 and February 2007. Instructions for the replies to requisitions were taken on 18th January, 2007, and furnished on 28th January, 2007. I have found, however, that this was not disclosed in the pre-contract negotiations. Nevertheless, I have also found that there was no express representation made by Mr. McGuinness that the Quarry was operational in January 2007. Further, Mr. Keegan gave evidence of holding a meeting in January 2007 and therefore must have observed the present position in the Quarry. I am not satisfied that the

reply to requisition No. 7 is a representation of fact that the Quarry was in operation in January 2007. Rather, it appears to me to be a representation of the then use of the lands in the sense of the use to which the lands may, as a matter of fact, be put. The terms of the contract, in the Special Conditions, confirm that what is being sold by Mr. McGuinness to Keegan Quarries are lands, on part of which is situate a quarry. Special Condition No. 6 provides, "it is a condition of this sale, that any lands in sale not actually being quarried or otherwise actively used by the purchaser may be farmed by the vendor free of charge". Further, Special Condition No. 9 provides that the lands are being sold with the benefit of Meath County Council letter of 15th December, 2006, which relates to the registration of the Quarry and imposition of conditions. Similarly, Special Condition No. 11 refers to the registration of the Quarry. Nevertheless, I am not satisfied that the reply to Requisition No. 7 was a false representation.

125. The reply given to Requisition No. 8 does appear to me to have been a false representation of past facts. The answer, "yes", is a representation that the property had been used as a quarry without material change continuously since 1st October, 1964. Even ignoring the representation of no material change (which might be considered a mixed question of fact and law) , the representation that the property had been used continuously as a quarry since 1st October, 1964, is, on the agreed facts, false. This is so whether one regards use as requiring a continuously operational quarry or an established use which is then quarried periodically. On the agreed facts, there was no quarrying carried out prior to 1st October, 1964. On the facts found there is no credible evidence of quarrying by the Boylan family prior to sale in 1975. Also it is agreed that Mr. McGuinness did not carry out any quarrying prior to 1989, having purchased the lands in 1986. There is no evidence that Mr. McGuinness had any knowledge of quarrying carried out by Mr. Coyle and Mr. Lawlor, and, on the evidence given, I find that no quarrying was carried out by them. This was accordingly a false statement, and for the reasons already found, I consider it to have been made recklessly by Mr. McGuinness in giving instructions to Ms. Mulligan to so reply. Representations of fact given in replies to requisitions must be considered as intended to be relied upon and to induce the purchaser to complete the sale. Mr. Moore, acting on behalf of Keegan Quarries, did rely upon the replies to requisitions in advising his client to complete the sale. In that sense, I am satisfied that Keegan Quarries relied upon such false representations in determining to complete the sale.

Loss and Damage Claimed by the Plaintiff

126. There is no dispute about the principles applicable to the determination of the loss and damage which Keegan Quarries is entitled to recover by reason of the fraudulent misrepresentations which induced Keegan Quarries to purchase the lands.

127. In *Northern Bank Finance v. Charlton* [1979] I.R. 149, Henchy J., at p. 199, explained the measure of damages recoverable for fraudulent misrepresentation in the following terms:

> "While it is said that the measure of damages for breach of contract is the amount of money necessary to put the damnified person in the position in which he would have been if the contract had not been broken, the claimant in tort is entitled, by an award of damages, to be notionally restored to the position in which he would have been if the tort had not been committed. As far as the tort of fraud or deceit is concerned, it is well settled that the measure of damages is based on the actual damage directly flowing from the fraudulent inducement, and that the award may include, in an appropriate case (of which this may not be an example), consequential damages representing what was reasonably and necessarily expended as a result of acting on the inducement: *Doyle v. Olby Ltd*."

128. In *Smith Newcourt Securities Ltd. v. Schrimgerour Vickers (Asset Management) Ltd.* [1996] 3 W.L.R. 1051, the measure of damages recoverable in a claim for fraudulent misrepresentation which induced the acquisition of property was considered by the House of Lords in some detail. Lord Browne-Wilkinson in his speech, considered the decision of the Court of Appeal in *Doyle v. Olby (Ironmongers) Ltd*. [1969] 2 Q.B. 158 (the same decision referred to by Henchy J. in the above) and then, at p. 1060, went on to summarise the principles to be applied in assessing loss as follows:

> "In sum, in my judgment the following principles apply in assessing the damages payable where the plaintiff has been induced by a fraudulent misrepresentation to buy property: (1) the defendant is bound to make reparation for all the damage directly flowing from the transaction; (2) although such damage need not have been foreseeable, it must have been directly caused by the transaction; (3) in assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction; (4) as a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered; (5) although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property. (6) In addition, the plaintiff is entitled to recover consequential losses caused by the transaction; (7) the plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud."

129. In application of the above principles, counsel for Keegan Quarries submits that it is entitled to recover all the losses claimed in the proceedings which, it contends, were caused by and flow directly from the misrepresentation of Mr. McGuinness.

130. Mr. McGuinness did not dispute the application of the above principles to the losses claimed. Counsel on his behalf laid great emphasis on the requirement of a causal link between the loss claimed and the misrepresentation made. He drew attention to Cartwright, 'Misrepresentation, Mistake and Non-Disclosure' (2nd ed 2007) at para. 5.38:

> "The normal principles of causation apply in deceit, and so it must be shown that there is a sufficient continuous causal link between the misrepresentation and the loss which the representee claims to have suffered as a result of his reliance on it. This will be a question of fact; judges ask such questions as whether the representation was a substantial factor in producing the result, or whether in common sense terms, there is a sufficient causal connection."

131. The quantum of the damages claimed by Keegan Quarries was agreed, but liability for same denied. The special damages agreed (subject to the denial of liability) are:

> "**AGREED SPECIAL DAMAGES (LIABILITY DENIED)**

Purchase Price €7,000,000.00

Stamp Duty on Transfer Deed €630,000.00

Legal Costs and Outlay of Purchase €19,596.00

Interest paid by Plaintiff (on borrowed purchase monies) €337,615.00

Imputed interest on Plaintiff's funds

(Contributed to purchase price) €283,634.00

Plaintiff's costs in Pierson proceedings €422,155.00

Plaintiff's liability for Pierson's costs €650,000.00

Start up costs of Quarry €200,000.00

Cost of restoration as per Court Order (in Pierson proceedings) €150,000.00"

It was further agreed that the profit made by Keegan Quarries during the period of the quarrying activities was €150,000.

132. The above losses may broadly be divided into two parts. The first five headings relate directly to the purchase of the lands. The last four elements are losses claimed by reason both of the purchase and of the quarrying activities carried out on the lands post-acquisition and the *Pierson* proceedings.

133. Applying the above principles, Keegan Quarries is entitled to recover the full purchase price paid for the lands, but, on the facts herein, should give credit for the benefit which it has received as a result of the transaction. It has acquired the Lands of approximately thirty acres and it remains the owner of such lands. In my judgment, there is no basis upon which Keegan Quarries should not give credit for the benefit it retains as a result of the transaction. There was no real dispute that the appropriate measure of that benefit should be the market value of the Lands as at the date of acquisition if the true facts applied *i.e.* the Lands without the benefit of an established pre-1964 quarry use. Mr. Potterton, an experienced auctioneer and valuer, gave evidence called by the plaintiff that in his view, the relevant market value was the price which a quarry operator would have been prepared to pay for agricultural land with a high quality limestone deposit and with a perceived reasonable prospect of obtaining permission to quarry. It was his view that the value of such property equates to the value of similar quality agricultural land plus a premium of 33% for "hope value". On that basis, it was his opinion that the value of the lands sold by Mr. McGuinness to Keegan Quarries in January 2007, without the benefit of pre-1964 quarry use, was €1,500,000. No contrary evidence was adduced on behalf of Mr. McGuiness. Mr. Potterton made reference to sales in 2006 and 2007 in support of his opinion. In my judgment, it is reasonable for the Court to accept the valuation of €1,500,000 for the lands without the benefit of pre-1964 quarry use in January 2007. It follows that Keegan Quarries is entitled, in respect of the purchase price, to recover a net amount of €5,500,000.

134. It also appears to follow that Keegan Quarries is entitled to recover the Stamp Duty and legal costs attributable to the additional purchase price of €5.5 million but not the entire amount as it remains the owner of the Lands. Further, insofar as the amount borrowed by Keegan Quarries for the purpose of the purchase is less than €5.5m, it is entitled to recover the interest claimed on such sums. As the amounts were agreed, I did not have evidence of the basis of same. I will allow this issue be further addressed.

135. I have concluded that Keegan Quarries is not entitled to recover any sum under the heading of 'Imputed Interest on Plaintiff's Funds'. There was no evidence offered in support of this claim. I am not satisfied that Keegan Quarries have established, as a matter of probability, that whatever element of the purchase price it funded itself would have remained on deposit in the subsequent period. I therefore disallow this element of the claim for damages.

136. The remaining items of loss and damage are the quarrying work carried out, the costs of the *Pierson* proceedings and the restoration work required pursuant to the orders made in the *Pierson* proceedings. Counsel for Mr. McGuinness submitted that such losses were not caused by the misrepresentation of Mr. McGuinness, but rather, were caused by Keegan Quarries' decision to commence quarrying operations at a level significantly in excess of the pre-1964 use described in the s. 261 application for registration without planning permission. It is submitted that it was Keegan Quarries' own decision to so commence quarrying operations which led to the institution of the *Pierson* proceedings and the ultimate decisions and losses caused thereby. It was made clear in submission that in accordance with the defence delivered this was not an allegation of contributory negligence but rather a contention that in accordance with the principles set out above the alleged fraudulent representations did not cause the claimed loss.

137. In my judgment, Keegan Quarries has failed to establish that the losses suffered by it by reason of the quarrying operations and the cost of the Pierson proceedings and the cost of restoration of the lands were caused by the misrepresentations of fact made by Mr. McGuinness. My reasons for so concluding are as follows.

138. The actionable misrepresentations must be misrepresentations of fact. The primary false fact which was misrepresented, on my findings, is that the lands were operated as a quarry prior to 1964. I have already found, for the reasons set out, that Keegan Quarries relied upon that representation of fact in determining to purchase the lands. Similarly, I have found that false factual representations were made as to the operations carried on at the Quarry in April 2004/2005, as set out in the s. 261 application form. Similarly, I have found that Keegan Quarries relied upon those representations in determining to purchase the lands.

139. I have also found as a fact that the pre-1964 history of the Quarry represented by Mr. McGuinness to Mr. Keegan was, in substance, in the terms set out in the s. 261 application form and accompanying letter. Mr. Keegan had obtained a copy of that prior to entering into the contract. I accept the submission that the nature of the use made by the Boylan family was a description of a small or limited use, namely, quarrying for road maintenance and building stone walls on the Hilltown Estate. There was also reference to the quarry being worked "on an occasional basis for fifty years".

140. The evidence of Mr. Keegan, which I have accepted, is that following his consultation with Mr. Moore, he was aware that the s. 261 registration did not have the effect of converting what was an unauthorised use into an authorised use. Mr. Keegan and Keegan Quarries must be deemed to know the law. There was no representation of any planning permission acquired for quarrying on these lands post-1964. Accordingly, in my judgment, Keegan Quarries, even though it relied upon the false representations of pre-1964 use as a quarry, and the false representations of current operations in 2004/2005 must be deemed to have known that, for planning

purposes, the only authorisation was to quarry in accordance with the pre-1964 use. It was not contended (correctly) that any of the factual representations made (now agreed to be false) of the operations in 2004/2005 or of use by Mr. McGuinness and his brothers, or by Mr. Gallagher, could be considered to create a factual situation which authorised the Quarry to be so operated for the purposes of the planning legislation.

141. In my judgment, on the agreed facts, the quarrying operations carried out by Keegan Quarries from 2007 were materially different to the quarrying represented to have been carried out by the Boylan family. Whether the quarrying operations of Keegan Quarries were or were not in breach of the conditions imposed by Meath County Council pursuant to s. 261 is not relevant to any issue which I have to determine, and I am not so finding. In my judgment, Keegan Quarries have failed to establish that the representations of pre-1964 use made by Mr. McGuinness formed a reasonable basis for a decision by Keegan Quarries to commence in 2007 the type of quarrying operations described at paragraph 11 of the agreed factswithout obtaining planning permission therefore. It is unnecessary for this Court to consider or reach a conclusion why or how Keegan Quarries determined to commence such operations having regard to the nature of the representations made as to the pre-1964 use. It is irrelevant whether this was by reason of a misunderstanding or as contended on behalf of Mr McGuinness the taking of a calculated risk by reason fo the s.261 registration and imposition of conditions by Meath County Council. The onus is on the plaintiff to establish that it was the false misrepresentation which caused each element of its claimed loss. I am not satisfied that it has done so in relation to the losses consequent to the commencement of quarrying operations in 2007.

142. In my judgment, it follows that if Keegan Quarries has failed to establish that the false representations of fact as to the pre-1964 use, or the false representations of fact as to the nature of the quarrying operations in April 2004/2005 caused it to commence quarrying operations of the type described, without planning permission that the remaining claims failed. The claim for the costs incurred in the quarrying operations must fail. The *Pierson* proceedings were commenced by reason of the quarrying operations carried on by Keegan Quarries. In such circumstances, it appears to me that it is the decision of Keegan Quarries to commence the type of quarrying operations described in the agreed Statement of Facts without the requisite planning permission which caused the *Pierson* proceedings. Hence, it appears to me that the proximate cause of the losses sustained by Keegan Quarries by reason of the Pierson proceedings both in respect of costs and other expenses is its own decision to commence the quarrying operations without the requisite planning permission and not the false representations as to pre-1964 use. It is true that the relief ultimately obtained in the *Pierson* proceedings may have been different if the representations of pre-1964 use were true. However, that is not in my judgment determinative as I have concluded that the proceedings were not caused by the false representations and rather by the decision of Keegan Quarries to commence the type of quarrying operations described in the agreed Statement of Facts without the requisite planning permission. Hence it appears that Keegan Quarries have not established the necessary causation in respect of losses claimed by reason of the *Pierson* proceedings.

Breach of Contract

143. Keegan Quarries makes a distinct claim for damages for breach of the warranty in General Condition 36(a) of the 2007 contract. This provides:

> "Unless the Special Conditions contain a stipulation to the contrary, the Vendor warrants:
>
> (i) that there has been no Development of the Subject Property since the 1st day of October, 1964, for which Planning Permission or Building Bye-Law Approval was required by law
>
> or
>
> (ii) that all Planning Permissions and Building Bye-Law Approvals required by law for the Development of the Subject Property as at the Date of Sale were obtained (save in respect of matters of trifling materiality), and that, where implemented, the conditions thereof in relation to and specifically addressed to such Development were complied with substantially."

The plaintiff relies upon the effect of this warranty, as explained by Wylie, *'Irish Conveyancing Law'* (3rd Ed.) para. 16.63 as follows:

> "The effect of this warranty, if it is not removed or reduced by a special condition, is to reverse the caveat emptor principle, under which the purchaser would be expected to check out the planning situation. A breach of the warranty would entitle the purchaser to sue for damages and, where the matter is a serious one going to the root of the contract or one which would seriously prevent the purchaser enjoying the property as expected, it is likely that he can rescind or resist a claim for specific performance."

144. Counsel for the plaintiff submits that on the agreed Statement of Facts, there is a breach of this warranty by reason of the quarrying carried out during the period since 1986 and specified above.

145. The submission on behalf of Mr. McGuinness is twofold. Firstly, that General Condition 36 was qualified by Special Condition 9 of the contract which provides as follows:

> "The lands are sold with the benefit of Meath County Council letter dated 15th December 2006. The Vendor shall not (except as stated in special condition 11) be making any submissions or observations to Meath County Council regarding the draft schedule of conditions attaching to the said letter dated 15th December 2006. Compliance with all conditions attaching to the final schedule of conditions to be issued by the planning and economic development of Meath County Council in relation to the registration of the quarry shall be a matter for the purchaser and no liability whatsoever in relation thereto shall attach to the vendor and no objection or requisition shall be raised by the purchaser in this regard."

146. In my judgment, Special Condition 9 does not qualify General Condition 36. It expressly provides that the lands are being sold with the benefit of the letter and seeks to limit the liability of the vendor in relation to the registration of the Quarry pursuant to section 261. As previously set out in this judgment, s. 261 does not have the effect of altering the status of a quarry registered thereunder for planning purposes, save to the limited effect that a failure to register or a failure to provide information requested may result in a quarry subsequently being considered as an unauthorised development.

147. Secondly, reliance was placed upon para. (c) of General Condition 36 which provides:

> "The warranties referred to in (a) and (b) of this Condition shall not extend to any breach of provisions contained in Planning Legislation, which breach has been remedied or is no longer continuing at the date of sale."

The submission is that, on the agreed facts, quarrying on the Lands ceased in or around April 2005 and was, therefore, "no longer continuing" as of the date of sale of the Lands within the meaning of General Condition 36(c). I cannot accept this submission. Under the terms of the contract for sale, the Lands being sold included a quarry. Special Conditions 9 and 11 confirm such a construction. The Lands were being sold with a current use of a quarry. To put it another way, the Lands being sold included a quarry registered pursuant to section 261 and being sold with the benefit of a letter from Meath County Council in relation to such registration.

148. On the now agreed facts, the current use of the Lands as a quarry in the absence of any such pre-1964 use constitutes Development for which planning permission is required by law. Accordingly, in my judgment, on the agreed facts, Mr. McGuinness is in breach of the warranty contained in General Condition 36(a).

149. The claim for damages for breach of contract is contended prima facie to be the difference between the value of the property as warranted and what they were actually worth: *Intrum Justita B.V. v. Legal and Trade Financial Services Ltd*. [2009] 4 I.R. 417, 434. In reliance on this approach, it is contended that Keegan Quarries is entitled to recover damages equivalent to the difference in value between what was paid for the Lands and what they were worth on the date of purchase if the true facts were known. The amount claimed under this heading is €5.5 million. As this already forms part of the damage for which I have concluded Mr. McGuinness is liable by reason of the fraudulent representation made in respect of the pre-1964 operation as a quarry, no additional damages arise by reason of the breach of warranty so found.

Fraudulent Conveyance

150. Keegan Quarries claims that the transfer of the Lands at Bellewstown from Mr. McGuinness to Mrs. McGuinness on or about 15th July, 2010, for no consideration, is a fraudulent transfer and should be set aside pursuant to s. 74 of the Land and Conveyancing Law Reform Act 2009, which provides, insofar as relevant:

> "(3) Subject to *subsection* (4), any conveyance of property made with the intention of defrauding a creditor or other person is voidable by any person thereby prejudiced.
>
> (4) *Subsection* (3) does not-
>
> (a) apply to any estate or interest in property conveyed for valuable consideration to any person in good faith not having, at the time of the conveyance, notice of the fraudulent intention, or
>
> (b) affect any other law relating to bankruptcy of an individual or corporate insolvency."

151. The Act of 2009 repealed the Irish Statute of Fraudulent Conveyances [1634]. The leading authority on the fraudulent intention required to bring a conveyance within the scope of s. 10 of the Act of 1634 is in *Re Moroney* (1887) 21 L.R. Ir. 27, in which Palles C.B. stated at p. 61:

> "Therefore to bring a conveyance within the statute, first, it must be fraudulent; secondly, the class of fraud must be an intent to delay, hinder or defraud creditors. Whether a particular conveyance be within this description may depend upon an infinite variety of circumstances and considerations. One conveyance, for instance, may be executed with the express intent and object in the mind of the party to defeat and delay his creditors, and from such an intent the law presumes the conveyance to be fraudulent, and does not require or allow such fraud to be deduced as an inference of fact. In other cases, no such intention actually exists in the mind of the grantor, but the necessary or probable result of his denuding himself of the property included in the conveyance, for the consideration, and under the circumstances actually existing, is to defeat or delay creditors, and in such a case . . . the intent is, as a matter of law, assumed from the necessary or probable consequences of the act done; and in this case, also, the conveyance, in point of law, and without inference of fact being drawn, is fraudulent within the statute. In every case, however, no matter what its nature, before the conveyance can be avoided, fraud, whether expressly proved as a fact, or as an inference of law from other facts proved, must exist."

152. The above principles have been applied more recently by Costello P. in *McQuillen v. Maguire* [1996] 1 ILRM 394, 399, and Laffoy J. in *The Motor Insurers Bureau of Ireland v. Stanbridge* [2008] IEHC 389 and in my judgment apply to s.74(3) of the Act of 2009.

153. The evidence in relation to the transfer from Mr. McGuinness of his interest in the Lands at Hilltown to Mrs. McGuinness in July 2010, is that Mr. McGuinness phoned Ms. Mulligan of Branigan Berkery on 14th July, 2010, to give her instructions in relation to the proposed transfer. This was approximately one week after he had given oral evidence in the High Court the *Pierson* proceedings. Ms. Mulligan's contemporaneous note of the telephone call states, insofar as relevant:

> "Att. Michael McGuinness when he phoned. He has now decided to transfer his premises at Hilltown, Bellewstown and Minnistown, Laytown, into the sole name of his wife Marie, in case there should be any come back in relation to the case taken by the local residence (sic) against Keegan Quarries. Also Michael is anxious to do this for health reasons following the accident. Marie already ownes (sic) a half share in the premises at Hilltown and there is no mortgage on them and so he is free to do what he wishes with the Bellewstown property. He solely sold the lands to Keegans and so any case taken by Keegans would be against Michael solely. The balance of the lands at Bellewstown were transferred into the joint names of himself and Marie following the sale to Keegans."

Mr. McGuinness, in evidence, accepted the accuracy of Ms. Mulligan's attendance of the instructions given her. On the following day, 15th July, 2010, Ms. Mulligan prepared the transfer and it was executed by Mrs. McGuinness. She made arrangements for Mr. McGuinness to be independently advised and he also executed the transfer.

154. I am satisfied, on the above evidence that an express intent and object in the mind of Mr. McGuinness when making this transfer was to defeat any potential claim by Keegan Quarries. Insofar as he had a concern about his medical condition I have concluded it was a secondary concern and that the intention to defeat a possible claim from Keegan Quarries was the primary intent. In such circumstances, I find that Keegan Quarries has proved a fraudulent intent as a fact. It also appears on the facts that the Court should conclude that the as "the necessary or probable consequences of the act done" was to defeat, delay or hinder creditors as a

matter of law it should infer fraud from the fact of the deed of transfer in July 2010 in accordance with the above principles.

155. Keegan Quarries was not a creditor at the time of the execution of the transfer. However, s. 74(3) is not confined to the defrauding of creditors, but includes "or other person" and is expressed to be voidable by "any person thereby prejudiced". On a proper construction of the section, it appears to me that a person from whom a potential claim is contemplated by the transferor is a person intended to be protected by s. 74(3) and comes within the class of "other persons" therein. Further, having regard to the money judgment to which Keegan Quarries is now entitled against Mr. McGuinness, pursuant to the proceeding part of this judgment, it is a person who may be prejudiced by the transfer of July 2010.

Relief

156. Keegan Quarries is entitled to judgment against Mr. McGuinness in a sum of €5,500,000.00 plus the amounts which require to be finalised pursuant to the decisions in paragraph 134 of this judgment.

157. Keegan Quarries is entitled as against Mr. and Mrs. McGuinness, to an order pursuant to s. 74 of the Land and Conveyancing Law Reform Act 2009 declaring void the transfer by Mr. McGuinness to Mrs. McGuinness made on or about 15th July, 2010, of his interest in Lands at Hilltown, Bellewstown, County Meath, comprised in Folios 24022F and 16421F of the Register of Freeholds, County Meath.