

## THE HIGH COURT

[RECORD NO. 2015 10100 P]

BETWEEN

BALLYMORE RESIDENTIAL LTD.

AND

CROSSWINDS COTTAGE LTD.

PLAINTIFFS

AND

ROADSTONE LTD, CRH PLC, MURPHY CONCRETE (MANUFACTURING) LTD AND

WILLIAM MILEY LTD.

DEFENDANTS

**JUDGMENT of Ms. Justice Murphy delivered on the 21st day of February, 2019 .**

1. This is the plaintiff's renewed application for an order pursuant to O. 50, r. 4 of the Rules of the Superior Courts ordering inspection and sampling of relevant parts of the first defendant's quarries at Huntstown, Belgard and Feltrim.
2. The initial application for inspection issued on 3rd June, 2016 and was brought in respect of quarries owned by the first and third defendants. That application was heard over three days between 30th May and 1st June, 2017. On foot of that application, the court ordered inspection of the third-named defendant's quarry at Hollywood, Co. Wicklow. The court gave a written judgment in the matter on 28th July, 2017, setting out the background to the application, the applicable law and the reasons for its decision. This decision should be read in conjunction with that earlier written decision.
3. At the original hearing, Roadstone resisted the application for inspection of its quarries on the grounds that it was premature, unnecessarily invasive and that the parameters and mode of inspection were not sufficiently clear. Particular emphasis was placed by Roadstone on the fact that the pleadings were not closed, and in those circumstances, in its submission, it was too early to decide whether inspection of its quarries was warranted. Roadstone pointed out that their quarries were all working quarries, covering approximately 300 acres of land, and that the ordering of inspection prior to the close of pleadings would constitute an unwarranted and unnecessary interference with its business and would cause it reputational damage.
4. During the course of the original hearing, Roadstone's initial position, that the material which it supplied was not the cause of any damage to residential properties in the Drumnigh Wood Estate, evolved to include a suggestion that it was possible that any damage which may have occurred to homes in the estate, resulted from a misuse by the plaintiffs of its rock products. While being careful not to commit Roadstone to any particular position, counsel for Roadstone stated that the only material suitable for use as subfloor stone infill, was stone of the grade of Clause 804, which is the highest and most expensive grade of stone supplied by Roadstone. The plaintiffs had used stone infill containing mudstone, a muddy limestone, in the subfloor infill of the houses when same was not suitable for that purpose. According to Roadstone, muddy limestone has the potential to contain reactive framboidal pyrite. The court noted that should that be the stance adopted by Roadstone in its defence of the claim, then inspection might not be necessary because liability would hinge, not on the source of the material, but rather on the purposes for which the material was used.
5. The court ordered an inspection of the Murphy quarry at Hollywood, Co. Wicklow in the hope that by having access to two of the three sources of stone used in the Drumnigh Wood Estate, the plaintiffs by a process of elimination, would be able to identify the third source. The court adjourned the application in respect of Roadstone's quarries, to await the outcome of the inspection of the Murphy quarry and to await the filing of its defence.
6. The inspection of the Murphy quarry took place in October, 2017. Unfortunately, for technical reasons which the court does not need to address on this application, the parties are agreed on one thing, namely, that the inspection of the Murphy quarry and the samples taken therefrom, is not sufficient to identify with precision, the presence of Roadstone material in any of the allegedly affected houses in the Drumnigh development.
7. Following the inspection of the Murphy quarry in October, 2017, the plaintiffs issued a motion for judgment in default of defence. The first and third defendants countered with a motion seeking to compel replies to particulars prior to the delivery of their respective defences. The replies to particulars sought included particulars requiring the plaintiffs to identify the specific houses in which the respective defendants' stone was used. The court notes that it is precisely for that purpose that inspection is necessary.
8. The application to compel replies to particulars prior to the delivery of the defendants' respective defences, was the subject of a decision given by this court on 29th January, 2018. In essence the court held that while the particulars sought by the first and third defendants might well be necessary for the purposes of the hearing of the case, they were not necessary for the pleading of the case. Accordingly, the court adjourned the motions for particulars and directed that the defendants each file its defence within three weeks of 29th January, 2018.
9. The first and second defendants delivered their defence on 19th February, 2018. Having raised three preliminary objections, the substantive defence clearly puts the plaintiffs on full proof that Roadstone supplied stone to the Drumnigh Wood Estate; the volume of stone supplied; the use of the defendant's stone in the construction of houses; the use of the defendant's stone in the subfloor infill of the houses that are the subject of the proceedings; the defectiveness of the stone; and the fact of damage and/or potential damage to the houses as a consequence of such defects.
10. On 26th February, 2018, the plaintiff's solicitors wrote to the first and second defendants' solicitors highlighting those pleas which in effect, put the plaintiff on full proof of its claim. The plaintiffs' solicitors identified 18 specific pleas which put the plaintiffs on the fullest proof of their claim. While paras. 32(h) and 40 of the defence delivered leave open the plea that any damage which may have been caused to affected houses, resulted from a misuse by the plaintiff of the defendant's product, it is clear on the basis of the totality of those pleas, that the plaintiff is in fact, on full proof that the first defendant's product was used as subfloor infill in each

relevant house; that same contained reactive framboidal pyrite; that the reactive framboidal pyrite has resulted in pyritic heave, with consequential damage to the fabric of the houses.

11. In light of the defence pleaded and the earlier judgment delivered by this court on 28th July, 2017, the plaintiffs requested confirmation that the first defendant would now agree to provide inspection and sampling facilities at its Huntstown, Belgard and Feltrim quarries. The court is satisfied that such an inspection is "*necessary... for the purpose of obtaining full information or evidence*" within the meaning of O. 50, r. 4, in light of the defence delivered on behalf of the first and second defendants.

12. The request for inspection facilities led to the generation of 18 further affidavits to be added to the 31 affidavits already filed in the earlier inspection motion. The first defendant filed four affidavits on 6th March, 2018. Two of those affidavits challenged and criticised the nature and method of the plaintiff's inspection of the third-named defendant's quarry at Hollywood in Co. Wicklow. In addition, there was an affidavit from Mr. Michael Buckley, Operations Director of Roadstone, in which he raises essentially the same objections that were raised on the initial inspection application in 2017: namely, health and safety risks associated with quarry faces; the alleged unsafe protocol for sampling material; the alleged non-representative nature of material sampled from quarry faces; and finally, he sets out the minimum steps which he says are required to protect Roadstone's property rights in the event that an inspection is ordered.

13. The efficacy of the plaintiff's proposed inspection was canvassed at length, before the court in the earlier inspection application. In that decision, the court noted that the purpose of O. 50, r. 4 as stated by Murphy J. in *Bula Ltd v. Tara Mines (No. 1)* [1987] I.R. 85 is:-

*"To give effect to the constitutionally guaranteed right of access to the courts to litigate justiciable disputes. It is there to ensure equality of arms, so that one party to litigation will not be disadvantaged in the conduct of that litigation, by the fact that relevant material is under the control of his opponent. In deciding whether or not to grant inspection the Court should bear in mind that a litigant has within reason, and subject to the rules of evidence, the right to present his case as he considers appropriate, so that even if the Court considers that the case might be presented in a different manner, that of itself would not act as a bar to an application for inspection. An order for inspection can also serve the purpose of ensuring that when a Court comes to determine a justiciable dispute it will have before it the best available evidence."* [Emphasis added]

The plaintiff's expert evidence, in the earlier inspection application, supported by other evidence, was that inspection of relevant locations in the defendants' quarries would permit precise identification, by a process analogous to DNA testing, of the source of the subfloor infill in the affected houses. The court in its earlier judgment, proceeded on that basis, and it is wasteful of the court's time for the parties to seek to revisit the issue on this renewed application.

14. Having asserted the prematurity of the plaintiff's application in the previous hearing on the basis *inter alia*, that the pleadings were not closed, Mr. Lenny, the defendant's solicitor, now asserts that the application for inspection is premature in the absence of discovery. He points out that the plaintiffs have not identified any locations in the quarries from which it is proposed to take samples. He refers to an earlier affidavit sworn on behalf of the plaintiff in which the plaintiff's solicitor, having asked the first defendant to identify the quarries at issue, swore in an affidavit of 26th September, 2016:-

*"If Roadstone is willing to identify the quarries at issue and the relevant parts thereof – or in the absence of such willingness, is directed by this Court to do so, (which can be verified in due course by inter alia discovery of the documentation to which Mr. Buckley refers) – there will be no need for documents to be produced by Roadstone at this stage which can be verified in due course by inter alia discovery."*

The first and second defendants express a concern that in the event that inspection is ordered prior to discovery, further inspection facilities will be requested after discovery. Mr. Lenny suggests that inspection pre-discovery creates a real risk that this will result in a request for multiple inspections. Mr. Lenny at para. 38 of his affidavit asserts that:-

*"Bearing in mind the requirement of proportionality and the requirement that the courts seek to minimise the interference with the property rights of the first defendant insofar as possible, inspection of the first defendant's quarries should not be ordered until after the relevant blast records have been discovered by the defendants. This would obviate any risk of a request for multiple inspections."*

He further asserts that it is possible that inspection of the quarries will be sought by the plaintiffs in the homeowner proceedings.

15. At para. 47 of his affidavit, Mr. Lenny summarises his new prematurity argument. He asserts that an order for inspection would be premature because (a) the plaintiffs have failed to identify any basis for the determination of the locations within the quarries from which samples ought to be taken and will not be in a position to do so until after discovery has been exchanged in these proceedings; (b) that the protocol proposed by the plaintiffs is wholly deficient; (c) the plaintiffs have failed to place any evidence before the court in relation to the inspections which have already taken place of the William Miley quarry and the Hollywood quarry, or the results of same; (d) no explanation at all has been provided by the plaintiffs as to why inspection of the first defendant's quarry is necessary at this time (or at all); and (e) the matters at issue in these proceedings should be determined in the homeowner proceedings and any inspection of the first defendant's quarry should only be ordered in the context of the homeowner proceedings.

16. The affidavits filed on behalf of the first and second defendants were countered by four affidavits from the plaintiff's experts, including Prof. Ian Somerville. Professor Somerville sets out at para. 5.2 to para. 5.5 of his affidavit the reasons why he deems inspection to be necessary. The court as it did in its earlier judgment, accepts the right of the plaintiff to present its case as it considers appropriate and notes that Roadstone has not identified any method of proof short of inspection and sampling, which would satisfy Roadstone's demand for proof of every element of the plaintiff's claim.

#### **Notice to Produce**

17. The references in the Roadstone affidavits, particularly those of Mr. Buckley and Mr. Lenny, to blast records, prompted an additional motion from the plaintiffs, in support of the motion seeking an order for inspection and sampling. On 28th May, 2018, the plaintiff served on the first and second-named defendants a notice to produce:-

*"The blast records which are referred to at para. 17 of the affidavit sworn on behalf of the first and second named defendants by Michael Buckley on the 16th May 2018, and para. 22 of the affidavit sworn on behalf of the first and second defendant by James Andrew Lenny on the 17th May 2018."*

The first and second defendants issued a notice of objection on the 1st June, 2018, and stated the following:-

*"That the first and second defendants object to giving you inspection of the documents mentioned in your notice to produce of the 28th day of May 2018 on the grounds that the documents sought to be produced should be sought by way of discovery, and that you are impermissibly seeking to obtain discovery by means of service of the notice to produce."*

18. A notice of motion seeking an order pursuant to O. 31, r. 18 of the Rules of the Superior Courts directing production of the blast records was issued on 27th June, 2018. The court was furnished with a further six affidavits relating to this motion. In short, what the various additional affidavits reveal is that the first defendant has blast records numbering approximately 800 which, when taken together with delivery dockets, would allow it to identify the location in its quarries from which the stone delivered to the plaintiff's development at the Drumnigh Wood Estate can be identified. The court had much learned argument as to the appropriateness of seeking the blast records by means of a notice to produce. The first defendant argued convincingly in the court's view that the plaintiff's application for the production of the blast records pursuant to O. 30, r. 18 is misconceived. The court is persuaded that O. 31, as its heading implies, refers to interrogatories, discovery and inspection. Inspection is limited under the terms of the rule to a document or documents mentioned in the pleading, or in an affidavit of discovery or in a list of documents ordered in lieu of an affidavit of discovery. The blast records referred to by Mr. Buckley and the solicitor Mr. Lenny have not featured in any pleading, nor have they featured in any affidavit of discovery or list of documents, since discovery has not yet been made in this case. The situation in this jurisdiction is more restrictive than that in the neighbouring jurisdiction where a more extensive list of documents may be sought. The defendant relied on a statement by Kelly J., as he then was, in *Cooper-Flynn v. RTE* [2000] 3 I.R. 344 where he observed:-

*"As is clear from its terms, r. 18 provides a mechanism whereby inspection of documents which have been included in an affidavit of discovery may be ordered."*

The defendant also relied on the clear statement of the Court of Appeal in *Burke v. Boston Scientific* [2016] IECA 230 in which the Irvine J. giving the judgment of the court held:-

*"As is clear from the provisions of Order 31 rule 15 and rule 18, the right of a party to inspection of documents is confined to documents known to exist and which have been identified in an affidavit of discovery..."*

19. When it became clear that a notice to produce might not be an effective means of compelling the production of blast records, the plaintiff issued a further motion, in effect seeking discovery in aid of inspection. That motion stands adjourned by consent awaiting this decision.

20. The additional motions filed in the course of this renewed inspection application were in the court's view an unnecessary distraction and deflection from the core issue which the court has to decide, namely the making of an inspection order pursuant to O. 50, r. 4 of the Rules of the Superior Courts. That said, they did serve to alert the court to the fact that Roadstone is in possession of all necessary information to ensure that any inspection ordered is focussed and is no more intrusive than it needs to be.

21. On the basis of the defence filed on behalf of the first and second defendants, inspection and sampling of the relevant locations of the defendant's quarries is necessary to allow the plaintiffs progress their claim. Until inspection and sampling take place, the plaintiffs will not be able to answer the particulars raised by the first three defendants as to the presence and extent of each defendant's stone in each house manifesting pyritic heave. The defendants, having had access to the subfloor stone infill in each house allegedly affected for more than two years, have been able to compare that stone infill to the stone in their respective quarries and so have access to full information as to the presence or absence of reactive framboidal pyrite in the stone infill supplied by them to the plaintiffs. The plaintiffs on the other hand do not have full information and will not have it until such time as they are permitted to inspect and take samples from the locations in Roadstone's quarries, from which stone infill was supplied to the Drumnigh Wood Estate.

22. The court is satisfied that intrinsic to its power to order inspection and sampling, pursuant to O. 50, r. 4, is the power to make orders to give effect to that inspection order. As the court held in its earlier judgment at para. 24, *"The rule is flexible enough to deal with any given set of facts presented to a court."* To illustrate that finding, the court quoted Chesterman J. in *Evans Deacon Pty Ltd v Orekinetics Ltd* [2002] QSC 42 as cited by Martin J. in *Process Minerals International Pty Ltd v Consolidated Minerals Pty Ltd* [2012] WASC 254 at p. 17:-

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

What is required in this particular case is that the plaintiffs be allowed to inspect and take samples from the locations in Roadstone quarries from which stone infill was supplied to the Drumnigh Wood Estate during the period from September, 2001 to June, 2007. Roadstone has the information necessary to identify the relevant locations. It has extraction plans which indicate the areas quarried at any particular time. It has blast records which give the date and coordinates of each blast. These apparently number 800. It has delivery dockets showing the deliveries made from each quarry to the Drumnigh Wood Estate. While Roadstone has argued that any inspection ordered should follow discovery, it has never contended, nor can it, that it is not possible for it to identify the locations in its quarries, from which the stone supplied by it derived. Undoubtedly, there will be work and costs involved in collating the information, to identify the relevant locations, but these will be costs in the cause recoverable by Roadstone in the event that it is successful in defending the plaintiff's claim.

23. Roadstone's primary objection to inspection at this point is that in the absence of discovery of the blast records and delivery dockets, there is a risk that any inspection will be overbroad because the plaintiffs, out of an abundance of caution, would have to inspect more of the quarry than may be necessary. Secondly, they assert that inspection in advance of discovery creates a risk that upon receipt of discovery further inspections will be sought. This in the court's view is a spurious argument in circumstances where Roadstone has all of the necessary information to ensure that the inspection is directed solely to the relevant areas of its quarries. In addition the plaintiffs have confirmed that in the event that Roadstone is directed to identify the relevant locations from which the stone supplied to the Drumnigh Wood Estate was extracted, they will not need to conduct any further inspections, either in these proceedings, or in the parallel subrogated proceedings being maintained by Liberty Insurance. As case manager of these proceedings, this court is best placed to ensure compliance with that undertaking and will do so.

24. In aid of its current claim of prematurity, Roadstone has pointed out that in the subrogated proceedings of Liberty Insurance,

being case managed by Eager J., the parties including the first plaintiff as third party to those proceedings, have apparently agreed to defer applications for inspection until the discovery process is complete. Roadstone argue that if this court orders inspection now, it is liable to be subjected to further inspections at the conclusion of the discovery process in the subrogated proceedings. This is also, in the court's view a spurious argument because in reality, Roadstone has full control over the decision whether there should be one inspection or multiple inspections. It is Roadstone's choice. The sites now to be identified in Roadstone's quarries, are those from which the stone supplied to the Drumnigh Wood Estate was extracted. That encompasses all of the 50 houses involved in the subrogated proceedings as well as the houses in these proceedings. It is therefore open to Roadstone to ensure that there is only one intrusion on its property. It can do so by inviting all parties involved in litigation in respect of stone supplied to the Drumnigh Estate, who may have an interest in inspecting and sampling the relevant sites, to attend at the one inspection. Should those parties decline such an invitation [an unlikely event in the court's view], those parties could well find themselves, depending on circumstances, estopped from seeking an inspection at a later stage. On the other hand, should Roadstone decide not to invite all of the identified parties to the Drumnigh Wood Estate litigation to attend at the inspection, they can hardly complain later if one or more of those parties then seeks inspection and sampling of the relevant sites.

25. This court first became involved in the case management of these proceedings in May, 2017, when it first heard the plaintiff's application for inspection pursuant to O. 50, r. 4. At that point, the pleadings were at the stage where the statement of claim had been served. In the period since then, the only progress made in the substantive claim has been to have the defences delivered and the pleadings closed. This is despite the fact that the case has been before the court on 25 occasions in that period. There have been nine mention dates, three judgment dates and a full 13 hearing days. The hearing days have been spent essentially dealing in one form or another, with Roadstone's objections to the progression of this claim. The court has a growing impression that Roadstone is deploying a strategy to hinder, impede and delay the progress of this claim by any lawful means at its disposal. In our adversarial system of civil litigation well-resourced litigants can quite readily clog the system with multiple applications, should they choose to do so. Just because they can, does not mean they should or that they should be permitted to do so. Courts must be vigilant to ensure, as best they can, that their scarce resources which are provided for the benefit of society at large, are not monopolised or disproportionately used to serve the ends of wealthy litigants, whose interest may be to hinder or impede litigation rather than ensuring its efficient and economical conduct.

26. The court's impression as to Roadstone's strategy was strengthened during the hearing of this application, by an exchange which it had with Roadstone's counsel. The court, having found during the course of the hearing, that inspection and sampling are necessary on the facts and the pleadings, asked counsel whether Roadstone accepted that inspection was necessary in principle, and were merely asking the court to delay inspection until after discovery, so that a more focussed inspection could occur. Counsel informed the court that Roadstone was reserving its right to challenge the necessity for inspection, even after discovery had been completed. The court indicated that if that was Roadstone's position there was little point in delaying inspection until after discovery. Having sought time to take instructions, counsel informed the court that he had been unable to get instructions as to whether Roadstone accepted in principle that inspection was necessary and was merely seeking a delay in execution, until discovery was completed. Offered the opportunity to take instructions on the matter overnight and revert if he obtained instructions, to that effect, counsel did not return. The position therefore, appears to be that Roadstone does not accept the court's finding that inspection is necessary but nonetheless wants the court to delay issuing an order directing inspection until discovery is complete, at which point it will seek to argue the whole inspection motion *de novo*. The court declines the invitation to venture down that particular 'rabbit hole'.

27. The court is satisfied that it is both necessary to order inspection and sampling of the relevant locations in the defendant's quarries at Huntstown, Belgard and Feltrim and that it is expedient to do so, at this time. Inspection and sampling will allow real progress to be made in the case, by allowing the plaintiffs the same opportunity that the defendants have had for years, to identify with precision the source of the stone under each house allegedly affected by pyritic heave. It will assist the plaintiffs in answering the particulars raised by the first three defendants, in which they have asked the plaintiffs to specify the individual houses in which each defendant's stone is present. It will allow them to be specific as to whose stone contains reactive framboidal pyrite. It will allow them to collate the evidence necessary to prove their case, if prove it they can. It will allow them assess the strength or weakness of their case against each defendant in respect of each house allegedly affected. It may be, that on the basis of that assessment, one or other or more defendants could be exonerated and the proceedings against them discontinued, or alternatively the claim against a particular defendant may be restricted to specific houses in the estate. Inspection and sampling may well have the effect of reducing the extent of the discovery needed to prove the case.

28. All of these factors feed into the court's assessment that the ordering of inspection and sampling now, is in the interest of justice, the avoidance of unnecessary costs, the efficient use of the resources of the court and the vindication of the plaintiffs' right of access to the court. By directing the first defendant to identify the locations in its quarries from which the stone supplied to the Drumnigh Wood Estate was extracted, the court is balancing the right of the plaintiff to have access to evidence in the control of his opponent with his opponent's right to have the least possible interference with his property rights. This is best achieved by ensuring that there is a focussed single inspection which, at Roadstone's election, all parties who may have a litigation interest in conducting an inspection, could attend.

29. The common sense of this approach perhaps becomes most apparent when one considers the alternative. Were the court to defer the consideration of the making of an inspection order until such time as the discovery process is complete, on the basis of experience to date, one could anticipate a protracted, heavily contested, discovery process, with a soaring affidavit count, followed by a probable appeal of any order made by this court, to the Court of Appeal. Two to three years from now, at the end of that process, we could all be back here discussing the question of the necessity for an inspection order. That is not desirable.

At the root of this claim are homeowners who bought their houses in good faith and at least some of whom have bought houses affected by pyritic heave. One or other or more of the parties to these proceedings are responsible for that situation. These proceedings are the means by which the person ultimately liable to those homeowners can most readily and efficiently be identified. Further, it is in the interest of those homeowners that liability be established in a contest between these two well-resourced litigants, rather than having to take the risk of a *David v Goliath* type confrontation with either of them.

30. For all of the reasons stated herein, the court proposes to make an order for the inspection and sampling of the relevant locations in Roadstone's quarries at Huntstown, Belgard and Feltrim from which stone was extracted and delivered to the plaintiff's development at Drumnigh Wood Estate. To give effect to that order, the court directs the first defendant Roadstone, to identify the relevant locations.

31. Each of the parties to these proceedings has a suite of experts. The court expects that as professionals they will be able to agree a protocol for inspection and sampling. Similarly, the parties have available to them insurers and risk assessors and the court expects that these experts will be able to come to an agreement on the nature and level of cover required to protect Roadstone's legitimate interests during the inspection process.

