

THE HIGH COURT

[2010 No.3402 P]

BETWEEN

MICHAEL HENNIGAN

PLAINTIFF

AND

ROADSTONE WOOD LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Eagar delivered on the 21st day of May, 2015

1. This is a claim for damages arising from alleged breach of contract and/or misrepresentation based on an oral agreement made between the plaintiff and the defendant.

2. The plaintiff, Michael Hennigan, is a 57 year old man who in 1995 started working in the Roadstone quarry in Bunratty, Co. Clare, as an employee of a company known as Ward & Ward. In 1995 the defendant company Roadstone hired a loader from Ward & Ward. It appeared that as a result of difficulties arising from unionisation the company sought the use of independent contractors.

3. The plaintiff, Michael Hennigan gave evidence to the effect that he became an independent contractor in his own right in 2000 and purchased a Volvo loader accordingly. It was a 26 tonne loader and he paid IR£60,000 at that time plus VAT. This sum was raised by way of leasing finance from ACC Bank (hereinafter referred to as "ACC"). At that time he was paid IR£22.50 an hour with the euro changeover occurring shortly thereafter. He spent his time as an independent contractor loading exclusively on the top of the quarry in Bunratty.

4. In 2004 the plaintiff decided to upgrade the loader as the other one had been in use for quite a while. He purchased a second-hand, 26 tonne Volvo loader from a man in Co. Westmeath who took the old loader as part payment. Again the finance was dealt with by ACC. In evidence the plaintiff was asked as to whether he had any discussion with anyone in Roadstone before he purchased this loading shovel and he responded that he met with Lee Hankinson, location manager. He asked Mr Hankinson would there be work for the loader and his evidence was that Mr Hankinson said "go ahead, there was no problem, there was loads of work there". He also spoke to Lee Hankinson seeking greater hourly remuneration and Mr Hankinson said there was no money there at that moment. At that stage the plaintiff was being paid €31.50 per hour. He further confirmed that Mr Hankinson was a difficult man to negotiate with and was averse to spending excess money however he did make a concession which involved the plaintiff receiving free diesel at the time he purchased the second hand Volvo in 2004.

5. In 2007 the quarry was very busy and there was a huge level of production. This was of course during the economic boom. The plaintiff said that he was working up to 65-70 hours some weeks and a minimum was 50 hours a week. Roadstone was involved with the construction of roads and by-passes in addition to tar and amounts of concrete being transported all over Limerick City and Co. Clare.

6. In 2007 there was a change in personnel and a Mr. John Alderson was appointed as production manager. Mr Alderson's main area of concentration was what was the work at the bottom of the quarry while the plaintiff's work was limited for the most part to the top of the quarry.

7. The plaintiff gave evidence that in June 2007 Mr. Alderson approached him and asked him would he consider buying a new loading shovel. The plaintiff agreed that he would, provided the circumstances were favourable. There was a discussion, according to the plaintiff, as to the rate of pay sought and he said he wanted €45 per hour. According to the plaintiff Mr Alderson reverted a day or two afterwards and said that that rate sought was too high and that he would be going down to the office negotiating on his behalf and he asked would he consider lowering his rate. Accordingly a compromise of €41 per hour was reached.

8. In evidence the plaintiff told the Court that he said to Mr Alderson that the terms and conditions would be that for the duration of the finance agreement over the loading shovel that he would be retained by Roadstone. Mr Alderson acquiesced to this. The plaintiff said "I would have to get the €41 an hour and five years work because that was the term of the finance". He told Mr Alderson that he would need five years work for it because of the terms of the lease of the new loader. And Mr. Alderson agreed to this. The plaintiff also said "I then asked him could I get a contract and he said 'what is the point in a contract? You either trust me or you don't?'" Mr Alderson was also supposed to have said "You wouldn't take on Roadstone if anything went wrong."

9. The plaintiff said that his old loader was working, but was working slowly and as a result of his conversation and subsequent agreement with Mr Alderson he decided to purchase a new machine. As location manager, Mr Lee Hankinson was responsible for handling receipts, time sheets dealing with the financial aspects of the quarry's operations. There were no Volvo machines available. But the plaintiff said that he met with Mr Hankinson a couple of months later and that Gerard O'Dwyer came down with him. Gerard O'Dwyer was the foreman.

10. The plaintiff gave evidence that he and Mr. O'Dwyer went in to the canteen and waited for Mr Hankinson. When he arrived they had a discussion about the machine. The plaintiff raised the issues of the necessity of the 5 years guaranteed work in order to comply with his financial obligations relating to the machine and rates of pay. Mr Hankinson was contemporaneously doing sums in what he thought was a diary but which was actually an A4 copy sheet. This A4 copy sheet was not discovered by the defendant. The plaintiff said Mr Hankinson was doing sums and he said "You could do over the term of it for €39" and the plaintiff did not say anything to him about this but the last thing he said to Mr Hankinson was "It is a five year term – are you agreeing on that?" and Mr Hankinson replied "Go away and purchase your machine. There is no problem". After the meeting the plaintiff met John Alderson and said to him that Lee Hankinson was only giving him €39 and also said to Mr Alderson "I thought we had an agreement?" Mr Alderson assured him he would get his €41 an hour and he went and arranged that and speaking to him two days later and he said that "It is sorted. You have your €41".

11. The plaintiff decided to enter into a leasing agreement with ACC in respect of a Komatsu 28 tonne loading shovel supplied by McHale Plant Sales, Bird Hill Co Tipperary for the price of €284,350 with the plaintiff trading in his existing Volvo machine for which he received an allowance of €56,978.18. He agreed to pay €271,741.80 by way of 60 monthly instalments of €4,529.03 (including VAT)

commencing on 25th July, 2007.

12. The plaintiff said for the first year they had plenty of work, it was busy given the economic climate, which was very favourable at the time. They worked long hours and the plaintiff spent the majority of his time at the quarry. A schedule was prepared by Fitzpatrick O'Dwyer, accountants of the plaintiff, detailing his gross income from August 2007 and that showed that the plaintiff's monthly earnings held up broadly about €10,000 up to May 2008 gross. The repayments to ACC were paid out of this. He was also in receipt of free diesel.

13. He spoke to a Mr. John Henchion who is described as the transport manager. He attended a meeting with Mr. Henchion, in the presence of Gerard O'Dwyer. Mr Henchion, in essence, suggested that Roadstone would lease the loading shovel from the plaintiff because there were too many union workers in the quarry who might cause hassle. Mr. Henchion continued that there may not be sufficient work available for the plaintiff but that he would lease the machine to Roadstone who would put one of their drivers on it. For this arrangement it was proposed to pay approximately €5,000 per month to the plaintiff. However nothing came of this arrangement and the plaintiff continued to work as an independent contractor at the quarry. Both Mr Henchion and Gerard O'Dwyer took notes at this meeting.

14. The next development in this matter arose in September 2009 when the plaintiff was called in by Alan Quinn, the area manager and Peter Mahon and informed that there would be no work for him in October. Neither of these men worked in the quarry at the time of the agreement. They told him they were giving him one month's notice but in fact he worked until the 22nd December when he was told that there would be no further work for him. He was told this after a traditional Christmas mass at the quarry. The plaintiff said that the act of termination involved Mr Mahon pulling up alongside the plaintiff and saying "The machine is finished now. You are not to come in here in January at all". That day the plaintiff went to his solicitor, Gerard Howard.

15. I think it is appropriate to look at some of the inter-party correspondence at this juncture. On 22nd December, 2009 Gerard Howard, solicitor wrote to Peter Mahon, location manager, the managing director of Roadstone Provinces Limited, the managing director of Roadstone Wood Limited, all in the same terms that his client was induced based on representations and promises by both John Alderson, production manager and Lee Hankinson, location manager to purchase a new Komatsu loading shovel on the basis that he would receive, at a minimum, five years work on a full-time basis on the Bunratty Roadstone quarry at a rate of €41 plus VAT per hour. In addition to this, his client was also entitled to a supply of diesel from Roadstone and Mr. Howard detailed the evidence that he recited about the meetings with John Alderson and suggested that unless Roadstone agreed to abide by the terms of the agreement proceedings would be issued.

16. By letter dated 25th January, 2010 and in response to the aforementioned correspondence, Messrs CM Hanby Wallace, solicitors, indicated that having taken their client's instructions it was quite clear that no inducements were given to the plaintiff nor was any guarantee given to him. It was further stated that his intentions were factually incorrect and made no commercial sense.

17. The solicitors went on to indicate that their client's business requirements as of 2007 was that their clients machinery was not entirely suited to the work involved and that the machinery required replacement and further went on to say that it was accepted that prior to making his decision to enter into the financial commitments to purchase a new machinery that the plaintiff had consulted with the defendant to ascertain what their future works' requirements might be. He went on to say that at the time he made his commitments there was work available and it was entirely understandable why he made his commitment as he did in 2007. The final paragraph stated that the solicitors indicated that their client had asked them to confirm that that the plaintiff had been a good service provider over the years he worked with the company and that the unavailability of work was due to the collapse in demand for construction materials.

18. In March 2010 the plaintiff owed ACC the sum of €140,806.86. The plaintiff then sought to try and sell the Komatsu loader. It was put on the market for €125,000 but a failure to achieve more than €75,000 resulted in ACC repossessing the machine and selling it for €80,000 plus VAT ultimately. At that stage the balance outstanding on the loan amounted to €60,000. It was suggested by the plaintiff that the stress of being out of work caused his marriage to break up. He then got some work in 2011 with a company called Clean (Ireland) Recycling as a driver.

19. In response to counsel for the defendant, the plaintiff agreed that Roadstone were providing no written guarantees to anybody. It was put to him that Mr. Alderson would say that there was a conversation between them and it was at variance with the conversation recounted by the plaintiff. The evidence that Mr Alderson was going to give was that the plaintiff had approached him to say that he was thinking about the machine to which Mr Alderson replied "you should consider it very carefully".

20. It was suggested to the plaintiff that Mr Alderson had actively discouraged him from buying a new machine and he stated that this was untrue. Furthermore it was put to the plaintiff that Mr Alderson would give evidence that he did not make any agreement with the plaintiff. It was put to the plaintiff that Mr Alderson had explained in some detail why the plaintiff should consider very carefully purchasing a new machine but this was denied by the plaintiff who said that Mr Alderson had approached him to change the machine so that he could cope with the workload at the top of the quarry.

21. It was further put to the plaintiff that Mr Alderson had previously been a contractor and had over €2,000,000 worth of equipment out on foot of which he would have had significant financial commitments and that he had many sleepless nights over it, he had told the plaintiff this. The plaintiff said that that conversation never took place

22. The plaintiff was also asked did he remember Mr Alderson saying "if he can get a written guarantee from Roadstone you are a better man than me". The plaintiff replied that this was not correct and that he had asked him for a piece of paper and Mr Alderson said "What do you want a piece of paper for? We trust each other" He continued "And my word is my bond". The plaintiff also stated in evidence that Mr Alderson said "You have no business getting paper from Roadstone because the likes of you would not take on Roadstone because they will drag you through the courts everywhere and they will destroy you". It was suggested to the plaintiff that the subsequent meeting with Mr Alderson about increasing the hourly rate from €39 an hour to €41 an hour did not take place while the plaintiff argued that it did.

23. It was also put to the plaintiff that Mr Alderson was not ill-disposed towards him and that he thought well of him in the past. It was put to the plaintiff that there was no doubt that the rate of €41 an hour was agreed and there was no doubt from the invoices that calculating back from €41 as a rate he was working significant hours. The plaintiff said that the rates did not improve and it was also put to the plaintiff that the €41 an hour was applied to other contractors and was not unique to him and the plaintiff replied that another driver with three or four machines and all he was only in receipt of €35.

24. He was cross examined about the meeting with Mr Henchion and Mr O'Dwyer in October 2008 and it was put to the plaintiff that

at that time the quarry had more men available than had machines coming back from other work projects. The plaintiff agreed that this was the case.

25. It was put to the plaintiff that the evidence on the defendant's side would be that this was because of an expression of concern by the plaintiff and Roadstone. As articulated via Mr Henchion, both were trying to see if a way could be found to provide the plaintiff with some assistance not on a charitable basis but some assistance by way of working out some arrangement with the plaintiff. One proposed arrangement involved Roadstone taking over the machine for a period and therefore carried the lease payments on the machine which would happen in relation to expensive items like the replacement of the cutting edge filter. It was put to the plaintiff that notes of Mr Henchion and Mr O'Dwyer detail that the rate of about €4,500 per month which would be the repayment owed by the plaintiff. This offer by Mr Henchion appeared to this Court to be a surprising gesture in the circumstances of a harsh commercial environment at the time.

26. The plaintiff was also questioned about a meeting in mid-March 2009 with Lee Hankinson in his office. During the meeting Mr Hankinson had told him that everyone in the quarry was taking a cut and that his rate of pay would be reduced to €37 an hour. This was non-negotiable and said to be on take it or leave it basis. The plaintiff asserted that he had told him about the agreement involving the flat rate of €41 plus VAT over five years and Mr Hankinson said "it has all gone out the door now and you either take it or leave it."

27. It was put to the plaintiff that when Peter Mahon and Alan Quinn told him he had to be finished by the 1st October that he had not said anything to either individual about asserting the contractual right which he alleged to possess. The plaintiff replied that he had no right to go to Peter Mahon informing him of same as he was not there at the time of agreement and he said he knew nothing about it.

28. The plaintiff was asked about any attempts he made to get the machine operating elsewhere and he responded that there was no point in looking for work for the machine at the end of 2009 because every quarry in the country was on the verge of closure.

29. In re-examination by counsel for the plaintiff, the plaintiff was asked about his meeting with Mr Henchion. The plaintiff said that it was John Henchion who called him and Gerard O'Dwyer to the meeting out of the blue.

30. The second witness for the plaintiff was a Mr Dillon who was the ACC manager in charge of collections and legal recovery at the time. Mr Dillon gave evidence that in their proceedings against the plaintiff the sum sought amounted to €60,806 and he gave further evidence about the attempts made by the plaintiff to sell the machine before ACC had it auctioned. He also said that the ACC proceedings hung fire awaiting the outcome of this case.

31. Counsel on behalf the defendant questioned the witness about the returns made between September and December 2009 and Mr Dillon indicated that they had been paid by cheque. He also indicated that ACC had phoned Mr Hennigan and he sent in cheques. He was also asked was there any explanation as to why the direct debits had not been paid and Mr Dillon said that on the 5th October, 2009 the plaintiff explained that he had lost his job, lost the contract and the fact was he was going to try and sell the machine and was looking for a settlement figure. Further he gave evidence that on the 5th January, 2010 he lost his job and he asked them to return his call. He was seeking for a settlement figure as he was still trying to sell the machine.

32. Mr Dillon also gave evidence that when the lease was taken out there was a note on the files stating "has a contract with Roadstone for €41 an hour plus VAT, works an average of 250 hours per week (month?). Diesel is provided. No problem with payments. Excellent client clearing account" (relating to the previous loan).

33. The next witness was Mr Fitzpatrick who was a member of the accountancy firm acting on behalf of the plaintiff and he handed in a booklet. Therein Mr Fitzpatrick gave the projected income of €274,000 for the second half with two and a half years remaining on the contract which was alleged to exist. From that figure there was a deduction of the lease rent of €3,743 by 30 instalments and the net income before taxation came to a figure of €124,764. This was effectively the computation of the loss that was suffered by the plaintiff. The plaintiff started working for Clean (Ireland) Refuse and Recycling Limited on the 10th September, 2011 and his total pay for 2011 was €7,491.75 and for 2012 was €27,665 inclusive of income tax and USC.

The defendant's evidence

34. Mr John Alderson gave evidence on the second day of the hearing of this action. He said that he had started crushing tip for Roadstone in Huntstown Quarry in Dublin in 1993. He then moved on to other quarries. He was working as an independent contractor with a partner at that stage. In 2005 he joined Roadstone as a production manager in Bunratty. He said that he would organise the blast at the quarry then organise crushing the blast down and then he would burn it into saleable products that would be moved up to the next level to Gerry O'Dwyer who would add value to the primary materials by turning them into concrete or tar asphalt products. The plaintiff worked in the top level. He said that terms and conditions under which any driver was engaged was the sole responsibility of Lee Hankinson. Mr Hankinson was the location manager or quarry manager and Gerry O'Dwyer was the second in command.

35. Mr Alderson said that he was well acquainted with the plaintiff and highly respected him. He described the plaintiff as a "top driver". He said he would not have to watch over his back. He said that as far as he could recall in May 2007 he was walking up between the two concrete planks and the plaintiff called him over to his shovel and said "I am thinking of buying a new shovel" and he said he had replied that they were very busy but would he consider "buying a second hand machine or maybe repairing this one as you do not know how long this work would last". He said that he had been a contractor since 1993 and had spent over €2,000,000 in plant but never ever had he any comfort that he would have ongoing work. He said that this conversation took place in the cab of the plaintiff's shovel. He also recalls that the plaintiff said that he had trouble with the transmission and did not know how bad it was. He was asked did he say to the plaintiff that either he (John Alderson) or Roadstone wanted him to purchase a new machine and he said no. It was also clear that he had never had a guarantee and never heard him talking of a guarantee. There was nobody with that level of authority to do anything like that apart from Roadstone. He said he had never agreed rates with any shovel driver and there was no guarantees given by him. Mr Alderson said that as far as he was concerned he had given the plaintiff advice and did not do anything more. He was also asked about the further conversation which the plaintiff had said he had where he got €41 from John Alderson where he said the plaintiff met John Alderson after he had been offered €39 by Lee Hankinson and that the plaintiff had said that there were a further two encounters, one in which the plaintiff said to Mr Alderson that he had only gotten €39 from Lee Hankinson and that Mr Hankinson said he would get the €41 for the plaintiff and then two days later he said he had it sorted. Mr Alderson answered that he had no recollection of this as he did not deal with the rates. It just did not form part of his job. He said that Lee Hankinson would have shown him the door and said "mind your own business" and he said he did not agree a rate. He said he left Bunratty quarry in late 2007 or early 2008 to go to Ballyquinn. In relation to the conversation which was alleged about "trusting each other" and "you have no business getting paper from Roadstone". He said that he recalled a conversation such as this and

probably said "Are you going to sue Roadstone?"

36. In cross examination Mr Alderson said that he recalled giving advice to Mr Hennigan on one occasion and he could not say how the plaintiff's rate came to be increased from €31 to €41 per hour and he said that he could only surmise that Lee Hankinson was the person who agreed it. He agreed that Mr Hankinson was a fairly frugal and tight fisted individual. He confirmed that he trusted the plaintiff in the quarry.

37. He said that all decisions with regard to new machinery and plant were done through Jack Kennedy, the area manager. He also indicated that he had been made redundant by Roadstone in September 2009. He said that the first he heard about this case was six weeks beforehand when John Henchion tracked him down on behalf of Roadstone. It was put to him that the first time that this was recalled to his mind was in 2015, some six to eight years after the event. He was asked about the letter which was written on the 22nd December 2009 by the plaintiff's solicitor, Mr Howard and reference was made to Mr Alderson and Mr Hankinson and he was asked had he been contacted about this. He said he was contacted about six weeks prior this hearing. He said the most senior person in a quarry between May and June 2007 was Lee Hankinson. He was the only person who had the primary responsibility for agreeing rates.

38. It was put to Mr Alderson that having had the conversation with the plaintiff advising him not to buy the machine that he would have had a conversation with them saying "you did not take my advice?" He had given his advice and he would not do that. Mr. Alderson said that he had given his advice and he would not have asked that question of the plaintiff.

39. Mr Alderson was also asked about the contents of the letter from Messrs BCM Hanby Wallace, solicitors, sent on behalf of the defendant. There was a quotation from the letter which indicated that if the plaintiff wanted to continue working for Roadstone he needed to purchase new machinery and Mr Alderson said he did not know anything about this. Counsel for the plaintiff then quoted to Mr Alderson the letter as follows:-

"It is accepted that prior to making his decision to enter into the financial commitments he did, your client (Mr Hennigan) consulted with our client's management to ascertain what their future work requirements might be."

Mr Alderson said that the plaintiff may have done so with Mr Hankinson but he did not do it with the plaintiff.

40. Counsel for the plaintiff suggested that the plaintiff was saying that there is a definite commitment and that the defendant's case is that there may have been discussions but there was no commitment. Mr Alderson agreed that the purchase of the 28 tonne truck would have been of benefit to Roadstone but he said there were many people seeking to get into Roadstone. He also agreed that in 2007 it was the busiest year of all in Bunratty and that the boom was reaching its height. He denied having been involved in any discussions in relation to a contract or an undertaking.

41. Mr Alderson also agreed that it would not have made any sense for the plaintiff to purchase the new loader without having been given some assurance in relation to either anticipated levels of work or what might be given to him. It was suggested to Mr Alderson that he was very anxious that the plaintiff got a larger loader and that a commitment was given that he would be covered for the finance but he said that he would like to help the plaintiff all he could but he could only keep giving the same answer. He agreed that he could not dispute the fact that the plaintiff purchased the loader and did effectively all of the work in the top of the quarry and was paid a rate of €41 an hour. Mr Alderson in answer to this Court said that he could not recall ever having seen the new machine.

42. The next witness for the defence was Mr Gerard O'Dwyer who said that he was the quarry foreman in Bunratty from 2007 and remains thus. He described the quarry floor as the area where John Alderson operated and that he was located "up the yard". He described that he would have reported directly to Lee Hankinson and the area manager who would have been Jack Kennedy., it would have been the former he reported to for the most part. He described that in 2007 it was the height of the boom and he had contractors in regularly as well a couple of drivers. He said there were a large number of contractors. He stated that he had a working relationship with the plaintiff and that he knows where he lives.

43. He was asked about the meeting which the plaintiff had with Mr Hankinson and as to whether or not he had any recollection of a discussion with the plaintiff about his purchasing a new machine or him talking about a new machine in or about 2007. Mr O'Dwyer said the plaintiff was concerned about the transmissions on his Volvo loader and that he did want to change the machine. He also said he was aware that the plaintiff pricing another machine. He did not recall any meeting with Mr Hankinson about agreeing rates of pay. He said that he did not deal with rates and continues this practice. He was asked in relation to the guarantee or commitment and he said he would not have been there for such a meeting. He was then asked about the meeting with John Henchion where both he and John Henchion had made notes. He said October 2008 would have been a drastic year as there was a very significant downturn in trade and that drivers were coming back who were employed by Roadstone. There were notes made by John Henchion and Gerard O'Dwyer about this meeting.

44. The third and final witness for the defence was Mr John Henchion. Mr Henchion said that in May 2007 to (he thought approximately) June 2009 he would have been regional resources manager for Roadstone. He was looking after the south-western region which would have included Limerick and extended to Waterford looking after a number of quarries. His role would have involved supporting quarry managers, working for the regional director and dealing with strategic matters such as demand forecasting, production planning, ensuring the correct equipment was present and assisting with capital expenditure programmes. He was asked that when he was based in Bunratty in 2004 would he have been aware of the plaintiff as an individual as he would have been engaged as a contractor by the company and he replied that he would have been. He was not aware that Mr Hennigan had originally bought his own shovel in neither 2000, 2004 nor in 2007 and he confirmed that he would not have had no involvement in any discussions which may have taken place in relation to same. He was asked in relation to the retention of contractors generally in the sites and as to whether he had any role in the retention or was that function left to local management. He confirmed that local management exercised this function. He further confirmed that in 2008 he attended a meeting in Bunratty involving the plaintiff. His recollection was that Gerard O'Dwyer would have contacted him in saying that the plaintiff sought a meeting as he was concerned about his future within Bunratty as a contractor. He said he was not aware of any guarantee or agreement and he looked at his note which had been discovered. He said there were sites closing and personnel coming back onto the Bunratty site. These were direct employees and the plaintiff he said was concerned about the future of his status as a contractor and what Mr Henchion was proposing was to build a degree of flexibility whereby the plaintiff had a machine and a man at an hourly rate but he was trying to suggest and get agreement on was that they could hire the machine only or introduce a degree of flexibility which may lengthen the time that the plaintiff would be on site. He confirmed there was a figure of €4,500 in the note. He said that when Roadstone were realising or purchasing machines and these were the figures that they would have had for that size of machine from an array of suppliers including Komatsu. He said he would have known what the lease rates would have been and he knew that €4500 was there or thereabouts. There was also a discussion he said about the plaintiff discussing who was going to pay for a replacement cutting

edge if the plaintiff was not going to be present. Mr. Henchion confirmed that this is covered in the notes. Also oils and greases for servicing would be supplied. He described the trading circumstances in Bunratty in October 2008 as having followed a very busy 2007 in which Roadstone were heavily involved in the construction of the Limerick tunnel and its associated road works which would have been a substantial project. This was then finishing.

45. He was asked by counsel for the plaintiff, as to whether Mr Alderson and Mr Hankinson were still in Bunratty in 2008 and he believed that they had since taken up other roles. He also confirmed that he had no involvement in the Bunratty site from June 2009. He confirmed that he became a performance manager for the newly formed Roadstone Limited. In answer to the Court he indicated Lee Hankinson's position would have been that of quarry manager. Accordingly he would have been responsible for health and safety, running production and to a lesser extent the sales demand. He was asked would he have had authority *vis-à-vis* agreements in relation to hours and would he have had come to him. Mr. Henchion responded in the negative. He was asked did he possess the authority to give a commitment for five years work. Mr Henchion answered that he would not have thought so but he was unsure.

Decision of the Court

46. The basic rule in commercial agreements is that it would be presumed that the parties intended to create legally binding contracts. This presumption can be rebutted but the onus of rebutting this presumption is a heavy one. In some cases the parties may clearly show that they wish to suspend binding legal obligations until the happening of some prescribed event. The duty of this Court is to carefully examine all of the surrounding circumstances in order to reach a conclusion as to what the intention of the parties was having regard to the evidence. I have listened to and heard the plaintiff give evidence of the discussion initially with Mr Alderson in 2007 at a time when Mr Alderson was appointed as production manager. It is quite clear that Mr Alderson said that he was well acquainted with the plaintiff and that he highly respected for him as he was a "top driver". The Court also has heard evidence as to the amount of work which Roadstone were turning over in the quarry in Bunratty in 2007. It has been described as the height of the boom. There was mounting pressure to ensure the quarries output was high.

47. I prefer the evidence of the plaintiff to the evidence given by the defence witnesses. The plaintiff is clear and appears to me to be clearly a careful man and he wanted to ensure that before he committed himself to purchasing the new loader he had to have some guarantee that he would continue to be used as a contractor for the period that he was going to repay the purchase. It is also clear that the plaintiff received an increase of an hourly rate to approximately €41 per hour which is consistent with his evidence.

48. The defence have called Mr Alderson in relation to the agreement. Mr Alderson was only contacted in relation to this matter a number of weeks ago and he is trying to recall a period of time more than seven years ago. I also believe that the evidence given by Mr O'Dwyer was not clear and that Mr O'Dwyer's demeanour in giving evidence was not helpful to his cause. However the biggest fault in the defence case is in my view is that it has not called Mr Hankinson and it was he who had the authority to make and conclude agreements. Mr Hankinson was regarded as a man who was difficult to persuade.

49. The plaintiff has said that in his discussion with Mr Hankinson that he told him that "It is a five year term. Are you agreeing on that?" and Mr Hankinson said "Go away and purchase your machine there is no problem". It appears to me that the plaintiff acted upon that assurance and purchased the machine for €284,350.

50. The evidence of Mr Henchion in relation to his discussion with the plaintiff in 2008 suggests that, despite his evidence, that the defendant company were aware of their obligation to the plaintiff. If they felt there was no obligation they would not have needed to seek to rent the Komatsu loading shovel at €4,500 per month, particularly in the context of a declining amount of work taking place at the Bunratty quarry and it is interesting that in fact that suggested agreement was never acted upon by the defendant in that they continued to use the plaintiff with his loader to work for a further period of 15 months.

51. It is noteworthy that when the matter came for the conclusion of this contract it was two different people, Peter Mahon and Alan Quinn, who were the persons responsible.

52. I am also mindful of the correspondence from Messrs BCM Hanby Wallace dated 25th January, 2010 in which they identify that the plaintiff had consulted with the defendant to ascertain what their future works requirement might be. This appears to me to be evidence of awareness of the issues which were to the forefront of the plaintiff's mind at that time. I accept the evidence of the plaintiff and in those circumstances find in his favour.

53. The issue as to damages is somewhat complicated and it has not been helpful that the parties have not come to an agreement as to what the financial loss to the plaintiff has been. However arising from the documentation provided by the plaintiff's accountants and the booklet of pleadings dealing with *ACC v. Mr Hennigan* the position appears to be as follows:-

- 1) The ACC are owed €60,806.86 by the plaintiff. They have showed admirable restraint in holding their proceedings until the outcome of these proceedings. The initial amount owing was €140,806.86 but ACC sold the Komatsu in the sum of €80,000 together with VAT so that the indebtedness of the plaintiff in these proceedings to ACC was €60,806.86
- 2) Messrs Fitzpatrick & O'Dwyer, accountants, outlined that the amount lost by the defendant was in the sum of €274,554.50. Some of this money included VAT up to 1st September 2008 as the VAT on sub-contraction was then the obligation of the principle contractor. However the sum of €274,554.50 does not include the VAT element.
- 3) The plaintiff was employed by Clean (Ireland) Refuse and Recycling Company Limited and his income to the end of 2012 was €25,159.39. Deducting that from €274,554.50 leaves a sum of €239,396.82 for the two and a half years of the agreement. However it is clear that the likelihood was that the plaintiff would not have been in a position to do 50 hours per week due to the economic recession and in those circumstances I am proposing to award a sum of €200,000 for the two and a half years remaining of the agreement. That sum is subject to general taxes that would apply.

54. I have considered counsel for the plaintiff's application that I also make an award of general damages. The position is that it is clear that both the hours worked by the plaintiff from 2004 and in particular from 2007 and his subsequent loss of employment gave rise to such pressure that he has given evidence, for example, that his marriage ended. It appears to me that this has certainly been the consequence of both the boom and the subsequent collapse of the economy. The purpose of damages for breach of contract is to remedy the breach insofar it can be done by an award of damages and I do not make any award for general damages against the defendant in this case. I therefore award the plaintiff the sum of €200,000 which will be subject to general taxes that apply.