

THE HIGH COURT
IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED) AND
IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING
AND DEVELOPMENT ACT 2000

[2020 No.137 MCA]

BETWEEN

DONEGAL COUNTY COUNCIL
APPLICANT

AND

P BONAR PLANT HIRE LTD T/A BONAR'S QUARRY

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered on the 16th day of July, 2020

Introduction

1. In this application, the applicant is seeking an interlocutory injunction pursuant to s. 160 of the Planning and Development Act, 2000, restraining the respondent from carrying on what it maintains is unauthorised quarrying at a quarry situated at Calhame, Letterkenny, Co. Donegal.
2. The essence of the respondent's defence, is set out at paragraphs (14) – (18) of the affidavit sworn by Mr. Patrick Joseph Bonar, a director of the respondent, on 15th June, 2020. He accepts that in a decision dated 2nd April, 2019, An Bord Pleanála refused permission for the carrying out of quarrying works at the site. He stated that the respondent complied with that direction and ceased all quarrying and related activities in an area of the site, which he has called the "extended area".
3. The respondent states that he has continued to quarry the rest of the site, which he alleges had been used as a quarry prior to 1st October, 1964. He alleges that that area had been continuously used as a quarry since quarrying began in the area sometime in the 1930s. He states that the working of the existing quarry constitutes a continuation of the works that were reasonably contemplated when the works commenced prior to 1st October, 1964. He further states that the operation of the quarry has not intensified to such an extent as to amount to a material change in use that would require planning permission.

Background

4. The background to this case has been set out in extensive detail in the affidavit sworn by Mr. Martin McDermott, Planning Enforcement Officer and Executive Planner employed by the applicant, on 29th May, 2020. His account of the various steps that were taken in relation to works carried on at the quarry and in relation to various planning applications that were lodged over the years, has not been seriously disputed by the respondent.
5. It is accepted that there was a small quarry on part of the lands prior to 1st October, 1964. On 8th January, 2003, the previous operator of the quarry, Mountain Top Quarry Ltd., made an application for retention and extension of the existing quarry. On 28th June, 2004, An Bord Pleanála (hereinafter referred to as "the Board"), refused permission and noted that "any future application for retention and extension of this quarry should be accompanied by an environmental impact statement". Thus, in 2004, the Board was of

the view that this was a quarry that required to be the subject of an Environment Impact Assessment (EIA) under the EIA Directive.

6. The previous operators of the quarry, Mountain Top Quarry Ltd., provided information for registration of the quarry under s. 261 of the Planning and Development Act, 2000 on 8th April 2005, which was finalised by Donegal County Council on 26th October, 2007.
7. On 6th October, 2006, Mountain Top Quarry Ltd. lodged an application for retention permission for removal of topsoil and extension of the quarry. This was accompanied by an Environmental Impact Statement (EIS).
8. On 10th June, 2008, the Board granted planning permission to the quarry operator. Condition No. 2 attaching to that permission, stated that the permission was to operate the quarry for a period of five years "*unless a separate permission for a further duration has been granted within this period*". Condition No. 5 required the submission of landscape and restoration plans, which had to be implemented within 12 months of expiry of the planning permission.
9. On 12th December, 2012, the previous operator applied to Donegal County Council for an extension of the duration of the 2008 permission for a further five years. That extension was granted, whereby the 2008 permission was extended until 9th June, 2018.
10. In 2014 the respondent took over operation of the quarry.
11. On 11th January, 2018, the respondent made an application to Donegal County Council for "*the continuation of quarrying activities for a period of 10 years on a site of 7.3 hectares*", which represented an application covering the entire of the quarry site. On 12th July, 2018, planning permission was granted by Donegal County Council; however a third party appeal was lodged with the Board on 3rd August, 2018.
12. The 2008 planning permission expired on 9th June, 2018. The respondent ceased works at the quarry as of that date.
13. On 2nd April, 2019, the Board refused planning permission for the continuation of quarrying activities for two stated reasons: firstly, because the Board was not satisfied that the development would not adversely affect the integrity of the Leannan River Special Area of Conservation (SAC), a designated European site located 3.5 km from the quarry and, secondly, because the Environmental Impact Assessment Report submitted with the planning application was considered to be inadequate.
14. While there was no quarrying for an initial period from that date, quarrying operations recommenced on the site, in or around 26th April, 2019. Complaints had been received by the applicant from members of the public that quarrying works were being carried on at the site.
15. On 26th June, 2019 an Enforcement Notice issued to the respondent requiring the cessation of quarrying within six weeks. This notice was not complied with by the

respondent. On 13th February, 2020 the applicant issued District Court summonses in respect of the alleged offence of non-compliance with the enforcement notice, which was returnable to 5th May, 2020. The hearing of that matter was adjourned due to the Covid-19 pandemic.

16. In his affidavit sworn on 29th of May, 2020, Mr. McDermott stated that while site inspections carried out on 22nd June, 2018 and 19th October, 2018 had established that quarrying works had ceased during that period, subsequent site inspections following the receipt of a complaint by the applicant on 26th April, 2019, that unauthorised works were being carried on at the site, revealed that such works were being carried on by the respondent at the quarry. In this regard, Mr. McDermott referred to a site inspection that had been carried out by Mr. McFeely on behalf of the applicant on 31st May, 2019. He referred to the report that had been submitted by Mr. McFeely, which was exhibited to the affidavit sworn by him. It was clear from the observations made by Mr. McFeely at that inspection that the respondent was carrying out quarrying works on the day of the inspection, including rock-breaking, without planning permission.
17. It was also clear from the report that Mr. Patrick J. Bonar, refused to give any undertaking on behalf of the respondent, to cease extraction of stone and the processing of materials on the site. It was following that inspection that the enforcement notice was issued and served on the respondent on 26th June, 2019.
18. As appears from the affidavit sworn by Mr. McFeely, a further site inspection on 30th August, 2019 revealed that quarrying and quarrying related activities had not ceased; stone was being extracted by rock-breaking on the day of the inspection and stone was being stockpiled and processed on the lands.
19. On 25th March, 2020, Mr. McDermott carried out an inspection of the site. The reason for that inspection had been due to the receipt of complaints by the applicant from people living in the vicinity, that they were being disturbed by quarrying activities for long periods of time. At that inspection Mr. McDermott gave Mr. Bonar a letter from the applicant's solicitor to the respondent, calling on the respondent to immediately cease all quarrying activities at the site and threatening legal action if it did not do so.
20. Mr. McDermott also stated that on 25th March, 2020 he spoke to Mr. Bonar and informed him that he had no planning permission to carry out works at the quarry; to which Mr. Bonar stated that he was aware that the matter was due in court in May, but that the courts would not be working then and that "*he couldn't stop working as he had workers to keep employed, contracts to fulfil*" and advised that he "*would stop working when he got planning permission for a new quarry in Raphoe*". Mr. McDermott stated that he formally requested that all unauthorised quarrying and processing of materials should cease.
21. Mr. McDermott stated that at that inspection, Mr. Bonar stated to him that he had approximately 15 lorry loads of material leaving the quarry daily. Mr. McDermott observed two lorries being loaded and depart the site during his short inspection, which lasted approximately 30 minutes. The respondent further told him that he had been

operating at the quarry from 08:30 hours to 17:30 hours to fulfil a number of ongoing contracts. During the inspection, Mr. McDermott observed that quarrying was ongoing with materials being extracted by rock-breaking along the south-eastern quarry face and the processing of quarrying materials was ongoing, with two separate crushers/screeners in operation at two separate locations on the site. A variety of vehicles were operating and stockpiles of material were loaded onto two lorries, which then left the site. He observed six vehicles operating on the site; he also observed a further five lorries and one dump truck parked near the site office at the upper level of the quarry near the public road.

22. Mr. McDermott went on to state that on 11th May, 2020 he carried out a further inspection of the site, when he again observed a number of vehicles working at the site and he could hear the noise of rock-breaking machinery and could hear the screening and processing plant in operation on the lower level within the quarry. He noted a single digger manoeuvring in the distance near the large lagoon and the smaller of the two on-site screeners/processing plants. He again advised Mr. Bonar that the respondent had no planning permission to continue with the works at the site. Mr. Bonar replied that his situation had not changed since the last inspection on 25th March, 2020; that he could not stop working as he had workers to keep employed and contracts to fulfil and that he would stop when he got planning permission for his new quarry.
23. In a further affidavit sworn on 19th June, 2020, Mr. McDermott stated that he carried out a further site inspection on 16th June, 2020, when he observed rock-breaking being carried on at the quarry floor. Material was being extracted by rock-breaking, and was being loaded into dump trucks and transported to the on-site processing plant. He observed Mr. Bonar operating a loader, with which he was loading processed materials from the processing plant onto lorries for transport off-site and also transporting some material between the two operational processing plants.
24. On 22nd May, 2020 the respondent submitted an "*exit strategy/plan*" for the quarry from Mr. O'Domhnaill of Michael Friel Architects and Surveyors Ltd., in respect of the site. This was unacceptable to the applicant because it envisaged the continuing of works at the site until September 2020, which the applicant was not going to countenance having regard to the fact that it maintains that all permission to carry on works at the quarry had ceased as and from June 2018.

The Respondent's Position

25. Mr. Patrick Joseph Bonar swore an affidavit in this matter on 15th June, 2020. He did not disagree with the history of the planning aspects which had been set out by Mr. McDermott in his affidavits. As noted earlier, the essence of his defence to this application was set out in paragraphs (14) – (18) of that affidavit. His core argument was to the effect that, as works had been carried on at the quarry since the 1930s and certainly long in advance of 1st October, 1964, the respondent was entitled to continue carrying on works at the part of the quarry that had been in use prior to that date. He alleged that the permission which had been obtained in 2008 and which had lasted until June 2018, was effectively only in respect of an additional area to the original quarry, which he

referred to as the "extended area". He stated that on the expiry of the planning permission in June 2018, he had ceased all works on the extended area.

26. The respondent maintained that it was entitled to revert to the pre-1964 area and to continue carrying out quarrying works at that area. Mr. Bonar denied that the operation of the quarry had intensified to such an extent as to amount to a material change in use that required planning permission.
27. An affidavit was sworn by Mr. Michael Friel, architect, in support of the respondent's case, on 1st July, 2020. In the affidavit he stated that on the expiry of the planning permission on 9th June, 2018, the respondent simply reverted to the pre-1964 quarry area known as the "existing quarry", while all operations in the extended area ceased. He referred to the decision in *Fingal County Council v. William P. Keeling & Sons Ltd* [2005] IESC 55, where the court held that where an application for planning permission was refused, the making of such an application did not disentitle the applicants from maintaining that the development was in fact an exempted development. He stated that, while it was accepted that an application for retention permission was made, the respondent did not accept as a matter of law that that acted as a bar, or form of estoppel, preventing it from relying on the status of the quarry prior to 1st October, 1964.
28. Mr. Friel also stated that abandoning the quarry without the proper grading of the rock face, would represent a potential serious health and safety issue. He stated that the applicant had not dealt adequately, or at all, with the repercussions arising from same. He went on to state that the respondent was entitled to remain on the site for the purpose of operating the concrete batching plant for which planning permission remained valid.

Response of Mr. McDermott

29. In his supplemental affidavit sworn on 14th June, 2020, Mr. McDermott dealt with the assertions made by the respondent to the effect that it had ceased carrying out quarrying works in the extended area and had reverted to working exclusively within the envelope of the original quarry and that therefore such operations were covered by the fact that such works had been carried on there prior to 1st October, 1964. Mr. McDermott pointed out that as far back as January 2003, the previous quarry operator had made an application for retention and extension of existing stone quarry to include drilling, blasting, excavating, crushing and screening of rock at the site. The Board had refused that application and had advised that any future application for retention and extension of this quarry should be accompanied by an Environmental Impact Statement. When the previous quarry operator subsequently made a further planning application in October 2006, there was again an acknowledgement that the existing quarry operation was unauthorised. In the inspector's report in respect of that application, the inspector noted that "*the unauthorised status of the existing operation remains and is accepted as such by the first party (section 2. 3. 3 of the EIS)*".
30. Secondly, Mr. McDermott submitted that by virtue of the granting of the planning permission in 2008, the operator had created a single enlarged quarry on the site, which in planning terms constituted a single planning unit. This enlarged site was not a pre-

1964 quarry and was, from June 2008 to June 2018, governed and regulated by the terms and conditions of the relevant planning permission. This was further established by the boundary drawn on the site map accompanying the 2006 application for planning permission. In addition, when the respondent applied in January 2018 for permission to continue quarrying activities at the site, he did not restrict such application merely to the "extended area", but made an application in respect of the entire quarry. He submitted that the respondent's argument that upon the expiry of the planning permission, he could revert to operating the pre-1964 area of the quarry, was artificial and incorrect as a matter of law.

31. Mr. McDermott further stated that it was not in fact the case that the respondent had ceased carrying out works in the "extended area" of the site. By use of aerial photographs exhibited to his affidavit, he demonstrated that works were continuing on the entirety of the site, including on the "extended area".
32. Furthermore, he pointed out that the respondent had not complied with condition No. 5, which required it to carry out restoration works within 12 months of the expiry of the planning permission. The respondent was seeking to ignore the requirements of this condition by continuing to carry out quarrying without permission on part of the quarry on the basis of an alleged user of that area prior to 1964.
33. Mr. McDermott also pointed out that the respondent's averments that it had continuously carried on quarrying works in the original part of the quarry, was not correct. Works had ceased at the quarry after the expiry of the permission in June 2018 and had only recommenced after the refusal of further permission by the Board in April 2019.

Conclusions

34. In addressing the legal issues which arise on this application, the court must apply the well-known test set down in *Campus Oil v. Minister for Industry and Energy* [1983] I.R. 82, which established that the court must ask three questions: is there a serious question to be tried; are damages an adequate remedy and where does the balance of convenience lie?
35. The court has also had regard to the judgment in *Limerick County Council v. Tobin* [2005] IEHC 281, where in a case not dissimilar to the facts of this case, the court had to consider whether to grant interlocutory relief pursuant to s. 160 of the Act of 2000, in respect of the operation of a quarry, where the respondent relied on an alleged pre-1964 user of the lands as a quarry. In granting the relief sought, Peart J. stated at page 8 of the judgment:-

"I consider that even though the respondent may well, and in all probability will, suffer some losses by the granting of interlocutory relief pending the hearing of this case, it is a loss which will be quantifiable in the event that the respondent is correct and can prove his case. That prospect of losses does not in my view trump the need to maintain the status quo from this point onwards as far as the integrity of these sites is concerned. Once that integrity is destroyed, even partially, it

cannot be restored adequately thereafter, in much the same way as in Dunne, the integrity of the alleged national monument could not be restored in the event that the development was not halted pending the hearing of the case. Not to allow the relief sought in a case such as this would be to permit or at least encourage those intent on breaking the law in this way from taking their chances, so to speak, in the hope, if not the expectation, that by the time matters reach Court for the substantive hearing they will have been able to benefit significantly by their own misdeeds. That would set at naught the intention of the Oireachtas in enacting legislation such as this."

36. The court has also had regard to the dicta of Baker J. In *McCoy & South Dublin County Council v. Shillelagh Quarries Ltd & Others* [2015] IEHC 838, which also concerned the alleged unauthorised operation of a quarry. Although that judgment concerned the granting of permanent injunctive relief, rather than interlocutory relief. That case again concerned an argument that the works and activity at the quarry had commenced prior to 1964.

37. In the course of her judgment, Baker J. noted that in relation to quarries there was a public interest in ensuring that their operation was carried on in a lawful manner: see paragraph 72 of the judgment. It was also of relevance that the respondent in that case had ignored previous determinations in relation to the lawfulness of his operation of the site: see paragraph 82 of the judgment. She further held that where the likelihood of further damage to the environment had been established, the public interest in the observance of environmental legislation and of determinations made by the competent authorities was a weighty imperative that would guide her in the consideration of what relief should be granted to the applicant. The judge elaborated on the impact of European law and in particular its environmental components at paragraphs 84 and 85 as follows: -

"[84] I consider myself constrained further by the requirements of European Community law, and especially the EIA Directive and the Habitats Directive as each of these mandates that an Environmental Impact Statement is required in respect of the operation of this quarry.

[85] Accordingly, were I to refuse injunctive relief or grant injunctive relief with respect to some only of the operation, I consider that my decision would be one which could be characterised as a failure to respect the integrity of the environmental legislation, and allow the development to continue when it is unauthorised under Irish [sic] and when Irish law arises as a result of the obligations of Ireland and Community law."

38. Turning to the facts of this case, I am satisfied that there is a serious question to be tried. There is no dispute on the following facts: there was some use of part of the site as a quarry prior to 1964; the previous operators of the quarry lodged a planning application for retention and extension of the quarry in 2003; in its refusal the Board advised that an EIS would be required; in 2006 the previous operators submitted a new application for permission to operate 7.3 hectares as a quarry; permission was granted by the Board

subject to a time limit and to a number of conditions; that permission was extended for a further five years in 2013 until 9th June, 2018; the respondent took over operation of the quarry in 2014; it submitted a further application for extension of the permission to operate the quarry in January 2018; the respondent ceased operations at the quarry from 9th June, 2018 until after the refusal of its application by the Board in April 2019; the respondent, through Mr. Patrick Bonar, has refused to comply with the enforcement notice issued by the applicant, or with the verbal or written directions issued by its agents since that time; there is clear evidence, which is not contradicted by the respondent, that operations are still being carried on at the quarry up to the present time. The respondent, through Mr. Bonar, has indicated that it intends to continue with the operation of the quarry until its new quarry is operational in September 2020.

39. Insofar as there is a dispute between the parties as to whether the respondent is only working the original area of the quarry, or is carrying out works in the so-called "*extended area*"; that is not a matter that can be determined on an interlocutory application based on affidavit evidence. However, the court is entitled to note that there is strong evidence in the affidavit sworn by Mr. McDermott and in particular, in the aerial photographs exhibited thereto, that the respondent is working the entire site, including the so-called "*extended area*".
40. In considering the application for interlocutory relief, the court is also entitled to have regard to the strength of the legal argument put forward on behalf of the respondent, which is to the effect that upon the expiry of the previous permission in June 2018, the respondent was entitled to revert to a position of carrying on works on the original area of the quarry, on the basis that such works did not require planning permission, as they had been in existence prior to 1964.
41. In considering the strength of that submission, the court is entitled to have regard to the fact that the respondent has not adduced any evidence to establish the scope of the pre-1964 envelope, including the extent of the lands owned and quarried at that time. The court is also entitled to have regard to the fact that as far back as January 2003, the previous operators of the quarry proceeded on the basis that the existing quarry at that time, constituted unauthorised development and therefore an intensification of any pre-1964 quarry, such as to require planning permission.
42. It is also noteworthy that as of June 2004, the Board indicated that this quarry required to be the subject of an EIA. The applicant is correct in its submission that as a matter of European law, if an EIA is required, planning permission is also required.
43. The court is also entitled to have regard to the fact that by virtue of the implementation of the 2008 planning permission, the operator created a single, enlarged quarry on the site, which in planning terms, constituted a single planning unit. The enlarged quarry was not a pre-1964 quarry and was, from June 2008 to June 2018, governed and regulated by the conditions of the planning permission that issued in 2008.

44. In the course of argument at the bar, counsel for the applicant referred to the statement of law set out in "*Planning Law and Procedure*" 2nd Edition, by Perdue, Young and Rowan-Robinson, published by Butterworths in 1989, wherein the learned authors, having reviewed a number of English cases came to the conclusion that where a planning application was submitted in respect of lands in respect of which there may have been an earlier exempted user, the carrying out of development on the land in consequence of receiving planning permission, created a "*new planning unit*" or the beginning of a "*new chapter of planning history*", the consequence of which was that the previously existing use rights attaching to the land in question were extinguished. The learned authors stated as follows at page 113:-

"As mentioned above, judges have sometimes spoken, in the context of the extinguishment of existing use rights, of the creation of a 'new planning unit', sometimes of a 'new chapter in planning history' being started. Any difference between the terms is, it seems, largely a matter of semantics. The important point is that both phrases are used to describe the situation where as in the Prossor, Leighton & Newman and Petticoat Lane Rental cases, a change in the physical nature of premises or in their planning status is so radical as to give rise to the inference that any prior use is being given up and a new planning history begun. In effect the slate is wiped clean."

45. That such was accepted by the respondent to be the state of affairs on the ground, is confirmed by the fact that when the respondent applied in January 2018 for permission to continue quarrying activities on the site after the expiry of the 2008 permission in June 2018, the application was not confined to the part of the quarry that Mr. Bonar now refers to as the "*extended area*". Rather, it applied for planning permission for the continuation of quarrying activities for a period of 10 years on the entire site: "*Development consisting of (a) the continuation of quarrying activities for a period of 10 years on a site of 7.3 hectares by lowering the floor of the existing quarry to 132 m AOD, and (b) revised opening hours*".
46. The court can also have regard to the fact that condition No. 5 of the planning permission granted in 2008, clearly contemplates and requires the cessation of quarrying and the taking of steps for land restoration on the site once that planning permission had expired, in the absence of any further planning permission having been granted. This condition continues to apply after the expiry of the planning permission, pursuant to s. 40 of the 2000 Act. It is not in dispute that the respondent has not complied with this condition, but instead seeks to cherry pick from the 2008 permission.
47. The respondent's argument that it is entitled to continue operations on the site of the original quarry, is considerably weakened by the fact that it ceased works in the quarry upon the expiration of the permission in June 2018 and did not attempt to recommence such works until after the refusal of its application for further permission by the Board in April 2019. The court is satisfied that it is entitled to take account of all of these matters in reaching its decision on this application.

48. In terms of the adequacy of damages, the court accepts the dictum of Peart J. in the Tobin case in this respect. The court is satisfied that if an interlocutory injunction were granted and if the respondent is ultimately successful at the trial of the action, his losses will be easily quantifiable by reference to previous trading records and the applicant will be in a position to satisfy any award of damages that may be made in favour of the respondent.
49. On the other hand, if an injunction is refused, the court would be encouraging a person to flout the planning laws, which are designed to protect the public interest and would be ignoring the environmental issues which clearly arise in this case, given the nature of the works carried on at the site and its proximity to the Leannan River SAC, with possibly permanent and irreversible adverse consequences thereto. In the circumstances, damages would be an adequate remedy to the respondent, but would not be an adequate remedy to the applicant.
50. The court is of the view that having regard to the application for retention and extension put in by the previous owners in 2006; having regard to the planning permission that was granted in 2008 and having regard to the terms of the permission sought by the respondent in January 2018 and the fact that he ceased works at the quarry from June 2018 to April 2019, it is stretching credibility to assert that the respondent genuinely believes that it is entitled to revert to the pre-1964 operation of the site, either in terms of its location, or in terms of the intensity of the works carried on thereat. The court is satisfied that any pre-1964 operation of the quarry, was superseded by the permission granted in 2008 and extended in 2013.
51. The clearly stated intention of the respondent as expressed by Mr. Boner, is to continue operating the quarry so as to fulfil its contractual commitments until it is in a position to commence operations at a new quarry in September 2020. The respondent, through Mr. Bonar, has articulated a clear intention to flout the planning laws and the environmental provisions contained therein, until it can carry on its commercial activities at another location.
52. In these circumstances the Court is satisfied that the balance of justice lies in favour of the grant of interlocutory injunctive relief against the respondent. The applicant is entitled to the reliefs sought at paragraphs (1) and (2) of the notice of motion.