O'CONNOR - HARRINGTON 1984/69 m.c.a
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THE HIGH COURT

BETWEEN

THOMAS A. O'CONNOR AND SPOLLEN CONCRETE GROUP LIMITED

APPLICANTS

AND

FRANK HARRINGTON LIMITED; FRANK HARRINGTON (BUILDING AND CIVIL ENGINEERING) LIMITED; NORTHERN DREDGING AND SALVAGE (IRELAND) LIMITED; ROBERT BROWN AND RYDENE TRADERS LIMITED.

RESPONDENTS

Judgment of Mr. Justice Barr delivered the 28th day of May 1987.

THE FACTS

A stone quarry has existed for upwards of 100 years at Scarden Mor off the Sligo-Strandhill road and about three miles from the town of Sligo. There was evidence that stone was drawn from it in connection with the building of Sligo Cathedral in the mid nineteenth century and it seems to have been used intermittently from that time, mostly in connection with the supply of stones to local authorities for road building and other purposes. In 1984 the quarry was owned by Mr. Robert Brown (the 4th respondent) and it had been in the ownership of the Brown family for many years at that time. It appears that the quarry was in regular use in the 1940's and 1950's and in the first half of the next decade. It may not have been in actual use on 1st October, 1964 (a date crucial to these proceeding) but the evidence suggests that the then

owners of the quarry probably intended then that it should continue in use and it is likely that further quarrying took place after that date. There was abundant evidence to establish that no quarrying was done from in or about the mid 1960's (save for the removal without use of explosives of a small sample of rock for the Board of Works in 1972) until 1984. In that year a large quantity of rock was required by the first three respondents in connection with a major engineering contract at Sligo harbour. One of those involved in that operation was Mr. William Hosford. He inspected the quarry and found that it was suitable for his purpose. He was told by Mr. Brown that it had been used down the years by Sligo County Council and other parties until the 1960's. It was evident to Mr. Hosford that the quarry had not been used for many years and that planning permission for its reopening might be required. He caused inquiries to be made by his quantity surveyor, Mr. Patrick Carter, from the Secretary of the Planning Department, Sligo County Council. Mr. Carter wrote to the latter on 6th June, 1984 and in course of his letter stated

> "My client, Mr. Bill Hosford, has instructed me to write to you regarding permission to use Mr. Bobby Brown's quarry at Hill Road, Strandhill Road, Sligo for the excavation of stone to supply the Sligo Harbour dredging contract.
>
> Mr. Hosford is a director of the firm which has won the dredging contract. He and his fellow directors will be signing the contract for the job this coming Friday.
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> The quarry in question has been used throughout

the 1940's, 1950's and into the late 1960's. The purpose of this letter is to request verification that there is no objection to the continued use of this quarry.

I would respectfully request that this matter be treated urgently as the successful signing of the contract on Friday may depend on the contractor having his assured source of stone...."

Patrick Carter and Associates received a reply from the County Council dated 8th June, 1984 in the following terms:-

"I refer to your letter of the 6th June, 1984 in regard to Brown's Quarry at Millroad, Strandhill Road Sligo and I wish to inform you that this Council would have no objection to the resumption of use of this quarry for the purpose for which it was formerly used, subject to the condition that there would be no intensification of the use of the quarry from that obtaining when it was previously used."

Mr. Hosford entered into a contract with Mr. Brown to purchase the quarry on 4th July, 1984. Extensive quarrying commenced soon afterwards in connection with the Sligo harbour contract. A company, Rydene Traders Limited (Rydene) took over Mr. Hosford's interest in the contract and in fact has been responsible for quarrying operations at Scarden Mor at all material times. It has been added as a Respondent. None of the other Respondents have any responsibility for the quarrying operations complained of in these proceedings and no relief is sought against them.

The evidence establishes that the quarrying carried out by

Rydene in connection with the harbour contract was a major operation and it probably exceeded in intensity any previous quarrying at Scarden Mor though this is difficult to ascertain having regard to the lapse of time and the absence of detailed records relating to activities there twenty to fifty years ago. Rydene's work involved occasional extensive simultaneous blasting along the cliff face which commenced on 18th July, 1984 and was repeated thereafter at about fortnightly intervals. There is a narrow link road about eleven feet wide which runs from the Strandhill - Sligo road to the strand at Coney Island. This link road was used by heavy lorries to carry spoil from the quarry to the main road and then to Sligo harbour. It appears that Rydene built three lay-bys to facilitate vehicles gaining access to or from the strand, Coney Island and other properties having access to the link road. Rydene relied upon the correspondence with the Planning Department of Sligo County Council to which I have referred as authorising the reopening of the quarry for the purpose envisaged and they did not apply for formal planning permission in that regard.

The first applicant is a farmer who resides on the outskirts of Sligo town about two and a half miles from the quarry. His farm comprises a number of different holdings one of which is relevant to these proceedings, namely, about two hundred acres on Coney Island which he acquired in or about 1982 and which he uses for the rearing of cattle and sheep. The island can be reached only at low water and it is the practice of the applicant to drive livestock to and from his holding there occasionally. He uses the link road for that

purpose. The applicant first became concerned about the quarry soon after Rydene commenced operations there in July, 1984. On one occasion while bringing livestock from the island he was held up for about half an hour while blasting was in progress. About a week later he was delayed for an hour or so for the same reason and on a third occasion he was held up by the Garda Siochana on Strandhill Road while blasting was in progress. Apart from a general contention that Rydene's activities interfered with tourism in the area (a point which was not pursued at the hearing before me) two other complaints have been made by the applicant i.e. that heavy lorries traversing the link road about once every six minutes have hindered his access to Coney Island and that his intention to develop the island by building holiday homes there at some future date has been frustrated by nuisance emanating from the quarry and the user thereof.

The applicant stated in evidence that immediately following the first time he had been impeded by blasting, he consulted his solicitor, Mr. McCanny. No attempt was made either by the applicant or his solicitor at any time to negotiate with Rydene, or any of the respondents, an amicable solution of the problem created by the blasting operations at the quarry, even though the applicant appears to have understood then that the quarry had been reopened solely in connection with the Sligo harbour contract and, therefore, the duration of quarrying would be limited and would not have long-term harmful effects in connection with user or development of his lands at Coney Island. In the premises it seems probable that the applicant and his solicitor would have appreciated that the applicant's

immediate difficulty could have been resolved by an arrangement with Rydene to carry out their blasting operations at times which would coincide with high water at Coney Island when the movement of livestock to or from there would not have been possible. Interference with the applicant's user of the link road caused by heavy vehicles also seems to have been a problem which had reasonable prospects of resolution by negotiation.

Spollen Concrete Group Limited (Spollen) is a company engaged in substantial stone quarrying operations and numerous related activities in County Sligo and elsewhere in Ireland. They are major competitors of Rydene for the large scale supply of stone. Mr. Michael Ryan is the managing director of Spollen. He has stated in evidence that he learned from his Sligo manager, Mr. Noel Barrett, that the quarry at Scarden Mor was about to be reopened in connection with the supply of stone for the harbour works at Sligo. Mr. Ryan visited the quarry in early July, 1984 before work had commenced there. He has sworn that Mr. Barrett, who knew the applicant, had heard that the latter was concerned about the reopening of the quarry and wished to take some form of legal action in that regard but was worried about the costs involved. Spollen agreed to contribute towards the applicant's costs and ultimately decided to take over the entire of his liability for costs. It is not in dispute that from the beginning Spollen regarded Rydene as a serious competitor and also one which had, in their view, an unfair commercial advantage in that, not having obtained formal planning permission, Rydene was thereby absolved from substantial obligations and restrictions which Spollen contends

would have been imposed by the Planning Authority with the result that the cost of Rydene's operation was less than it ought to have been.

It is conceded that Spollen was at all times well aware that, like the applicant, they were entitled to make application to the Court on foot of Section 27 of the Local Government (Planning and Development) Act, 1976 for an Order prohibiting the operation of the quarry at Scarden Mor by Rydene and that, prima facie, they would be entitled to such relief if they could satisfy the Court that Rydene's operation constituted an unauthorised development or an unauthorised use of the land. However, I am satisfied from the evidence that as soon as Spollen became aware in July 1984 that Rydene was about to commence quarrying at Scarden Mor, they decided in the first instance not to have an application under Section 27 made on their own behalf but instead to seek out and fund some local person who was in a position to satisfy the Court that he was suffering an immediate hardship or loss through the operation of the quarry. In course of his evidence Mr. Barrett stated that he heard that the applicant was taking legal advice about Rydene's operations and he went out to see him. He met the latter on the road and told him that Spollen would give him money towards running the case. At that stage all concerned believed that a simple Section 27 application to this Court grounded on an appropriate affidavit was all that would be required to obtain the requisite relief. Mr. Barrett did not indicate precisely the amount which Spollen was willing to contribute towards the applicant's costs but in fact he had been authorised to pay up to £1,000 in that regard. The

applicant's evidence confirmed that of Mr. Barrett. He said that his meeting with the latter took place some time in July, 1984 after he had consulted Mr. McCanny; that there was a discussion about the cost of running the case and that he was told by Mr. Barrett that if he needed financial assistance Spollen would provide it. The applicant informed his solicitor about that offer on the following day.

The applicant's affidavit grounding his original application to this Court was sworn on 2nd August 1984 and the Notice of Motion in which he sought an Order relating to the quarry and relief under Section 27 of the 1976 Act bears the same date. I am satisfied that financial support offered by Spollen probably was the determining factor which caused the applicant to launch and prosecute the present proceeding. If no such support had been offered, the more likely outcome is that the applicant would have adopted the alternative course of opening negotiations with the object of bringing about a mutually acceptable arrangement with Rydene as to blasting at the quarry which would have avoided any interference with him in taking livestock to and from Coney Island at low water.

The applicant's motion came on for hearing at a vacation sitting of this Court before Mr. Justice Egan on 8th August, 1984. Replying affidavits on behalf of the respondents were sworn by Mr. Robert Brown and Mr. Fergus A. Murphy. Mr. Brown deposed to the sale by him of the lands comprising the quarry to Mr. Hosford and he exhibited the contract for sale dated 4th July, 1984. Mr. Murphy, a director and secretary of the 3rd respondents, deposed to the fact that his company had been awarded the Sligo harbour contract and were then in the

course of carrying it out. He described the nature of the contract and deposed to the fact that a large government grant relating to it was conditional upon the works being completed on or before 31st December, 1984 and that, furthermore, his company would be liable to penalties if the contract was not completed on time. Mr. Murphy also exhibited the correspondence between Patrick Carter and Associates and the Planning Department of Sligo County Council to which I have already referred and he explained why a decision was made to obtain stone for the harbour contract from the Scarden Mor quarry rather than from certain other quarries in County Sligo including that operated by Spollen. It was not disclosed to Mr. Justice Egan that the applicant was receiving any financial backing from Spollen or that the latter had any interest whatever in the proceedings. Mr. Justice Egan refused the application and reserved costs.

Quarrying at Scarden Mor in connection with the Sligo harbour contract came to an end in or about the month of October, 1984. Some quarrying continued thereafter but on a limited scale. At subsequent hearings before Mr. Justice Barron on 4th February, 1985 and Mr. Justice Lardner in April, 1986 the existence of the Spollen interest was not disclosed to the Court. As a result of increased quarrying by Rydene at Scarden Mor the proceedings were re-activated by a Notice of Motion dated 19th February, 1986 in which the applicant sought an Order adjourning the proceedings for plenary hearing. He swore an affidavit in that connection on 23rd April, 1986 in which he sought to explain delay in proceeding with his complaint against Rydene which he alleged

resulted in part from his inability to put his solicitor in funds to continue the litigation. In that affidavit he also disclosed for the first time the interest of Spollen in the case, though it seems to be implicit from his deposition that Spollen's agreement to finance the litigation on his behalf was of recent origin. In fact this is untrue having regard to the subsequent evidence viva voce of Mr. Barrett and the applicant. It also emerged from Mr. McCanny's evidence that he asked for and received from Spollen on 19th June, 1985 a payment of £1,000 on account of the applicant's costs. Since then further payments have been made to Mr. McCanny on Spollen's behalf and, as previously stated, they have agreed to underwrite all of the applicant's costs in these proceedings. Mr. O'Connor's affidavit of 23rd April, 1986 is seriously misleading to say the least of it. I am satisfied that from the beginning he fully appreciated that Spollen was behind him and would finance whatever litigation was necessary to close the quarry at Scarden Mor or hinder Rydene in the operation of it. I am also satisfied that neither the applicant or Spollen would have sought to reopen the proceedings, or bring a new application, but for the fact that in or about late 1985 Rydene obtained another major quarrying contract and intensification of user was anticipated.

Motions came on for hearing before me on 24th and 31st July, 1986. Spollen was added as an applicant and Rydene as a respondent. Rydene undertook not to quarry at Scarden Mor until after 20th October, 1986. Numerous further affidavits had been sworn and served on behalf of each side and notices to cross-examine the deponents had been served in respect thereof. The plenary hearing commenced on 25th November and

continued until 3rd December, 1986.

In essence the case put forward by Mr. O'Connor was that which he had made from the beginning, i.e., Rydene's interference with his user of the link road and his apprehension that continuing blasting operations at Scarden Mor might jeopardize the possible future delelopment of his lands at Coney island for holiday housing and other such amenities. It was not contended by or on behalf of either applicant that there should be no quarrying at Scarden Mor. It was submitted on behalf of both that Rydene's operation ought to have had formal planning permission or, alternatively, that it amounted to an unauthorised development within the meaning of the Planning Acts.

It was stated on Spollen's behalf that it was not seeking to avail of its rights under Section 27 (1) merely as a vehicle to inhibit a competitor, but that the development of the quarry by Rydene constituted unfair competition because by failing to apply for formal planning permission as required by the Planning Code for an alleged new operation or, alternatively, for a much intensified user of the quarry, Rydene had avoided restrictive provisions as to the operation of such quarries which planning authorities normally impose and had imposed on Spollen in relation to their quarries. It was contended that compliance with such conditions involves substantial capital outlay and continuing expense which is a substantial cost factor affecting the price of the end product. No evidence was led as to the nature of such conditions which might have been imposed or as to the capital outlay or costs involved in complying with them or regarding the unfair disadvantage in

which Spollen allegedly found itself through the activities of Rydene at Scarden Mor.

THE LAW

Section 27 (1) of the 1976 Act is as follows:-

27 (1) "Where -

(a) development of land, being development for which a permission is required under Part IV of the Principle Act, is being carried out without such a permission, or

(b) an unauthorised use is being made of land,

the High Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order prohibit the continuance of the development or unauthorised use".

It is not in dispute that when Rydene commenced quarrying at Scarden More in July, 1984 in connection with the Sligo harbour contract, either or both applicants were, prima facia, entitled to seek and obtain relief under Section 27 (1) if they were successful in establishing to the satisfaction of the Court that Rydene's operation required planning permission under Part IV of the Local Government (Planning and Development) Act, 1963 or, alternatively, that it constituted an unauthorised use of land. It is not necessary for an applicant who seeks an Order under Section 27 (1) to show that he has suffered loss or that any right of his has been or will be infringed by the development of which complaint is made. To that extent it differs from the equitable remedy of injunction

where the party seeking such an Order must satisfy the Court that he has a sufficient interest in the relief sought - see Hallsbury, 4th edition, Volume 24 paragraph 1041. Apart from that distinction, the remedy provided by Section 27 (1) is far-reaching and broadly similar in nature to that afforded by the equitable relief of injunction. In practice both are often vehicles for the vindication of the property or commercial rights or interests of the applicant. Both also have a vital common feature. In each case the remedy sought is at the discretion of the Court. It is not mandatory on the Court to grant relief on a Section 27 application because an unauthorised development has been proved - see the judgment of Barrington J. in Nancy Stafford and Another .v. Roadstone Limited delivered on 17th January, 1980 (unreported but referred to in extenso in "A Source Book on Planning Law in Ireland" by O'Sullivan and Shepherd pp 367/8). In course of the judgment Barrington J., having quoted Section 27(1) continues

> "A question arises as to whether the word "may" as used here is mandatory in the sense that the High Court "must" when an unauthorised use or unauthorised development is established, issue an injunction. Traditionally courts of equity have always retained a wide discretion in themselves as to whether they should or should not issue an injunction. They have always retained the right to refuse an injunction to a plaintiff who has not come into court with clean hands or to accept an undertaking, in lieu of an injunction, in an appropriate case.
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> Sub-section 2 of the section gives the court

> jurisdiction to issue mandatory orders directing the carrying out of certain works. While the word "injunction" is not used in this section it is clear that the section confers on the High Court jurisdiction to issue both restraining and mandatory injunctions. In these circumstances it appears to me that the word "may" allows to the High Court, at least the discretion which the High Court has traditionally held in relation to the issue of injunctions."

I respectfully concur in the view of the learned judge set out in the foregoing passage. It is well settled since time immemorial that where a party seeks equitable relief by way of injunction the Court in exercising its discretion takes into consideration the conduct of that party and relief will be refused if the plaintiff does not come to the Court with clean hands. I am satisfied that this principle applies with equal force to applications made under Section 27 of the 1976 Act. In seeking such relief an applicant should put before the Court fairly and with candour all facts known to him which are relevant to the exercise of the Court's discretion and he should satisfy it about his bona fides and the true purpose of his application. I am satisfied that in the present case both applicants have failed to discharge that obligation. I have no doubt that for so long as it was possible to do so Spollen sheltered behind Mr. O'Connor and caused an application to be made to the Court under the section which was seriously misleading and the primary motivation for which had not been disclosed. Mr. O'Connor allowed himself to be used as a tool in this deception and even as the truth began to emerge when he

wished to reactivate his application in 1986 he again misled the Court about his connection with Spollen and in particular that they had agreed from the beginning to fund the application which they had encouraged him to bring. In the premises Mr. O'Connor is not entitled to the relief which he seeks. I am satisfied that any difficulty which occasional blasting at Scarden Mor may cause to the movement of livestock to or from Coney island and/or regular user of the link road by heavy vehicles can be readily dealt with by negotiation with Rydene. In the event that a reasonable solution to these problems acceptable to both sides does not emerge, then it is open to Mr. O'Connor to seek equitable relief to restrain interference with his rights.

As to the relief sought by Spollen; I am satisfied it decided that instead of making its own application as it was entitled to do, it would remain in the wings and would encourage and stimulate Mr. O'Connor through an offer of financial assistance to make application under Section 27 (1) for the purpose of defeating or hindering Rydene in the operation of the quarry thus laying the ground for the deception of the Court to which I have already referred. By taking that course I am satisfied that Spollen also has disentitled itself to the relief which eventually it claimed at a late stage of the proceedings.

In arriving at my decision to exercise discretion against the applicants I have also taken into account the conduct of Rydene and the other respondents. It is evident from the correspondence with the Planning Department of Sligo County Council in June, 1984 to which I have already referred regarding the reopening of the quarry at Scarden Mor to provide stone for the Sligo harbour contract that the position was

fairly put to the local authority. In reply, the latter gave its blessing to the proposed project subject to the proviso that there would be no intensification of the previous user. Bearing in mind that the precise extent of previous operations at the quarry varied and was difficult to ascertain because of the lapse of time since it had been in operation prior to 1984, it seems to me that Rydene was entitled to proceed on the basis that the local authority had no objection to the extent of quarrying which would be entailed in connection with the harbour contract of which in all probability it would have had local knowledge. Accordingly if, contrary to the attitude adopted by the authority, planning permission was required by law in connection with the reopening of the quarry (and I make no finding in that regard) the absence of planning permission was an innocent and understandable omission in the circumstances of the case and would have entitled Rydene to a reasonable opportunity, if necessary, to put its house in order by obtaining the requisite permission.

Other issues have been raised in these proceedings regarding (a) whether in the circumstances the conduct of Spollen amounted to the tort of maintenance; (b) whether quarrying at Scarden Mor had been abandoned prior to its acquisition by Rydene; (c) whether it should be deemed to have been in operation on 1st October, 1964, the appointed day provided for in the 1963 Act and (d) whether there has been an intensification of user of the quarry since it was acquired by Rydene. In view of my decision not to grant relief under Section 27(1) to either applicant, for the reason stated, it is unnecessary to make any finding on these issues.

Approved R.B. 28/5/87