Neutral Citation Number: [2008] IEHC 428

THE HIGH COURT

JUDICIAL REVIEW

2008 157 JR

BETWEEN

M. F. QUIRKE AND SONS

APPLICANT

AND
MICHAEL MAHER

RESPONDENT

Judgment delivered by Mr. Justice Herbert on the 19th day of December 2008

1. The applicant is the owner and, operator of a quarry at Ballahacommane, Killarney, Co. Kerry. The most recent of a series of planning permissions granted by Kerry County Council, the relevant Planning Authority, to the applicant in respect of development at the quarry was dated the 11th December, 2002.

2. It was expressly provided by Condition 3(ii) of the that planning permission that activities are restricted to quarrying, processing, crushing, haulage, storage and stock piling of aggregate. It was further expressly provided by Condition 25 of that planning permission that the extraction of sand and gravel by blasting was specifically excluded.

3. The applicant appealed from this Decision of the Planning Authority to An Bord Pleanála. An Bord Pleanála, by a Decision of 12th May, 2003, reference No. PL08, 201503, granted planning permission to the applicant to continue the operation of the existing quarry and associated aggregate extracting, screening and crushing and for the extraction of aggregate from two further areas adjacent to the existing quarry. It is a Condition of this planning permission that it is granted in accordance with the plans and particulars lodged. Condition 2 of this planning permission granted by An Bord Pleanála provides that:-

> "Activities on the site be restricted to quarrying, processing, crushing, haulage, storage and stockpiling of aggregate. All relevant conditions attaching to Planning Register Reference No. 1062/95 granted by Kerry County Council on the 12th day of April, 1996, shall apply to this grant of permission.
>
> Reason: In the interests of clarity."

4. This planning permission, Reference No. 1062/95 did not include any express condition prohibiting the extraction of sand and gravel by blasting, as contained in the planning permission granted by Kerry County Council.

5. Condition 5 of the planning permission granted by An Bord Pleanála stipulates that within four months of the date of the order, the applicant must submit to Kerry County Council for written agreement, a proposal for an Environmental Management System.

6. As required by Condition 5 of the planning permission granted by An Bord Pleanála, a proposed Environmental Management System was furnished by the applicant to Kerry County Council. Section 5(a) of this Environmental Management System which, in compliance with the provisions of Condition 5 of the planning permission granted by An Bord Pleanála on the 12th May, 2003, was furnished by the applicant to Kerry County Council on or about the 15th October, 2003. Under the heading, "Noise Suppression", it stated that, "no blasting takes place at this site". It went on to state that the on-site noise suppression methods would ensure that sound levels would remain well within the 55dB(A) range required under Condition 9 of the planning permission granted by An Bord Pleanála. This Condition 9, stipulates that in the interests of residential amenity the equivalent sound levels attributable to all on-site operations associated with the proposed development should not exceed 55dB(A) over a continuous four hour period between 08.00 hours and 19.00 hours, Monday to Saturday inclusive, when measured outside any dwelling house in the vicinity of the site. This Environmental Management System appears to have been agreed in writing by Kerry County Council as required by Condition 5 of the planning permission granted by An Bord Pleanála.

7. This representation in the Environmental Management System, submitted to and agreed by Kerry County Council, that blasting did not take place at the applicant's quarry at Ballahacommane, reflects the terms of the Environmental Impact Statement furnished in July 2002, by E.G. Pettit and Company, Consultant Engineers on behalf of the applicant, for the purpose of obtaining a grant of planning permission. At para. 2.4.3 of this Environmental Impact Statement, under the heading, "Proposed Operation", it was stated that:-

> "Future operation of the quarry will involve continued excavation of the existing quarry site past March 2004 and the development of two newly proposed extraction areas. The activities to be carried out at the proposed new extraction areas will differ from the existing operation in that it will involve excavation only and no processing works . . . ."

8. Further, at para. 2.4.3, under the heading, "Extraction", it was represented that:-

> "A dedicated excavator will extract sand and gravel from the site at a maximum rate of 150 tonne per hour. The excavator to be used will be the existing excavator previously used for extraction on the Existing Quarry Site. Future excavation in the existing quarry and the proposed new extraction site is proposed as outlined in Figure 2.4.3. . . ."

9. In those sections of this Environmental Impact Statement dealing in detail with noise and dust emissions, references are entirely to excavation machinery, loading machinery, processing by way of screening, washing, crushing and stockpiling and to truck traffic within the site. There is no reference whatever to "blasting" or the use of explosives.

10. In Appendix No. 3 of this Environmental Impact Statement, at s. 1.2 under the heading, "Noise Report: Existing Development", it is stated that:-

> ". . . The major plant operated at the quarry consists of,
>
> [a] a gravel washing unit and screening plant,
>
> [b] rubber wheeled mobile loading shovels . . .,

[c] trucks entering and leaving the site

[d] a tracked excavator operating at the pit face – also used to displace overburden,

[e] a 40 tonne dump truck hauling aggregate from the pit face to the gravel processing area.

Currently there is no gravel crushing or batching carried out at the site and blasting is not used. Under existing planning permission the management has the option to operate a gravel crusher at the site."

11. As I have already stressed the Decision of An Bord Pleanála is to, "grant permission for the above proposed development in accordance with the lodged plans and particulars based on the reasons and considerations under and subject to the conditions set out below. These are the plans and particulars lodged initially with Kerry County Council. The Environmental Impact Statement was clearly a vitally important part of these plans and particulars. The significance of such an express provision in a grant of planning permission is indicated by the judgment of the Supreme Court in *Readymix (Éire) Limited v. Dublin County Council* (Unreported, Supreme Court, Henchy J., 30th July, 1974).

12. It was common case between the parties at the hearing of this application for judicial review, that on the 30th March, 2007, explosives were transferred to and were employed at Ballahacommane Quarry. Following upon this use, two adjoining property owners registered complaints with An Garda. They contended that the applicant did not have planning permission for the use of explosives at Ballahacommane Quarry. In support of this opinion they referred to a copy of the applicant's Environmental Management System and, pointed in particular to the section which states that no blasting takes place at the site.

13. At para. 9 of his affidavit sworn in this application on the 6th May, 2008, Supt. Maher states that he refused permission to the applicant to again use explosives for the blasting of materials at Ballahacommane Quarry on the 28th November, 2007, "on the grounds that planning permission was granted to the applicant on the basis that no blasting operations were carried out at the site". The letter of refusal from Supt. Maher to the applicant is date-stamped the 28th November, 2008, and it states as follows:-

"I am not in a position to grant you authority to use explosives for the blasting of materials at the above mentioned Quarry. It appears having enquired with Kerry County Council that planning permission granted for this site on foot of an E.I.S. submitted by you is based on a 'no blasting" scenario".

14. It was accepted by both parties to this application for judicial review, that Supt. Maher was the Superintendent of An Garda Síochána for the district where the transfer of explosives would terminate in this instance. He was therefore the, "Recipient Competent Authority", within the definition of Regulation 2(2) of S.I. 115 of 1995, European Community (Placing on the Market and Supervision of Explosives for Civil Uses) Regulations 1995. It is provided by Regulation 8(1) of S.I. 115 of 1995, that:-

"No explosives may be transferred within the State (whether by way of export, import or internal transfer) except under the authority of a recipient competent authority document."

15. This Recipient Competent Authority Document is defined in Regulation 2(2) of the S.I. 115 of 1995, as, "the approval document authorising the transfer and issued by the Recipient Competent Authority".

16. By letters dated the 30th November, 2007, and 14th December, 2007, Messrs J. and P. O'Donoghue, Solicitors for the applicant, sought from Supt. Maher reasons for this refusal. By a letter dated the 30th March, 2007, Supt. Maher wrote to Mr. Tom Curran, County Manager of Kerry County Council giving details of the complaints received following upon the explosion at Ballahacommane Quarry requesting advice. The third paragraph of this letter states as follows:-

"Tim Corcoran produced an Environmental Impact Statement requiring developments at Ballahacommane, Killarney, Co. Kerry. This document, which he states was given out by the Quirke's before they got planning in 2001, indicates that no blasting would be carried out at the existing quarry or proposed quarry extension site. Tim Corcoran and Michael O'Sullivan are adamant that the Quirke's have no planning permission to carry out blasting at this site. In addition to this, Corcoran states that there was never any blasting in this quarry in the past."

17. It was accepted by both parties to this application for judicial review that though this letter refers to an "Environmental Impact Statement", Supt. Maher was in fact referring to the Environmental Management System submitted by the applicant to Kerry County Council in compliance with Condition 5 of the planning permission granted by An Bord Pleanála. That the parties are correct in this conclusion is clearly evident from the ultimate sentence of para. 6 of the affidavit of Supt. Maher sworn in this application on the 6th May, 2008.

18. By letter dated the 8th June, 2007, Supt. Maher was advised by K. Barrett, S.S.O., Planning Section, Kerry County Council that it would appear that there was no prohibition on blasting conditioned (the emphasis is mine) for the operation of the Ballahacommane Quarry.

19. By a letter dated the 3rd July, 2007, Supt. Maher responded to the Planning Department of Kerry County Council referring to, what he erroneously describes, as the Environmental Impact Statement, (in fact the Environmental Management System) on which the two complainants placed reliance and which indicated that no blasting would be carried on at the Quarry site. Supt. Maher suggested that there may have been a possible oversight in the planning department's letter of the 8th June, 2007.

20. The relevant section of the Environmental Management System under the heading, "Condition 5(a) Noise Suppression", states as follows:-

"No blasting takes place at this site. The methods of suppressing on-site noise is chiefly to maintain the Mobile Plant in good order to ensure that all silencers are working to manufacturer's specifications. Similarly all Lorries are to be kept in good working order with their silencers in sound condition. The fixed plant is also to be kept in good order and positioned towards the centre of the sand and gravel pit.

Vegetation will only be removed as required and adequate screening is to be maintained around the periphery of the development.

With these measures the equivalent sound levels will remain well within the 55dB(A) range required under Condition 9 of this planning permission and, more generally, under the EPA guidelines."

21. It is important moreover to recall that Section, 1.2 of the Environmental Impact Statement submitted by the applicant, in the 3rd Appendix thereof under the heading, "Noise Report: Existing Development", also stated that "currently there is no gravel crushing or batching carried out at the site and blasting is not used".

22. By a letter dated the 27th August, 2007, Mr. Christopher Van Schoor, Executive Planner at Kerry County Council Planning Department, with special responsibility for quarries, replied to Supt. Maher's letter of the 3rd July, 2008, as follows:-

> "Having checked the EIS submitted with the planning application for this development, it would appear that:
>
> 1. There is no mention of blasting in the EIS.
>
> 2. Section 2.4.3 of the EIS states that extraction will be by a dedicated (existing) excavator.
>
> 3. Section 3.6.3.1 in relation to noise has no mention of blasting as a source of noise.
>
> 4. Appendix III of Vol. 3, at p. 2, states ' . . . and blasting is not used'.
>
> The entire assessment conclusions therefore are based on a 'no blasting' scenario."

23. By a further letter dated the 11th December, 2007, Mr. Van Schoor advised Supt. Maher as follows:-

> "I wish to confirm that the Planning Authority considers that the permission granted per planning reg. No. 1910/02 (An Bord Pleanála reference 08.201503) does on permit extraction by blasting, having regard to the following considerations:-
>
> (a) Condition No. 2, of the permission granted by An Bord Pleanála on the 12th May, 2003, restricts the activities on site to 'quarrying, crushing, haulage, storage and stockpiling of aggregate'.
>
> (b) The Environmental Impact Statement prepared in relation to the application does not include an assessment of the impacts associated with extraction by blasting.
>
> (c) The Environmental Management System prepared and submitted to the Planning Authority by M.F. Quirke and Sons in compliance with Condition No. 5 of the permission granted states 'no blasting takes place at this site'.

24. This further letter was received after Supt. Maher had made his decision so therefore it could not form any part of the basis for that decision.

25. Supt. Maher also sought guidance, through the office of the Chief Superintendent. of An Garda Síochána at Tralee, from the Legal Section of An Garda Síochána at Garda Headquarters in Dublin. By a letter dated the 27th February, 2008, Chief Supt. G. Blake replied as follows:-

> "*Re: Authorisation to Expend Explosives – Form TD2*
>
> The Attorney General is of the view that licenses should not be granted in situations where planning permission to carry out such activities has been refused or where Enforcement Orders to desist from such activities have been made. In other words illegal acts cannot be condoned by the State.
>
> While District Officers may be aware of the existence of planning matters relating to a quarry, this should not be the determining factor, but rather it should be on the basis of criminal liability that any decision ought to be made. The Attorney General has not advised subsequent to the issuing of H.Q. Directive 1(L) 2005. The Legal Section is reverting to the Attorney General in relation to this advice in light of recent contradictory advice from Counsel which has resulted in the Garda Síochána conceding in a number of similar proceedings.
>
> Until such time as the Attorney General decides on the issue the contents of H.Q. Directive 1(L) 2005 is still enforced."

26. This Directive, dated the 22nd March, 2005, appears to be in the following terms:-

> "The following instructions are issued for Officers dealing with applications for Authorisation to Expend Explosives – Form T.D.2.
>
> Where the legality of the quarrying operations is contested particularly:-
>
> ***** Where planning permission for the activities has been refused.
>
> ***** An Enforcement Order is issued by the Local Authorities directing quarry operators to cease operations or
>
> ***** Complaints have been received from members of the public of damage to property due to blasting."
>
> The matter was referred to the Attorney General for directions and in his advice the Attorney General has directed that following the ex-tempore judgment of Geoghegan J. in the High Court in *Lackagh Quarries Limited v. The Minister for Justice, Equality and Law Reform and Others*, a Superintendent cannot refuse a licence on planning grounds because planning decisions are a matter for the local authority or An Bord Pleanála, as the case may be. However, the Attorney General is of the view that licences should not be granted in situations where planning permission to carry out such activities has been refused, or where Enforcement Orders to desist from such activities have been made. In other words illegal acts cannot be condoned by the State.
>
> The Attorney General is also of the view that complaints regarding damage to family homes and outhouses should be considered as a further and separate matter in that it concerns safety."

27. The parties were unable to find any copy of this decision of Geoghegan J. above referred to, but Senior Counsel for the applicant was able to confirm from personal knowledge that what is stated correctly reflects that was held by the learned Judge in that case.

28. At para. 14 of his affidavit sworn in this application on the 6th May, 2008, Supt. Maher avers as follows:-

> "I say therefore that in making my decision I did not assume any expertise in the area of planning and development or seek to usurp the functions of the planning authorities. I say that I made and continue to make no decision on the lawfulness of the Applicant's blasting operations from a planning standpoint, but that once alerted to a possibility that such an operation would be unlawful, I was anxious to ensure that I did not authorise an unlawful activity. I say therefore that, having confirmed my position with the relevant planning authorities I based my decision on my concern that as a member of An Garda Síochána I could not authorise an activity that I was informed by the relevant authorities was unlawful. I say further that I sought and obtained information on this decision from the Legal Section of An Garda Síochána."

29. At para. 7 of the same affidavit Supt. Maher avers that at the same time as he wrote to Mr. Tom Curran he, "contacted the applicant by telephone to inform him of the complaints and of the queries raised". These are set out by Supt. Maher in his letter to Mr. Tom Curran date stamped 30th March, 2007, and, to which I have already adverted, in the following terms:-

> "On the 30th of March, '07, Tim Corcoran, Coolcaslough, Killarney and his son-in-law, Michael O'Sullivan (same address) called to the station to complain about the blast at Quirke's Quarry the previous day. Michael O'Sullivan stated that his two-storey house shook when the blast went off. He stated that he was not contacted prior to the explosion either by telephone or calling to his home."

30. In this application for judicial review, the applicant claims an order of *certiorari*, quashing the decision of Supt. Maher to refuse to issue a Recipient Competent Authority Transfer Document, for the transfer to and use of explosives at Ballahacommane Quarry. The applicant seeks a declaration that Supt. Maher acted in excess of his jurisdiction in basing his refusal on the opinion expressed to him by Kerry County Council that the planning permission granted to the applicant was based upon a "no blasting" scenario. The applicant additionally seeks a Declaration that Supt. Maher exceeded his statutory powers and acted in breach of fair procedures and of natural justice in failing to afford the applicant an opportunity to respond to this opinion expressed by Kerry County Council, and in failing to give reasons for his decision. The applicant also claims damages.

31. The Statement of Opposition asserts that Supt. Maher exercised his statutory discretion within jurisdiction and, that he was entitled to have regard to the advice of the relevant Planning Authority. It is denied that Supt. Maher acted in breach of fair procedures and natural justice in not allowing the applicant to respond to the views expressed by Kerry County Council, before deciding to refuse the R.C.A. Transfer Document. It is asserted that Supt. Maher did not enter into the planning arena or assume any expertise in the field of planning, but was entitled to reach the decision he did, reasonably and justly on the facts before him and, that he gave a sufficient reason for his decision. It is further claimed that Supt. Maher was obliged to consider whether in all the circumstances the granting of an R.C.A. Transfer Document was in the public interest or, whether this would be to condone and unlawful act. The applicant's claim for damages is denied.

32. I find that the Decision of Kerry County Council, dated the 11th December, 2002, to grant planning permission, was subject to an express condition that the extraction of sand and gravel by blasting was specifically excluded, in order to protect the amenities of the area. I find that the Decision of An Bord Pleanála, dated the 12th May, 2003, to grant planning permission, in accordance with the plans and particulars lodged with Kerry County Council, contains no similar express condition excluding blasting.

33. An Bord Pleanála imposed an express Condition in the following terms:-

> "Activities on the site shall be restricted to quarrying, processing, crushing, haulage, storage and stockpiling of aggregate. All relevant conditions attached to Planning Register Reference No. 1062/95 granted by Kerry County Council on the 12th day of April, 1996, shall apply to this grant of permission.
>
> Reason: In the interests of clarity."

34. None of the conditions imposed in Planning Permission reference No. 1062/95 prohibit blasting or the use of explosives at Ballahacommane Quarry.

35. It was submitted on behalf of the respondent that the restriction of use to "quarrying", prohibited the employment of blasting and the use of explosives as a method of extraction of materials at the Quarry. I cannot agree with this submission.

36. In s. 261(13) of the Planning and Development Act 2000, "quarry" is defined by reference by s. 3(2) of the Mines and Quarries Act 1965, where it is defined as:-

> "An excavation or a system of excavations made for the purpose of, or in connection with, the getting of materials (whether in their natural state or in solution or suspension) or products of minerals, being neither a mine, nor merely a well or bore-hole or a well and bore-hole combined."

37. In my judgment, it is significant that s. 96(1) of the Mines and Quarries Act 1965, makes express provision for the making of Regulations controlling the supply, storage and use at quarries of blasting materials and devices, (i.e. Quarries Explosives Regulations, S.I. 237 of 1971 and S.I. 1 of 1976, as amended by S.I. 357 of 1995). These are defined by reference to s. 66(3) of that Act of 1965, where they are defined as:-

> "Explosives and any articles designed for the purpose of breaking up or loosening minerals by means of explosion, the expansion of gas, the change of a substance from one physical state to another or a chemical reaction not constituting combustion."

38. The dictionary definition of "quarrying" simply refers to, cutting into rock or ground to obtain stone or other material (see for example, The Concise Oxford Dictionary, (10th Ed. Revised, 2001), Oxford University Press).

39. In my judgement there is nothing in the ordinary meaning of the word "quarrying" or, in the meaning derived from the provisions of the Mines and Quarries Act 1965, which would in any way exclude the use of explosives or the employment of blasting at Ballahacommane Quarry.

40. Condition 2 of the planning permission granted by An Bord Pleanála on the 12th May, 2003, which limits the types of activities which may be carried on at Ballahacommane Quarry, does not restrict the applicant to any particular indicated method of extraction.

41. However, there must be a very strong argument that the only logical inference to be drawn from this planning permission considered as a whole, as it must properly be considered and, not piecemeal, is that An Bord Pleanála did not deem it necessary or appropriate to impose an anti blasting condition, having regard, as it is obliged to do by the provisions of s. 173(1) of the Planning and Development Act 2000, to the clear statement representation contained in Vol. 3 of the Appendix to the Environmental Impact Statement, under the general title "Noise Impact Assessment", which declares that:-

> "Currently there is no gravel crushing or batching carried out at the site and blasting is not used. Under existing planning permission the management has the option to operate a gravel crusher at the site."

42. In my judgment it is very significant that Condition 2 expressly includes "crushing" in the list of permitted activities, but is silent with regard to blasting. There is no reason why An Bord Pleanála should expressly forbid something which the applicant for planning permission clearly stated it did not do.

43. Condition 5 of the planning permission granted by An Bord Pleanála imposed an obligation on the applicant, within four months of the date of the order granting planning permission, to submit to Kerry County Council for written agreement a proposal for an Environmental Management System. The stated reason for the condition is that An Bord Pleanála considered it necessary in the interest of orderly development and the safeguarding local amenities. The planning objective sought to be achieved was the monitoring and regulation of environmental impacts identified by An Bord Pleanála. In order to identify possible environmental impacts An Bord Pleanála had a duty, *inter alia* to properly and carefully consider and evaluate the Environmental Impact Statement submitted by the applicant. In s. 2 of the Planning and Development Act 2000, an "Environmental Impact Statement" is defined as:-

> "A statement of the effects, if any, which the proposed development, if carried out, would have on the environment."

44. In *R. v. Cornwall Council Ex. p. Hardy* [2001] Env. L.R. 25, it was held that the:-

> "Information contained in the environmental impact statement should be both comprehensive and systematic, so that a decision to grant planning permission is taken 'in full knowledge' of the project's likely significant effects on the environment."

45. Condition 5 of the planning permission granted by An Bord Pleanála requires agreement between Kerry County Council and the applicant in respect of a number of matters including the following:-

> (a) Proposals for the suppression of on-site noise,
>
> (b) Proposals for the on-going monitoring of sound emissions and,
>
> (c) Proposals for the suppression of dust on-site.

46. The overwhelming significance of blasting in the context of each of these matters is to be clearly seen from the judgment of Costello J. (as he then was), in *Patterson v. Murphy and Trading Services Limited* [1978] I.L.R.M. 85 at p. 90 – 94. In my judgment it is revealing that the Environmental Management System which was submitted by the applicant in order to comply with the terms of Condition 5 and, which was agreed by Kerry County Council repeats, under the heading "Noise Suppression" the statement contained in the Environmental Impact Statement that no blasting took place on the site.

47. Condition 5 does not permit of multiple Environmental Management Systems being submitted by the applicant to Kerry County Council if, and according as, the applicant decided to make changes in the operation, including the system of extraction identified in the Environmental Impact Study. Condition 5 requires that the Environmental Management System be submitted for agreement by Kerry County Council within four months of the date of the order granting planning permission and, that all actions be implemented within six months of the date of that order.

48. In my judgment, if the applicant was correct in its belief that the planning permission granted by An Bord Pleanála entitled it to engage in blasting at Ballahacommane Quarry whenever the applicant decided it was expedient so to do and, to whatever extent the applicant considered necessary, it could well be argued that the planning permission was therefore invalid as having been granted on wholly insufficient information in the Environmental Impact Statement regarding impacts on the environment and, as allowing additional environmental impacts, which will aggravate the identified impacts without properly considering and assessing the matter. It appears to me that the same argument could be made even if An Bord Pleanála had left the matter to be agreed between the applicant and Kerry County Council.

49. I do not accept, as contended by the applicant, that at most this was simply a question of whether blasting would or would not amount to such an intensification of a permitted use, through the introduction of a different production method so as to amount to a material change in the permitted use and consequently a need to obtain a new planning permission. In my judgment, the issue was whether the use of explosives and, blasting at Ballahacommane Quarry was seemingly contrary to the true meaning and purport of the terms and conditions of the applicant's existing grant of planning permission and if so forbidden.

50. In *Readymix (Éire) Limited v. Dublin County Council and the Minister for Local Government* (Unreported, Supreme Court, 30th July, 1974), 004662 at 004664, Henchy J. held as follows:-

> "Where the permission recorded in the register is self-contained, it will not be permissible to go outside it in construing it. But where the permission incorporates other documents, it is the combined effect of the permission and such documents that must be looked at in determining the proper scope of the permission. Thus, because in the present case the permission incorporated by reference the application for permission together with the plans lodge with it, it is agreed that the decision so notified must be construed." (as above indicated).

51. In my judgment, no reasonable lay reader looking at these documents (see *In Re. EJSI Investments Limited* [1986] I.R. 750 at 756, Supreme Court per McCarthy J.), or the extracts from them would see them as authorising the applicant to carry out blasting at Ballahacommane Quarry. In these circumstances Supt. Maher was a "lay reader".

52. Section 1.2 of the Environment Impact Statement contains a plain representation that blasting was not used. I am unable to accept the construction sought to be placed on the sentence by the applicant that "currently" governs "blasting" as well as "crushing" and "batching". The paragraph reads as follows:-

> "Currently there is no gravel crushing or batching carried out at the site and blasting is not used. Under existing planning permission the management has the option to operate a gravel crusher at the site."

53. When both sentences are considered together it is plain that "currently" refers only to the present non-use of "crushing", which is otherwise permitted by an existing planning permission.

54. In my judgment for a number of reasons no estoppel arises against Kerry County Council as the relevant Planning Authority by virtue of the letter of the 8th June, 2007, from K. Barrett, S.S.O. Planning Section to Supt. Maher. It is an expression of opinion rather than a statement of present fact, it is made to Supt. Maher and not to the applicant and, it is well established that an opinion expressed by an officer of a Planning Authority cannot estop that Planning Authority from subsequently contending that the particular development is not permitted. (see *Southend-on-Sea Corporation v. Hodgson (Wickford) Limited* [1961] 2 A.E.R. 46 per Lord Parker, C.J.).

55. In *Hempstown Stone Quarries v. Superintendent Thomas Neville, Garda Commissioner and Minister for Justice, Equality and Law Reform* (Unreported, High Court, 15th March, 2005), a judgment strongly relied upon by the applicant in the instant case, the facts were, that a number of persons had objected to the granting of a Recipient Competent Authority Transfer Document by the first named respondent to the applicant. In the course of his judgment in that case O'Neill J. identified the grounds of objection as, traffic management, traffic generation, noise, dust and air quality, dirt and mud on roads, reduction in property prices, damage to the rural environment, interference with the water supply and damage to the equestrian industry. The learned Judge found that the first named respondent had considered these objections and had refused to issue the Recipient Competent Authority Transfer Document because, as stated in the letter of refusal, he was concerned about noise, water and air pollution and, possible damage to houses in the area. He also referred to the fact that the relevant Planning Authority had issued an Enforcement Notice pursuant to the provisions of s. 154 of the Planning and Development Act 2000, requiring the applicants to cease all developments on the site.

56. In that case, O'Neill J. held, that though the first named respondent was legally competent to make the decision sought to be impugned, his decision was *ultra vires* his powers and, the procedures adopted by him in reaching that decision were in breach of the applicant's constitutional right to fair procedures. In the course of his judgment the learned Judge held as follows:-

> "The first issue that has to be considered and decided by me is whether the First Respondent was entitled to take into account the matters set out in his letter of the 15/12/2004. In my view, he was not. All of these matters belong to the realm of other statutory authorities, for example, the Planning Authority for the area, or the Environmental Protection Agency.
>
> The first named respondent was not entitled to make a decision based on the merits of the content of the objections taken on these grounds. In placing himself as a decision maker on the merits of these objections, he was usurping the statutory functions and authority of the local planning authority and perhaps also the Environmental Protection Agency. He was not entitled to do that. He would have been entitled to have regard to a proven non-compliance by the applicant with other statutory or legal obligations such as proven breaches of the planning code. This would have had a relevance to his decision in two respects.
>
> Firstly, it would have impinged upon the character of the Applicant.
>
> Secondly, the absence of appropriate planning permission, if planning permission was required in the first place, for the activity for which the explosives were required would have vitiated *ab initio* the legal entitlement of the Applicant to carry on the activity in question.
>
> In this case, the First Named Respondent went much much further in taking into account and deciding in favour of the objectors on the merits of their objections. In doing so, in my opinion, he acted *ultra vires*."

57. The facts of the instant case are materially different from those in the *Hempstown Stone Quarries* case. Here, Supt. Maher did not purport to adjudicate upon matters which were properly matters within the remit of the Kerry County Council as the relevant Planning Authority or within the remit of the Environmental Protection Agency. Here, Supt. Maher declined to issue the Recipient Competent Authority Transfer Document solely because of his concern that the planning permission granted to the applicant by An Bord Pleanála may have been granted on a "no blasting" basis because of what he had been told and seen. I am satisfied that the letter of the 27th August, 2007, indicates with sufficient certainty and for reasons given, that it was the opinion of the Planning Authority that the planning permission was granted on the clear premise that there would be no blasting on the site.

58. In the *Hempstown Stone Quarries* case, O'Neill J. found that a Superintendent of An Garda Síochána, as the Recipient Competent Authority, could have regard to a proven non-compliance by an applicant with statutory or legal obligations, such as breaches of the provisions of the Planning Code, as a ground for refusing to issue a Recipient Competent Authority Transfer Document pursuant to the provisions of Article 9(2) of S.I. 115 of 1995. This Article 9(2) provides that:-

> "(2) If the recipient competent authority is not satisfied with respect to-
>
> (a) the information provided in support of an application for an approval under Regulation 8(2), or
>
> (b) the conditions under which a transfer for which such an approval is sought might take place, having regard in particular to any special security requirements,
>
> the recipient competent authority may refuse to give the approval."

59. It was submitted by Senior Counsel on behalf of the applicant in the instant case that only a Court of competent jurisdiction could make such a finding. This would usually take place in the course of injunction proceedings taken by a Planning Authority pursuant to the provision of s. 160 of the Planning and Development Act 2000.

60. Certainly, an adverse decision of a Court of competent jurisdiction in proceedings taken pursuant to the provisions of s. 160 of the Planning and Development Act 2000, would clearly amount to sufficient proof of non-compliance with the provisions of the Planning Code. However, I do not consider that conclusive proof of this nature is always required and, I do not believe that the judgment of O'Neill J. in the *Hempstown Stone Quarries* case is authority for such a proposition.

61. Where a grant of planning permission, or even a decision to grant planning permission, contains an express condition that the

extraction of materials at a quarry by blasting is specifically excluded, in my judgment it would incompatible with one of the principle objectives of Council Directive 93/15/EEC of 5th April, 1993, as identified in Article 3 thereof, to ensure that a party seeking to obtain a transfer of explosives must be legally entitled and authorised to seek that transfer, if a Recipient Competent Authority Transfer Document could not be refused other than by a decision of a Court of competent jurisdiction. If an applicant seeks a Recipient Competent Authority Transfer Document for the excavation of materials in a quarry by blasting, and such blasting is prohibited by an express condition in the planning permission under which the applicant is carrying on the particular development, then in my judgement, there is sufficient evidence to enable the relevant Superintendent of An Garda Síochána to reasonably and rationally arrive at a *prima facie* conclusion that the applicant is not legally entitled to a transfer of explosives for that purpose.

62. It must be accepted, and I find as a fact, that there is no such express prohibitory condition to be found in the planning permission granted by An Bord Pleanála to the applicant in the instant case. However, I cannot conceive of any dictate of law or a public policy which would require that proof of possible non-compliance with the provisions of the Planning Code should be confined to evidence of the existence of an express prohibitory condition forbidding blasting in the particular planning permission. In my judgment, it is therefore a question of whether the facts found in each particular case would permit a Superintendent of An Garda Síochána, to reasonably and rationally form a *prima facie* conclusion that the applicant for a Recipient Competent Authority Transfer Document may be acting without, or in breach of the terms of, a planning permission.

63. In the instant case, Kerry County Council is the Planning Authority charged by statute with the duty of securing the proper planning and development of an area which includes Ballahacommane Quarry. In that capacity, it advised Supt. Maher that the applicant had informed An Bord Pleanála, before it was granted planning permission by that body and, had subsequently informed Kerry County Council in the course of complying with a condition contained in that planning permission, that no blasting took place on the site. It is important to stress that this was not a matter of interpretation or of construction on the part of the Planning Authority. This was the express assurance and representation freely given and made by the applicant in its own Environmental Impact Statement and in its own Environmental Management System. In my judgment it was reasonably and rationally open to Supt. Maher to form a *prima facie* view, on being appraised of these matters by the Planning Authority, and in the light of the other circumstances that to approve the transfer of explosives to Ballahacommane Quarry, could well be to authorise an unlawful activity, which as an officer of An Garda Síochána he could not do.

64. I believe the applicant is quite wrong in its contention, that these facts count for far less than the issuance by a Planning Authority of an Enforcement Notice pursuant to the provisions of s. 154 of the Planning and Development Act 2000, which it argued, – though this is not at all clear, – O'Neill J., by inference considered insufficient proof. The decision to issue such an Enforcement Notice is the sole act of the Planning Authority and, that decision could well be made in error or even through inadvertence.

65. Even if the assurance and representation contained in the Environmental Impact Study was, as alleged by the applicant, - which for the reasons already set out I do not accept, – confined to the undefined present, there was no such qualification in the representation made in the Environmental Management System, which is the representation latest in time. Further, it was not a matter which could be decided by Supt. Maher, whether, when or on what planning and environmental terms the applicant was entitled to commence blasting at Ballahacommane Quarry.

66. It was not argued before me and, entirely correctly so, that Supt. Maher was estopped from refusing to issue the second Recipient Competent Authority Transfer Document by reason of having issued the first one, which of course was done at a time when he was entirely unaware of the full facts.

67. I have no doubt, that other instances of what maybe considered to be sufficient proof will be argued on other facts in other cases. In my judgment it is not feasible to state any general rule in the matter. Each case will fall to be decided on its own particular facts and, the law should be permitted to develop incrementally.

68. In this case, I am satisfied that there was no failure on the part of Supt. Maher to adopt fair procedures in arriving at his decision to refuse to grant the Recipient Competent Authority Transfer Document to the applicant. In his letter to Mr. Tom Curran, County Manager of Kerry County Council, date-stamped 30th March 2007, (but referred to in the letter of the 3rd July, 2007, to K. Barrett, Planning Section, Kerry County Council, from Supt. Maher, as being dated the 29th March, 2007), Supt. Maher stated as follows:-

> "I envisage that further applications will be made for permits to carry out further blasts. It is inevitable that the people living in close proximity to the Quarry – especially the people I have mentioned, will call again to the Garda Station to voice their objections."

69. At para. 7 of his affidavit sworn in this application on the 6th May, 2008, Supt. Maher, avers that he personally contacted the applicant by telephone "to inform him of the complaints and of the queries raised". As the applicant is a private limited company it is not clear who exactly was the recipient of this telephone message. This averment is not denied by Mr. John Quirke in his Replying Affidavit dated the 13th February, 2008. At para. 3 of that affidavit Mr. Quirke avers that he is a director of the applicant and has run the company for the past 33 years with the assistance of his two brothers, Tom and Michael and Mr. Michael O'Donoghue. The letter from Supt. Maher date-stamped the 28th November, 2007, declining to grant the Recipient Competent Authority Transfer Document is addressed to "M.F. Quirke and Sons, Head Office, Rangue, Killorglin, Co. Kerry". I think it is significant that at para. 9 of his affidavit, Mr. Quirke refers to a telephone call from Supt. Maher to Mr. Rob Kehoe, described as Mr. Quirke's agent, advising him that a "blasting licence" would not be granted.

70. I am satisfied that the applicant was fully aware of the problem following the blast at Ballahacommane Quarry on the 29th March, 2007, and the subsequent telephone call from Supt. Maher. The applicant then had ample opportunity to take expert advice in the matter, including contacting the Planning Authority and making a full response to Supt. Maher's telephone call prior to applying for a further Recipient Competent Authority Transfer Document on the 20th November, 2007. In my judgment there was no obligation on Supt. Maher in the circumstances of this case to conduct a sworn or unsworn inquiry into the issue of whether the applicant was or was not entitled to a Recipient Competent Authority Transfer Document. I am satisfied that there was no obligation on Supt. Maher, before making the decision to refuse to grant the transfer document to the applicant, to hold a, "judicial type of hearing involving the examination and cross examination of witnesses". (see *Doupe v. Limerick Corporation* [1981] I.L.R.M. 456, per Costello J.; *Davy v. Attorney General & Others* [2008] 2 I.L.R.M. 507 at 523-524 per. Charleton J.). However, the applicant contends that Supt. Maher failed to observe fair procedures in failing to furnish the applicant with copies of the letters dated the 8th June, 2007, and 27th August, 2007, from the Planning Section of Kerry County Council and, allowing them a reasonable opportunity to respond, before making a decision in the matter and, also in failing to give reasons for that decision.

71. The reason given by Supt. Maher was that, "planning permission granted for this site on foot of an Environmental Impact Statement submitted by you is based on a 'no blasting' scenario." I am satisfied that this reason could not but have clearly conveyed

the entire picture to the applicant. In making an administrative decision of this nature I am satisfied that there was no obligation on Supt. Maher to provide a more ample statement of reasons or to deliver a discursive judgment. (see *F.P. and Another v. The Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164 at 172-173, Supreme Court per Hardiman J.).

72. I find that Supt. Maher, on or about the 29th March, 2007, told the applicant that two local objectors were contending that the applicant had no planning permission to carry out blasting at Ballahacommane Quarry because their planning permission was based on a document given out by them before they got planning permission in 2001, indicating that no blasting would be carried out at the existing quarry or proposed quarry extension sites. This is the only proper inference to be drawn from what is averred by Supt. Maher at para. 7 of his affidavit, sworn on the 6th May, 2008, which is uncontradicted, and the contents of his letter of the 28th/30th March, 2007, to Mr. Tom Curran, County Manager, Kerry County Council. Supt. Maher was entitled to and did canvas the opinion of the Planning Authority for the area on this contention by the local objectors. The applicant obviously considered that it was entitled to extract materials by blasting. Kerry County Council, as the relevant Planning Authority, advised Supt. Maher that the entire planning application for the development at the quarry was based on a "no blasting" scenario. Supt. Maher could not and did not purport to decide the matter of whether the applicant's planning permission did or did not permit blasting.

73. Supt. Maher had to decide, in accordance with the provisions of Article 9(2)(a) of S.I. No. 115 of 1995, whether the information provided was sufficient to grant the necessary Recipient Competent Authority Transfer Document. Whether the opinion of the Planning Authority and the opinion of local objectors was right or was wrong was not a matter which Supt. Maher could decide. He could only accept that this was their view in the matter. In my judgment, in such circumstances, substantial fairness did not require that he furnish the letters of the 8th June, 2007, and 27th August 2007, to the applicant and afford them an opportunity of commenting on these letters if they so desired.

74. Because this is an issue as to fair procedures, I take no account of the probability that the applicant's response to the opinion of the Planning Authority would not matter anyway, as it was not the function of Supt. Maher and, he lacked jurisdiction, to resolve any conflict between the Planning Authority and the applicant. Under the Statutory Scheme which gives effect to Council Directive 93/15/EEC of 5th April, 1993, Supt. Maher had to make a decision whether or not to grant the Recipient Competent Authority Transfer Document. In my judgment, he was entitled both reasonably and rationally to decide as he did on the information before him.

75. The court will therefore refuse the application.