



THE COURT OF APPEAL

UNAPPROVED

Record No.: 2019/215

Neutral Citation: [2022] IECA 66

Faherty J.

Collins J.

Binchy J.

BETWEEN/

**BALLYMORE RESIDENTIAL LIMITED AND CROSSWINDS COTTAGE
LIMITED**

PLAINTIFFS/RESPONDENTS

- AND -

**ROADSTONE LIMITED, CRH PUBLIC LIMITED COMPANY, MURPHY
CONCRETE (MANUFACTURING) LIMITED AND WILLIAM MILEY LIMITED**

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Binchy delivered on the 16th day of March 2022

1. In these proceedings the respondents, who are the plaintiffs in the proceedings, claim indemnity and contribution from the defendants in respect of any liability that they, the respondents, may be found to have to the plaintiffs in other proceedings issued against the respondents by a number of individual homeowners in a development constructed by the

respondents at Portmarnock, County Dublin, and known as Drumnigh Wood Estate (the “Development”). The Development, which comprises 145 houses, was constructed by the respondents between November 2001 and August 2007. In the course of constructing the Development, the respondents used stone products of varying grades supplied by the first, third and fourth defendants. An earlier judgment of the High Court in these proceedings records that in excess of 80% of these products were supplied to the respondents by the first named defendant, one of the appellants in this appeal (where appropriate, I shall refer to all defendants collectively as the defendants, and I shall refer to the first and second named defendants as the “appellants”). The second named appellant was joined to these proceedings in its capacity as a guarantor of the liabilities of the first named appellant. When referring to the first named appellant only hereafter, I will refer to it as “Roadstone”.

2. Not very long after the construction of the Development, homeowners began to complain of structural defects. This led to the issue of proceedings, against the respondents who in turn issued the within proceedings, in May 2016, against the defendants, claiming indemnity and contribution from the defendants herein, in respect of all losses, howsoever arising, that the respondents may suffer arising out of the supply by the defendants to the respondents of stone infill for use in the Development. Soon after the issue of these proceedings (on 3rd June 2016) - before the service of a statement of claim - the respondents issued a motion pursuant to O. 50, r. 4 of the Rules of the Superior Courts, seeking, *inter alia*, an order permitting inspection of certain lands of Roadstone and the third named defendant, the lands concerned being quarries from which stone products were extracted and supplied by those defendants to the respondents for use in the Development. This motion first came on for hearing before Murphy J. in May 2017, and on 28th July 2017 she handed down her first of two judgments relating thereto, which judgment was not appealed.

3. Before proceeding further, it is useful at this juncture to set out the provisions of O. 50, r. 4 RSC:

“The Court, upon the application of any party to a cause or matter, and upon such terms as may be just, may make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid may authorise any person to enter upon or into any land or building in the possession of any party to such cause or matter and for all or any of the purposes aforesaid may authorise any samples to be taken or any observations to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.”

4. In her judgment of 28th July 2017, Murphy J. related that fifty of the houses in the Development had been remediated pursuant to an insurance bond provided by the respondents at the time of the sale of the houses, and the insurers underwriting that bond, in exercise of their rights of subrogation under the bond, then issued proceedings as against the first and third named defendants in respect of those claims. Separately, more than thirty additional homeowners (whose claims for one reason or another were not, as I understand it, covered by the bond referred to above) have issued proceedings against all the parties to these proceedings claiming damages arising out of defects in their houses which defects are claimed to have arisen owing to the phenomenon known as pyritic heave.

5. So far as Roadstone is concerned, its lands were specifically identified in the motion, and included large quarries located at Belgard, Tallaght, Dublin 24; Huntstown, Finglas, Dublin 11 and Feltrim, Swords, Co. Dublin, as well as three other Roadstone quarries, in respect of which the application was later withdrawn. In addition to seeking an order for inspection, the notice of motion sought an order entitling the respondents to take and remove

samples of rock including by the drilling of rock, as well as an order requiring the first named appellant to provide “*such reasonable cooperation and assistance as the plaintiffs and their respective servants and/or agents may reasonably require in order to complete [the inspection and taking of samples].*”

6. Very similar orders were sought as against the third named defendant, the only difference being that the respondents sought an order directing that defendant to identify the lands from which aggregate and crushed rock products had been supplied by it, the third named defendant, to the respondents, and thereafter to facilitate inspection of those lands.

7. These proceedings have given rise to numerous interlocutory applications and have, for several years, been the subject of case management by the High Court, under the direction of Murphy J. This motion for inspection was initially heard over three days, on 30th May, 31st May and 1st June 2017. The motion was opposed by the appellants, principally in the grounds that it was premature pending closure of the pleadings (as I mentioned above, the respondents had not yet delivered a statement of claim in the proceedings at the time they issued the motion, though they had done so by the time the motion came on for hearing). The judgment of 28th July 2017 records that the appellants also opposed the motion on the grounds that it was unnecessarily invasive and that the parameters and mode of inspection were unclear. At para. 2 of the judgment, when describing the relief sought as against Roadstone, the trial judge stated:

“In addition the plaintiffs sought an order directing the first defendant to cooperate with the inspection by identifying the location in its various quarries from which stone supplied to the plaintiffs had been sourced.”

This passage was repeated almost verbatim at para. 16 of the same judgment, and this issue – the identification of the locations within the Roadstone quarries from which stone was extracted and supplied to the respondents for use in the Development – is now the sole

surviving issue arising out of the decisions of the High Court on the respondents' motion of 3rd June 2016. More specifically, the issue is a later order made by Murphy J., on 11th April 2019, following upon a second judgment on the motion delivered by her on 21st February 2019, directing such identification, which order is the subject of this appeal.

8. In her judgment of 28th July 2017, Murphy J. noted that no application had been brought as against the fourth named defendant by the respondents, from which she inferred that inspection facilities had been agreed with that defendant. She noted (at para. 22) that samples had already been taken by the respondents from the subfloors of the houses allegedly affected by pyritic heave, and that the appellants and the third named defendant had been facilitated in the taking of samples at the same time. She also noted that the appellants' expert, a Dr. Kelly, had averred that samples taken from two houses had been analysed, and those samples did not come from the Roadstone quarries. From this evidence, the trial judge inferred that it is possible to identify the precise source of subfloor infill in each house.

9. The trial judge noted that the respondents had used deliveries of stone from all three suppliers as they arrived on site, for all purposes for which stone was required in the Development, including for subfloor stone infill in houses. She also noted that the respondents had no records as to whose products were used in any particular house, and the respondents were therefore hampered in identifying the source of any reactive framboidal pyrite present in the subfloor infill. It is this type of pyrite that can give rise to problems in dwellings, by reason of its propensity to expand in damp conditions. The defendants, on the other hand, had already been given access to the subfloor infill of the allegedly affected houses, and had had the opportunity to analyse it and compare it to the stone in their quarries.

10. The trial judge further noted that, by the time the motion had come on for hearing, the third named defendant had identified the relevant quarry from which it had supplied stone.

The trial judge, having considered relevant authorities (to which I refer below) then conducted a balancing exercise, weighing, on the one hand, the right of the respondents to litigate their claim, and on the other the right of the defendants to have their property rights interfered with as little as possible. At paras. 29 and 30 she said:

“29. ...the Court asks itself what is the least intrusive inspection which will satisfy the plaintiffs’ need and entitlement to obtain evidence necessary to permit it to pursue its claim, while interfering to the least possible extent with the rights of others?”

30. It appears to the Court that this can best be achieved by making an order now for the inspection and sampling of the Murphy quarry at Hollywood. Unlike the Roadstone quarries, this is not a working quarry and is currently being used for landfill. Since drilling is not required, there is no danger of deleterious substances leaching into the water table. By contrast, inspection of Roadstone’s quarries would require interference in working quarries and would potentially require ancillary orders directing disclosure of various matters such as quarrying sites at the relevant times.”

11. The trial judge concluded that the best course at that time was to make an order as against the third named defendant only. She considered it possible that if inspections of the quarries of the third and fourth named defendants were to proceed, then by a process of elimination it might be possible to identify those houses in the construction of which the Roadstone’s products were used. In short, it appears that the trial judge considered that the outcome of the inspections to be carried out on the lands of the third and fourth named defendants would have a significant bearing on such orders as might be required to be made in respect of the Roadstone quarries. It was even possible such orders might not be required at all.

12. Accordingly, the motion was then adjourned as regards the appellants. For the purpose of what subsequently transpired, and for the purpose of this judgment, the references at paras.

2 and 16 of her judgment to the identification of sites within the Roadstone quarries from which stone supplied to the respondents had been sourced, and the reference in para. 30 to identification of quarrying sites, is of some importance.

13. In the course of her judgment, the trial judge considered the principles relevant to applications advanced pursuant to O. 50, r. 4 RSC and relevant authorities in which the order has been considered, such as *Bula Ltd. v. Tara Mines Ltd. (No.1)* [1987] IR 85 and *James Elliot Construction Ltd. v. Lagan & Others* [2015] IEHC 631. While I return to these in due course, the issue of law for determination on this appeal is very different to the issue determined by the trial judge in her decision of 28th July 2017.

Judgment of High Court, 21st February 2019

14. In due course, the motion was re-entered and was listed for hearing again in July 2018, when it did not conclude. It was then listed for hearing on 23rd October 2018 and concluded the following day. In the period since the first judgment of 28th July 2017, the respondents had inspected the quarry of the third named defendant and, having taken samples, it transpired it was not possible to identify with sufficient precision the presence of materials supplied by Roadstone in the houses allegedly affected. For this reason, the respondents wished to proceed with their application to inspect the Roadstone quarries.

15. In the meantime, there had been progress on the pleadings since the decision of Murphy J. of 28th July 2017. At that time a statement of claim had not even been delivered by the respondents. In the intervening period, a statement of claim was delivered and, following upon the motions issued by the appellants to compel the respondents to reply to particulars, and by the respondents for judgment in default of defence, the appellants delivered their defence on 19th February 2018. As recorded by Murphy J. in the judgment under appeal, which she handed down on 21st February 2019 (para. 10), the effect of the defence filed by the appellants is to put the respondents on full proof that “*the first*

defendant's product was used as subfloor infill in each relevant house; that same contained reactive framboidal pyrite; that the reactive framboidal pyrite has resulted in pyritic heave, with consequential damage to the fabric of the houses."

16. At para. 11 of the same judgment, Murphy J. held:

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

17. The trial judge relates how the approach of the appellants to the application for inspection changed between the 2017 and 2018 court dates. On the first occasion, the appellants claimed that the application for inspection was premature on the basis, *inter alia*, that the pleadings were not closed. On the second occasion, they claimed that the application was premature in the absence of discovery. The appellants were concerned that if inspection was ordered prior to discovery, and in particular, discovery of Roadstone's blast records, there would be a risk of multiple inspections. The respondents countered this with a motion for discovery, which they issued on 20th September 2018, during the period between the commencement of the hearing of the inspection motion in July, and the resumed hearing of that motion on 23rd October 2018. The discovery motion was returnable for 23rd October, but did not proceed and was ultimately struck out by the trial judge by the order under appeal, though that part of the order is not appealed.

18. The trial judge noted, at para. 16 of her judgment, that the appellants had not identified any method of proof, short of sampling and inspection, which would satisfy their own

requirement (arising out of their defences) for proof of every element of the respondents' claim.

19. The trial judge referred to a motion issued by the respondents pursuant to O. 31, r. 18 RSC, seeking an order for production of Roadstone's quarry blast records, which was also before the court. The respondents had issued this motion on 27th June 2018, following upon service by them on the appellants of a Notice to Produce the blast records. The respondents had served the Notice to Produce as a result of references to those records in affidavits sworn on behalf of the appellants in opposition to the inspection motion. The appellants objected to production of the blast records prior to discovery, and the respondents responded with the motion for production of the same. While the trial judge concluded that a Notice to Produce was not an appropriate mechanism to compel production of those records, she noted that the affidavits sworn on behalf of the appellants in opposition to that motion revealed that Roadstone had in its possession approximately 800 blast records, which, when taken together with delivery dockets and extraction plans also in Roadstone's possession, would enable it to identify the locations in its quarries from which stone delivered to the Development could be identified. The trial judge concluded as follows at paras. 21 and 22 of her judgment:

“21. On the basis of the defence filed on behalf of the first and second defendants, inspection and sampling of the relevant locations of the defendant's quarries is necessary to allow the plaintiffs to progress their claim. Until inspection and sampling take place, the plaintiffs will not be able to answer the particulars raised by the first three defendants as to the presence and extent of each defendant's stone in each house manifesting pyritic heave. The defendants, having had access to the subfloor stone infill in each house allegedly affected for more than two years, have been able to compare that stone infill to the stone in their respective quarries and so have access to full information as to the presence or absence of reactive framboidal pyrite in the

stone infill supplied by them to the plaintiffs. The plaintiffs on the other hand do not have full information and will not have it until such time as they are permitted to inspect and take samples from the locations in Roadstone's quarries, from which stone infill was supplied to the Drumnigh Wood Estate.

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

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

What is required in this particular case is that the plaintiffs be allowed to inspect and take samples from the locations in Roadstone quarries from which stone infill was supplied to the Drumnigh Wood Estate during the period from September, 2001 to June, 2007. Roadstone has the information necessary to identify the locations. It has extraction plans which indicate the areas quarried at any particular time. It has blast records which give the date and coordinates of each blast. These apparently number 800. It has delivery dockets showing the deliveries made from each quarry to the Drumnigh Wood Estate. While Roadstone has argued that any inspection ordered

should follow discovery, it has never contended, nor can it, that it is not possible for it to identify the locations in its quarries, from which the stone supplied by it derived....”

20. As to the objection of the appellants that inspection in advance of discovery creates a risk of multiple inspections, the court noted that the respondents had confirmed that in the event that the appellants identified the relevant locations from which stone was supplied to the Drumnigh Wood Estate, the respondents would not need to conduct further inspections.

21. The appellants also raised an objection that the order being contemplated by the trial judge would involve the appellants in a significant amount of work and expense not normally associated with an order for inspection. The trial judge dealt with this by noting that such costs would be costs in the cause, recoverable by the appellants in the event that they are successful in the proceedings.

22. At para. 27, the trial judge expressed the view that inspection and sampling would allow real progress to be made in the litigation. It would assist the respondents in identifying with precision the source of the stone under each house allegedly affected – an exercise which the appellants had had sufficient information to conduct for some years. It would assist the respondents in answering the notices for particulars raised by the first three defendants. As regards the identification of locations within the quarries from which stone was extracted and supplied by the appellants, the trial judge stated, at para. 28:

“By directing the first defendant to identify the locations in its quarries from which the stone supplied to the Drumnigh Wood Estate was extracted, the court is balancing the right of the plaintiff to have access to evidence in the control of his opponent with his opponent’s right to have the least possible interference with his property rights. This is best achieved by ensuring that there is a focussed single inspection which, at Roadstone’s election, all parties who may have a litigation interest in conducting an inspection, could attend.”

Accordingly, the court made an order for the inspection and sampling of the relevant locations within the quarries of Roadstone at Huntstown, Belgard and Feltrim from which stone was extracted and delivered to the Development; and to give effect to the order, the court directed that Roadstone should identify the relevant locations. While the appellants initially appealed both parts of this order, i.e. firstly, the order for inspection and sampling, and, secondly the order directing Roadstone to identify relevant locations within its quarries, they pursued the appeal in relation to the latter only, for reasons explained below. In granting the order, which was perfected on 11th April 2019, the court noted an undertaking given by the respondents that, in the event that the court should grant such orders, the respondents would not seek further orders for inspection of the quarries at Huntstown, Belgard or Feltrim, either in these proceedings or in the subrogated proceedings.

23. There was one other dimension to the appeal before this Court. At para. 25 of her judgment, the trial judge made remarks about the conduct of the appellants in the proceedings, which remarks have given rise to a specific ground of appeal. In order to address this ground, it is necessary to quote this paragraph in full:

“25. This court first became involved in the case management of these proceedings in May, 2017, when it first heard the plaintiff’s application for inspection pursuant to O. 50, r. 4. At that point, the pleadings were at the stage where the statement of claim had been served. In the period since then, the only progress made in the substantive claim has been to have the defences delivered and the pleadings closed. This is despite the fact that the case has been before the court on 25 occasions in that period. There have been nine mention dates, three judgment dates and a full 13 hearing days. The hearing days have been spent essentially dealing in one form or another, with Roadstone’s objections to the progression of this claim. The court has a growing impression that Roadstone is deploying a strategy to hinder, impede and delay the progress of this

claim by any lawful means at its disposal. In our adversarial system of civil litigation well-resourced litigants can quite readily clog the system with multiple applications, should they choose to do so. Just because they can, does not mean they should or that they should be permitted to do so. Courts must be vigilant to ensure, as best they can, that their scarce resources which are provided for the benefit of society at large, are not monopolised or disproportionately used to serve the ends of wealthy litigants, whose interest may be to hinder or impede litigation rather than ensuring its efficient and economical conduct.”

24. The order of the High Court was perfected following upon submissions made by the parties as regards the precise terms of the order. So far as the locations part of the order is concerned, the appellants requested the court to qualify the order so as to provide that Roadstone identify the relevant locations in the quarries “*insofar as possible based on the documentation and information available to it*”. The respondents objected to the inclusion of such language in the order, and the trial judge declined to qualify the order in this way, taking the view that to do so might diminish the intended impact of the order or give rise to further dispute as to whether the appellants had or had not properly identified the relevant locations, and in turn, possibly, further disputes as to the undertaking given by the respondents not to seek further inspection. Instead, the trial judge gave the parties liberty to apply in relation to the inspection and sampling in case any difficulties should arise in the implementation of the order.

25. On 3rd May 2019, the appellants sought a partial stay as regards only that part of the order relating to the locations in the quarries from which stone infill was extracted and supplied to the respondents for use in the Development. On the same date, Roadstone offered to provide the respondents with blast records and extraction plans for the quarries, for the relevant periods of supply, together with delivery dockets, so that the respondents

could form their own view as to the relevant locations in the quarries for the purposes of inspection. This application was opposed by the respondents. The trial judge granted the partial stay until the first directions hearing before this Court, on condition that Roadstone deliver the aforementioned documents within a period of eight weeks from the order for inspection of 11th April 2019. The stay was thereafter extended by this Court, by consent, pending the determination of this appeal.

Grounds of appeal

26. The appellants filed a notice of appeal on 21st June 2019. While they initially appealed from the order as a whole, i.e. the order directing entry, inspection, taking samples and identification of locations on the lands of Roadstone from which stone was extracted and supplied to the respondents, as I mentioned above, at the hearing of the appeal before this Court, the appellants pursued only that part of the appeal relating to the last mentioned part of the order, i.e. that part requiring Roadstone to identify locations from which stone was extracted and supplied to the respondents for use in the Development. This was because, in the intervening period, by arrangement between the parties, Roadstone made available to the respondents its blast records, delivery dockets and extraction plans (i.e. those relating to the materials supplied by it to the respondents in the relevant period), and thereafter facilitated the respondents with entry and inspection of its quarries at Huntstown, Belgard and Feltrim, and the taking of samples. At the hearing of this appeal, the respondents confirmed that, with the use of the documentation provided by Roadstone, they had satisfied themselves as to the likely identification of the locations within the Roadstone quarries from which material was extracted and supplied to the respondents, and thereafter, and following agreement on an inspection protocol between the parties, they had been able to inspect the relevant locations at the quarries and take such samples as they required. The respondents confirmed to the Court that they had no ongoing need to enter upon Roadstone's lands, and furthermore

that they would not again need to enter upon its lands for the purposes of these proceedings. In response to a specific question from the Court as to whether the respondents accepted that Roadstone had complied with the locations part of the order, counsel for the respondents confirmed that they did so accept, on the basis that Roadstone had provided an affidavit to say that they could do no more to identify the relevant locations in its quarries. This was a reference to an affidavit sworn by a Mr. John Glynn, Strategic Operations Manager of Roadstone, sworn by him for the purpose of this appeal.

27. The grounds of appeal may be summarised as follows:

- (1) O. 50, r. 4 RSC does not confer any authority on a court to require a defendant to litigation to furnish information under the guise of an order for inspection, and nor does it confer jurisdiction on a court to require a defendant to collate and review a large volume of documentation, for the purpose of providing information, separate and prior to the discovery process. The High Court therefore exceeded the jurisdiction conferred on it by O. 50, r. 4.
- (2) The High Court erred in ordering Roadstone to identify the locations in its quarries from which stone was supplied to the respondents in circumstances where no such relief was sought in the notice of motion issued by the respondents on 3rd June 2016. Accordingly, the order made by the High Court was in breach of fair procedures.
- (3) Even if the court had jurisdiction under O. 50, r. 4, to make such an order, the court erred in doing so in circumstances where such an order was neither necessary nor expedient, as required by O. 50, r. 4. On the contrary, the order made was oppressive, requiring the appellants to engage in a very significant exercise of collating and reviewing a large volume of documentation generated a long time previously, as well as interviewing and obtaining information from

current and former employees of the appellants with a view to identifying locations within the Roadstone quarries, from which stone infill was supplied to the respondents. Moreover, the exercise will also involve Roadstone in forming a view or opinion as regards the relevant locations, giving rise to the possibility that the respondents could be found to be in breach of the order if they failed to identify the correct locations. While blasting records will identify locations where blasting took place during the relevant period of supply, they will not identify the relevant locations from which stone infill was extracted and supplied to the respondents, in circumstances where there are now large voids in the areas where blasting took place, and from which materials were extracted and supplied. If the High Court considered it appropriate to make an order for inspection, confined to the locations in the quarries from which stone was supplied to the respondents, such order was neither necessary nor expedient and should not have been made until after exchange of discovery, and this is so also as regards any ancillary orders made by the court for the purpose of O. 50, r. 4. In ordering Roadstone to identify the locations in its quarries from which stone was supplied by Roadstone to the respondents, the High Court required Roadstone to furnish information under the guise of an order for inspection. Further, in making a mandatory order in the terms that she did, the trial judge effectively reversed the burden of proof and required Roadstone to make admissions, which is wholly inconsistent with the right to fair procedures and the principles applicable in adversarial litigation.

- (4) With reference to para. 25 of the judgment of the High Court, the appellants submit that the findings of the trial judge in this paragraph were not based on any evidence before the court, were not the subject of submissions by the parties,

and are inaccurate. The adverse findings against Roadstone in this paragraph of the judgment were made without affording it an opportunity to be heard and constitute a breach of its right to fair procedures. The appellants also contend that these findings, which they claim were relied upon by the trial judge in arriving at her decision on the motion, are based on inaccurate facts and ought to be set aside.

Respondents' Notice

28. In their respondents' notice, the respondents reject all grounds of appeal. In the first instance, they maintain that the appeal is moot or some of the grounds of appeal are moot and do not require determination in circumstances where the appellants have conceded in their notice of appeal that Roadstone "*can identify the locations in which it was blasting during the relevant period of supply*" (subject only to potential gaps and some inaccuracies) and in which the appellants do not dispute that Roadstone supplied stone infill/crushed rock products to the respondents for use in the Development. Moreover, the appellants did not seek and were not granted a stay on the portion of the order of the High Court of 11th April 2019 which required Roadstone to provide inspection and sampling facilities to the respondents, save the portion of the order that required Roadstone to provide details of the locations from which stone was extracted and supplied to the respondents. (This point acquired greater force by the time this appeal came on for hearing by reason of the fact that, in the intervening period, an inspection of Roadstone's quarries had been carried out by the respondents, and I return to this issue in greater detail below.)

29. Mootness aside, the respondents reject all grounds of appeal advanced by the appellants and in particular:

- (1) The respondents submit that O. 50, r. 4 is, as the trial judge held in her first decision on the motion "*flexible enough to deal with any given set of facts*

presented to a court” (noting the trial judge’s reference to analysis of the application of a similar rule of the Supreme Court of Queensland, Australia in *Evans Deakin Pty Ltd. v. Orekinetics Pty Ltd.* [2002] QSC 42, as cited by Kenneth Martin J. of the Supreme Court of Western Australia in *Processed Minerals International Pty Ltd. v. Consolidated Minerals Pty Ltd.* [2012] WASC 254).

- (2) Accordingly the High Court was entitled to make the order that it did requiring Roadstone to identify the locations from which stone products were extracted and supplied by Roadstone to the respondent. It was clearly within the scope of the powers of the High Court to make such ancillary orders as were necessary and/or expedient to give effect to the principal order for inspection being made by the High Court.
- (3) The trial judge in this case had been case managing these proceedings for a considerable period, and she considered it to be expedient and necessary to make the order that she did in order to progress the proceedings.
- (4) There was no breach of fair procedures on the part of the trial judge in making the order; moreover, if such an order were not made, there is every likelihood that the appellants would dispute, at a later stage, such locations as might be identified by the respondents, by reference to documents supplied by the appellants.
- (5) The respondents deny that the High Court ordered the provision of information under the guise of a motion for inspection. The part of the order that directed Roadstone to identify the locations from which stone products were extracted and supplied to the respondents was necessary to ensure that the inspection of

Roadstone's properties by the respondents was as focussed as possible and with a view to avoiding multiple inspections.

- (6) The respondents deny that the order of the trial judge constituted a reversal of the burden of proof. They further deny that the order was in any way oppressive or burdensome and endorsed the view of the trial judge that, in the event that the appellants are successful in the proceedings, they will recover the costs of complying with the order under appeal as costs in the cause.
- (7) The respondents deny that the High Court made any adverse findings against the appellants without affording them an opportunity to be heard, and while the appellants have taken exception to the contents of para. 25 of the judgment under appeal, they have passed no comment upon or sought to reject the contents of para. 26, which provide support for the more general conclusions in para. 25. The manner in which parties to proceedings conduct themselves may be the subject of criticism by a court including in any judgment delivered by a court and the assertion that the parties should have further opportunities, after the conclusion of the proceedings, or the conclusion of any interlocutory application, to make submissions about their conduct or to adduce further evidence in connection therewith, before they may be criticised in respect of such matters, is misconceived a matter of law.

Developments subsequent to order under appeal

30. As mentioned above, in May 2019, in accordance with the order for a stay granted by the trial judge, Roadstone provided the respondents with documentation, comprising blasting records, extraction plans and delivery dockets, so as to enable the respondents themselves to identify the relevant locations within the Roadstone quarries from which stone was extracted and subsequently supplied to the respondents. By arrangement, the respondents

subsequently attended at the Roadstone quarries at Huntstown, Belgard and Feltrim to inspect the locations which they had identified from the documentation provided, and to take samples from those locations.

31. In the event that this appeal is determined against the appellants, the stay will of course fall away, and, in the submission of the appellants, will leave Roadstone subject to a free standing obligation (i.e. a continuing obligation, notwithstanding that the inspection has taken place), which is matter of great concern to the appellants. The respondents however argue that the obligation to identify locations is not a free standing obligation, but is one ancillary to the order for inspection, and submit that this is abundantly clear from the judgment of Murphy J. at para. 30 thereof, wherein she states that the order [to identify locations] is made in order to “*give effect to*” the order for inspection and sampling.

32. The inspection and sampling undertaken by the respondents gave rise to an exchange of correspondence between the solicitors for the parties in the lead up to the hearing of this appeal, and subsequent to the exchange of submissions by the parties. In a letter of 12th November 2020, Messrs. Arthur Cox, solicitors for the appellants, proposed to Messrs. Byrne Wallace, solicitors for the respondents, that the respondents should confirm:

(i) That the appeal from the “*locations*” portion of the High Court order should be allowed on consent and,

(ii) That they would not seek any further inspections of Roadstone’s quarries.

33. The letter then went on to say that if such confirmations were provided, the appellants would bear their own costs in respect of this aspect of the appeal, on the basis that the respondents would do likewise. This proposal was made in the light of the contents of paras. 7 and 8 of the submissions of the respondents in which they stated as follows:

“7. The first four grounds of appeal relate to the locations portion of the Order. After the judgment and Order of the High Court, Roadstone furnished extensive

documentation and information to the Respondents relating to the identification of the relevant locations, provided confirmations in respect thereof on Affidavit and facilitated pre-inspection visits to the quarries, in the light of which the inspection of the Roadstone quarries took place in August and September 2019.

8. The effect of the foregoing in conjunction with the significant narrowing of the grounds of appeal apparent from the submissions on behalf of Roadstone noted above has been to render each of these grounds of appeal moot and to obviate any conceivable basis for the appeal by reference thereto.”

34. As mentioned above, the appellants were concerned that the locations part of the order created a free-standing obligation and therefore did not accept that the inspection and sampling that had taken place obviated any conceivable basis for the appeal. It was for that reason that they proposed, as they did, that the respondents confirm that the appeal from the locations portion of the order should be allowed, and that no further inspection of Roadstone’s quarries would be sought.

35. Messrs. Byrne Wallace replied by letter dated 18th November 2020. They did not accept that the locations part of the order had any form of independent existence. They took the position that the locations part of the order was merely to “*give effect to*” the principal order, i.e. the order for inspection. They referred to the penultimate paragraph of the judgment of the High Court in which the trial judge stated:

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

36. Messrs. Byrne Wallace went on to say that as the inspection had taken place, there could be no question of Roadstone being required to take steps to give effect to the locations portion of the order, whether by identifying relevant locations in the quarries or otherwise.

37. The respondents' solicitors also noted that, when applying for the stay on the locations portion of the order, the appellants did not file any affidavit explaining the difficulties asserted by them in complying with the locations part of the order, and nor did they exercise the liberty to apply granted to them by the trial judge. In response to the proposal made on behalf of the appellants, the respondents replied that the appellants should consent to an order striking out the entire appeal, including the fifth ground of appeal concerning para. 25 of the judgment of the High Court.

38. Two further letters were exchanged between the solicitors, but the parties were unable to reach agreement. One point of significance did arise from this correspondence however, and that is that in response to a point made by Arthur Cox that the respondents had not unequivocally confirmed that the order of the High Court was spent, and that they would not seek further inspections of the Roadstone quarries, Messrs. Byrne Wallace, in a letter of 25th November 2020, stated: *"It is and has been perfectly clear that our clients will not need to, and will not, conduct further inspection of your clients' quarries."* This statement was made on the basis, referred to in the immediately preceding sentence of that letter, that the respondents accepted what had been stated on affidavit and by way of correspondence on behalf of the appellants, i.e. that they had provided such information as they could in order to enable the relevant locations in the quarries from which samples should be taken to be identified, *"insofar as possible"*.

Issues to be decided on this appeal

39. This appeal raises three issues:

- (1) Are the first four grounds of appeal moot, in light of the inspection that has taken place and the samples that have been taken by the respondents, and their subsequent confirmation that they will not need to and will not seek to conduct further inspections of the Roadstone quarries?
- (2) If the first four grounds of appeal are not moot, did the High Court have jurisdiction to make such an order?
- (3) Did the trial judge make findings, in para. 25 of her judgment, that can and should be set aside if the Court were satisfied that such findings were made in breach of fair procedures?

Are the first four grounds of appeal moot?

40. In simple terms, the respondents contend that the appeal is moot so far as the first four grounds of appeal are concerned, because, having received the blast records, extraction plans and delivery dockets, and having carried out the inspection and taken samples from the quarries of the appellants in September 2019, they accept that the part of the order requiring Roadstone to identify locations within the quarries has been satisfied. They accept this on the basis of an affidavit of 28th June 2019 of Mr. John Glynn, Strategic Operations Manager of the first appellant, in which he deposed that the appellants can do no more than they have done to identify the relevant locations in the Roadstone quarries from which stone infill and crushed rock products were supplied by Roadstone to the respondents for use in the Development. The respondents submit that there is no suggestion on their part that the order will ever be invoked by them to suggest non-compliance with it, and, so far as the High Court is concerned, it has been informed of all of this at subsequent case management hearings. The High Court is also aware, since delivery of replies to particulars by the plaintiffs in December 2019, that the inspection has served its intended purpose of enabling the respondents to identify those houses in the construction of which stone from the

Roadstone quarries was used. Accordingly, as far as the High Court is concerned, the issue of inspection and all related issues (including the locations part of the order) is now closed.

41. The appellants' position however is that if this Court does not entertain the appeal from this part of the order of the High Court, the result will be that the order of the High Court remains, and that the stay thereon will be lifted (unless continued by this Court) leaving Roadstone in a situation where there is an extant order of the High Court with which it has not complied, a situation which is not acceptable as far as the appellants are concerned. In so far as the respondents point to the fact that the appellants were given liberty to apply by the High Court, and did not exercise that entitlement, the appellants say that there would have been little point in them exercising that liberty, because the High Court previously rejected any suggestion that the appellants be permitted to qualify their compliance with this part of the order by requiring the appellants to identify locations "*insofar as possible*". If the High Court was not satisfied to insert such a caveat in the order to begin with, then it would be futile for the appellants to exercise the liberty to apply given by the order for much the same purpose. So, in the submission of the appellants, there remains a live controversy for determination by this Court.

42. Moreover, the appellants expressed concern that the decision of the High Court as regards the interpretation of O. 50, r. 4 will, if left undisturbed, be a precedent which may well be used against the appellants in other litigation involving pyritic heave.

43. While the parties made extensive submissions to this Court as to whether or not the this aspect of the appeal is moot, very little was submitted to the Court as regards the law of the doctrine of mootness. No authorities at all were opened to the Court, although counsel for the appellants referred to the decision of the Supreme Court in *Lofinmakin v. Minister for Justice* [2013] IESC 49. It was submitted on behalf of the appellants (in very general terms) that the principle established by *Lofinmakin* is that an appeal is moot when a decision

on the appeal will not have the effect of resolving some live controversy affecting or potentially affecting the rights of the parties, but the court always retains a discretion to depart from that general principle. However, that discretion will not be lightly exercised. In their written submissions, the respondents also refer to *Lofinmakin*, and to *Irwin v. Deasy* [2010] IESC 35, in support of their contention that the issue raised by the appellants does not meet the threshold for determining moot cases, i.e. in their submission the issue raised is not one of exceptional public importance and there are no special reasons in the public interest for hearing the appeal, as far as the first four grounds of appeal are concerned.

44. Notwithstanding the very strong and persuasive arguments advanced on behalf of the respondents, I am of the opinion that the appeal cannot be considered as moot in circumstances where the appellants remain subject to an order of the High Court with which they have not complied. While it is clear from the submissions of the respondents, that while they are accepting as a matter of practicality that the appellants can do no more than they have done to identify the relevant locations, the respondents have made it clear both in their written submissions and in their oral submissions to this Court that that acceptance by them is made on the basis of the sworn evidence of Mr. Glynn. It will be recalled that, at the time of the hearing both in the High Court and the hearing of this appeal, discovery had yet to be made by the appellants. It is not entirely fanciful to consider that something could arise on discovery that might give rise to further dispute between the parties on this issue and cause the appellants to reconsider the locations issue, on the basis that their concession before this Court was made on a false premise. I am fortified in my conclusion in this regard by the decision of O'Donnell J. (as he then was) in *Farrell v. Governor of St. Patrick's Institution* [2014] 1 IR 699.

45. *Farrell* arose out of an enquiry pursuant to Article 40.4.2 of the Constitution. The enquiry arose in circumstances where there were certain charges pending against Mr. Farrell

in the District Court, and that court had refused him legal aid in respect of those charges. Mr. Farrell sought to challenge that decision of the District Court by way of judicial review. The High Court granted him leave to do so, and at the same time granted a stay on the District Court proceedings. Within a matter of days, Mr. Farrell was before the District Court for a further remand, and it was submitted that the District Court had no jurisdiction to make any further order remanding Mr. Farrell in custody as the proceedings had been stayed. The District judge did not accept this argument and remanded Mr. Farrell in custody, with consent to bail. Arising out of that order, Mr. Farrell brought an application for his release pursuant to Article 40.4.2 of the Constitution.

46. Before the enquiry came on for hearing in the High Court, Mr. Farrell was released. Nonetheless, the High Court entertained the application because the trial judge took the view that because of the very narrow period of time involved, the issue was one which would escape effective judicial oversight unless determined. Accordingly, the court heard the application, even though there could be no question of making any order for the release of Mr. Farrell. Instead, finding in his favour, the High Court declared that Mr. Farrell was entitled to have been released from custody on the date when he made application, *ex parte*, to the High Court for an enquiry pursuant to Article 40.4.2 of the Constitution.

47. In the Supreme Court, the majority took the view that the appeal was moot, but went on to hear and determine the appeal for five reasons, including that the issue arose in circumstances which would escape review if the court did not exercise its discretion to hear the appeal, and the issue was one of systemic relevance to cases before the courts, where an application for judicial review has been granted. While O'Donnell J. concurred with the decision of the majority as regards the decision to determine the issue, he expressed the opinion that the appeal was not truly moot for reasons explained at para. 72 as follows:

“72. However, it seems to me that the appeal was not moot in any real sense of the word. Mootness is an issue which can arise in Article 40 enquiries when for various reasons the applicant is at liberty. There is, to put it at its lowest, some difficulty about making orders for release or non-release under Article 40 of a person who has long since left custody. However here, the fact that the release had occurred before the High Court hearing meant that the court could not make any such order, and instead made a declaration that the respondent was entitled to have been released on the 4th July, 2012. Assuming for the moment that such an order could validly have been made under an Article 40 inquiry, that declaration together with a consequential order for the costs of the initial application and for 80% of the costs of the hearing of the inquiry, remains in place. It is a declaration that of the legal position between the parties, which is binding upon them. As long as it remains in place, and is in any way capable of affecting the rights and obligations of the parties (and moreover providing a legal basis and justification for the order for costs) I consider that the appellant was entitled to appeal it as of right and that the proceedings could not be said to be moot. If however, this is too narrow a view, I also express my agreement with Denham J., that even if the appeal is considered to be moot, it is one that the court should hear and determine.”

48. In this case, Roadstone remains subject to an order with which it has not complied, and with which it claims it cannot comply. The respondents do not disagree that the locations part of the order of Murphy J. has not been complied with by Roadstone, and while it may be highly unlikely that the issue of compliance with the order will be raised in the remainder of the proceedings, this cannot be ruled out entirely. If anything, the order in this case has a greater continuing significance than the declaration made by the High Court in *Farrell* (for the reasons explained in para. 44 above).

49. Finally, on this issue, the appeal raises an important point of law as to the extent of the Court's jurisdiction under O. 50, r. 4 RSC, which is likely to arise again in the future and, for that reason also, the Court took the view that it was appropriate to address the appeal on the merits.

50. Having thus concluded, I will now proceed to consider the second issue identified for determination, i.e. did the High Court have jurisdiction to make an order directing Roadstone to identify the locations within its quarries from which stone supplied by it to the respondents for use in the Development was extracted?

Does O. 50, r. 4 RSC confer jurisdiction on the High Court to make orders ancillary to an order for inspection (such as that made by the trial judge in this case ordering the first named appellant to “*identify... the locations in the said quarries from which the stone supplied by the First Named Defendant to the Plaintiffs for use in the Drumnigh Wood Estate Drumnigh Wood Portmarnock County Dublin was extracted...*”)?

51. In *Bula Ltd. v. Tara Mines Ltd. (No.1)* [1987] IR 85, Murphy J. stated (at p. 92):

“It seems to me that the rights of litigants to seek and the power of the courts to grant relief or assistance of a procedural nature must be viewed in the context of litigation and the administration of justice as a whole. It is the right of citizens under the Constitution to have access to the courts and for the resolution of justiciable controversies.”

At p. 93 he continued: *“If, then, a citizen is free to institute proceedings he must be at least equally free to invoke the procedures of the court to present his case properly.”* It was the plaintiff's claim in that case that the defendant had trespassed, below ground, into a valuable orebody belonging to the plaintiff. The plaintiff sought an order for inspection of the defendant's lands in order to advance its case. Murphy J. concluded that in the circumstances of the case *“it would be impossible to vindicate the plaintiffs' right to litigate if they were*

not afforded an appropriate opportunity of inspection to attempt to substantiate the claim which they have made.”

52. *Bula* was considered and applied by Morris P. in *Hearne v. Marathon Petroleum Ireland Ltd.* [1998] 4 IR 186. In that case, the plaintiff had issued proceedings against the defendant claiming damages for personal injuries allegedly sustained by him while working on the defendant’s oil rig. The plaintiff sought an order for inspection of the oil rig, and the defendant, while willing (albeit reluctantly) to facilitate such inspection, was only willing to do so on the basis that the plaintiff’s expert carrying out the inspection would complete an indemnity in favour of the defendant absolving it from all responsibility for any injury sustained by him while carrying out the inspection. The plaintiff’s engineer refused to carry out an inspection on these terms. Since there was no dispute between the parties as regards the carrying out of the inspection, the issue for the court to decide, as identified by Morris P. was “*whether the defendant is reasonable in seeking a full indemnity and if not then what terms, if any, should be imposed as being ‘just’ in the circumstances.*”

53. Morris P. considered *Bula* and the related case of *Wymes v. Crowley* (Unreported, High Court, 27th February 1987), also the subject of a judgment handed down by Murphy J. on the same day as his judgment in *Bula*. Having considered those authorities, Morris P. identified the following principles as being applicable to applications under O. 50, r. 4:

“[The court] must in the first instance ensure that circumstances are created in which the plaintiff will have facilities for presenting his case to the court so as to enable the court to have the benefit of all the advices and information which the plaintiff may wish to make available to the court. On the other hand the defendant’s rights as a property owner must be protected during this inspection so as to ensure that the inconvenience of the inspection is not injurious to his rights as a property owner.”

54. Morris P. noted, at p. 189 that Murphy J. had held in *Bula* that the “*purpose of the rule was to ensure that the litigant is given the information he needs ‘to present his case properly’ and to that end the court has power to determine the terms on which such an inspection should take place so as to ensure that the business of the court is not obstructed by the party against whom the order for inspection is to be made.*”

55. On the facts of *Hearne*, Morris P. concluded that “[t]o allow the defendant a total immunity from responsibility would of necessity mean that no inspection would take place and the court would be deprived of the benefit of engineering evidence and would be so obstructed in the administration of justice.” Accordingly, he ordered that the inspection should proceed without the indemnity sought.

56. In the more recent decision of *James Elliot Construction Ltd. v. Kevin Lagan & Others* [2015] IEHC 631, Costello J. carried out a review of the authorities relating to O. 50, r. 4, including all of the authorities referred to above. She then extrapolated the following principles as being relevant to such applications:

- “(1) *The Court may order that a party may take samples of the property of another party to proceedings which may be necessary or expedient for the purpose of obtaining full information or evidence.*
- (2) *The power must be viewed in the context of a party’s constitutional right of access to the courts.*
- (3) *The Court must ensure that the litigant will have facilities to present his case to the Court. This includes all the advices and information which the litigant wishes to present to the courts, either in support of his own case, or to undermine that of his opponent.*
- (4) *The right to an order for inspection or the taking of samples is not dependent upon the strength of the case of the party seeking the order.*

- (5) *Inspection, or the ordering of the taking of samples, should be facilitated if it can be achieved while at the same time protecting the interests of the opposing party. The interests of an opposing party that a court takes into account are those relating to that party's rights as an owner or occupier of property.*
- (6) *The proposed inspection or taking of samples must be shown to be necessary or expedient by reference to the issues in the case.*
- (7) *The inspection or sampling ordered should be limited to that which the party seeking the order has shown to be necessary or expedient to his own case or his defence of his opponent's case."*

57. While these principles make no reference to the nature of any ancillary powers enjoyed by the court for the purpose of O. 50, r. 4, they are nonetheless very helpful in a consideration of that issue, describing, as they do, the matters to be taken into account when considering applications advanced under the rule. Those matters may also inform the court in the consideration of any orders that may be necessary to give effect to the substantive orders under consideration by a court.

58. More recently, in the case of *Murphy Environmental Hollywood Ltd. v. Spencer Place Development Company Ltd. & Ors.* [2017] IEHC 782, Costello J. was required to consider an order already made by McGovern J. for the inspection of the first named plaintiff's property, which had been made subject to agreement by the parties on a protocol for inspection. The parties were unable to agree on the protocol and had to return to the court for further orders. The case is of relevance for two reasons. Firstly, in the course of her judgment, Costello J. considered and applied the first decision of the trial judge in these proceedings (and on this motion) of 28th July 2017. It will be recalled that that decision was not appealed by any of the parties. Costello J. laid some emphasis upon the determination of Murphy J. in that case that the purpose of the right of inspection conferred by O. 50, r. 4

is to ensure equality of arms as between the litigants. She also noted with approval the statement by Murphy J. that a litigant has, within reason, and subject to the rules of evidence, the right to present his case as he considers appropriate.

59. While these authorities are informative and helpful in consideration of the issue now under discussion, they obviously only bring us so far. The issue was more directly addressed by the High Court (Barr J.) in the recent case of *Matute v. Medtronic Ireland Ltd.* [2017] IEHC 431. In that case the plaintiff claimed to have suffered a repetitive strain injury in the workplace. In the usual way in such matters, the plaintiff sought facilities to have his workplace inspected by a consulting engineer. The defendant agreed to provide the facilities but when the plaintiff's engineer attended to carry out the inspection, he was informed that he would not be allowed to take photographs during the inspection. This was to protect the confidentiality of the defendant in its industrial processes. Instead, an employee of the defendant offered to take photographs during the course of the inspection, at the direction of the plaintiff's engineer. As a result, the plaintiff's engineer did not receive sufficient photographs in quality or in number to enable him to draw up his report. The trial judge concluded that the plaintiff was prejudiced as a result and made an order entitling the plaintiff's engineer to re-inspect the premises and to take his own photographs. By this time, however, the defendants had altered the configuration of that part of its premises where the plaintiff worked. The trial judge received evidence that, as a result, the plaintiff was significantly prejudiced in the preparation of his case. Accordingly, he directed the defendant to reinstate that portion of the defendant's factory in which the plaintiff worked, to the condition that it was in at the time of the original inspection carried out by plaintiff's engineer. He made this order, pursuant to O. 50, r. 4. Notwithstanding that he had been informed that the cost of such works would be of the order of €60,000. While the order was

made pursuant O. 50, r. 4, it is unclear the extent to which the jurisdiction of the court to make such an order was argued.

60. The jurisdiction of the court to grant orders ancillary to an order for inspection, and, if there is such a jurisdiction, the scope of it, are not matters that have arisen for detailed consideration previously. Much of the analysis of the trial judge is taken up with the primary issue as to whether or not to make an order for inspection. Having decided that such an order was necessary (which part of her decision and order is no longer under appeal) the trial judge then went on to deal, at para. 22, with ancillary orders. The relevant parts of her judgment, i.e. paras. 21 and 22 thereof are quoted in full at para. 19 above. The appellants argue that the authority referred to and relied upon by the trial judge in this part of her judgment, i.e. *Evans Deacon Pty Ltd. v. Orekinetics Ltd.* [2002] QSC 42 is not authority for the proposition for which it is cited by her in the judgment, and the appellants rely on the express terms of O. 50, r. 4 which they submit does not confer any such jurisdiction on the court. Specifically, they argue, the rule does not confer any jurisdiction on the court to order a party to proceedings to collate and review a large volume of documentation, at significant expense, for the purpose of providing information, separate and prior to the discovery process.

61. The appellants rely on the decision of the High Court in *Bula Ltd. v. Tara Mines Ltd.*, insofar as in that case, the court, while making an order for inspection, refused to make an order requiring the defendants to provide the inspectors with any maps, drawings or documentation for the purpose of the inspection, because such documentation was not sought in the original notice of motion, the court noting that such documentation “*need not be produced until an order for discovery has been made and complied with.*”

62. The respondents rely on the express terms of O. 50, r. 4, in particular the second line thereof which provides that an order for inspection may be made “*upon such terms as may be just.*” They refer to the conclusion of the trial judge, at para. 28 of her judgment, that “*the*

ordering of inspection and sampling now, is in the interest of justice, the avoidance of unnecessary costs, the efficient use of the resources of the court and the vindication of the plaintiffs' right of access to the court" as well as the further conclusion of the court that "[b]y directing the first defendant to identify the locations in its quarries from which the stone supplied to the Drumnigh Wood Estate was extracted, the court is balancing the right of the plaintiff to have access to evidence in the control of his opponent with his opponent's right to have the least possible interference with his property rights."

63. The respondents submit that the reliefs sought in the motion before the court expressly included the provision of "*such reasonable cooperation and assistance as the plaintiffs and their respective servants and/or agents may reasonably require in order to complete the inspection*", and submit that such relief is broad enough to include the identification of the relevant locations to enable the inspection to be undertaken. This (it is submitted) distinguishes the facts of this case from those in *Bula v. Tara Mines* where the court declined to direct the production of documentation because it was not sought in the original notice of motion. Moreover, it is clear from the decision in *Bula* that the court there made more restricted orders than it might have otherwise on account of other orders it had made on the same day in the related case of *Wymes v. Crowley*.

64. The respondents refer to the first decision of the trial judge on the motion of 28th July 2017 wherein she stated, at para. 24, that "*the rule is flexible enough to deal with any given set of facts presented to a court*", a conclusion which the respondents observe was not appealed by any party. It was in this context that the trial judge referred to the passage quoted above at para. 19 from the decision of the Supreme Court of Queensland, Australia, in *Evans Deacon Pty Ltd. v. Orekinetics Ltd.* [2002] QSC 42 as cited by Kenneth Martin J. of the Supreme Court of Western Australia in *Process Minerals International Pty Ltd. v. Consolidated Minerals Pty Ltd.* [2012] WASC 254 at p. 17.

Discussion and conclusion on question of jurisdiction under O. 50, r. 4

65. The quarries of the appellants are vast. The Court was informed at the hearing of this appeal that the Belgard Quarry is so large that it can be seen from outer space. In an affidavit sworn by Mr. Michael Buckley, Operations Director, Roadstone, on behalf of the appellants of 16th May 2018, Mr. Buckley deposes that the total active quarrying area of the Roadstone quarries covers over 300 acres of land. It is clear that without direction, any inspection of the quarries would be akin to looking for a needle in a haystack, and there was really no dispute that this was so. This could have several consequences. Firstly, it would almost certainly result in the respondents spending far longer in the quarries than would be necessary if assistance from the appellants were to be provided. These are active quarries and, inevitably, inspection in such circumstances would give rise to heightened health and safety considerations not to mention increased costs and expense to both parties. Moreover, at the time, the court had good reason to believe that a bare order for inspection would be frustrated in the absence of information as regards the locations from which the material concerned was extracted and supplied to the Development.

66. The appellants' response to these difficulties is that the appropriate course for the respondents to take to address them is, firstly, to seek discovery of such documents as are necessary to identify the relevant locations in the quarries, and, thereafter (if necessary) to bring a further "*focused*" motion for production of documents and/or the provision of information. The appellants claim that what has happened in this case turns proper procedure on its head, creates confusion, and will inevitably lead to more than one application for discovery. They submit that the reference to "*upon such terms as may be just*" in O. 50, r. 4 means the terms upon which inspection may be carried out, and samples taken, by the applicant, and typically those terms have been concerned with issues such as date and time of access, personnel, insurances and the like, i.e. conditions to be imposed upon the

applicant. The obligation to identify locations was not an ancillary order, but the imposition of a further substantive obligation on the appellants which the respondents did not even seek. The appellants argue that it was no function of the trial judge to “*enter the fray*” and work out the best way to give the respondents the most effective order, and then provide them with such relief. Moreover, the appellants submit, that even if sought by the respondents, O. 50, r. 4 does not authorise the court to make an order such as was made by the trial judge in this case.

67. In discussion with the Court, counsel for the appellants accepted that in exceptional circumstances, and provided it was sought by an applicant, the court might have power to direct production of a particular map or drawing. Such an inference might be drawn from the decision in *Bula*. However, that power could never extend to a whole category of documents such as should more properly be the subject of an application for discovery. In this case, what is involved is large volumes of documentation generated over a period of several years.

68. Nonetheless, putting aside for one moment whether or not it is expressly sought by the motion, if it is the case that the court has jurisdiction to direct the provision of at least some information or documentation in aid of the order for inspection, that establishes the jurisdiction of the court to make such an order as a matter of principle, and thereafter, in any given case, what is at issue is a matter of degree. I agree with the conclusion of the trial judge, expressed at para. 22 of her judgment that “*intrinsic to its power to order inspection and sampling, pursuant to O. 50, r. 4, is the power to make orders to give effect to that inspection order.*” In arriving at this conclusion the trial judge had regard to the fact that such an order would achieve several objectives, all of which have been mentioned in the authorities above as forming the rationale for the rule, i.e. “*...the interest of justice, the avoidance of unnecessary costs, the efficient use of the resources of the court and the*

vindication of the plaintiffs' right of access to the court" as well as the other factors referred to by the trial judge quoted above at para. 62. So it is fair to say that the trial judge based her decision on this issue on well-established principles relating to the application of O. 50, r. 4.

69. The trial judge stated expressly that she was directing Roadstone to identify the relevant locations in its quarries in order to "give effect to" the order for inspection. For much the same reason that the courts will avoid making orders with which compliance is not possible, it is surely desirable that the court should not make orders which, for one reason or another are unlikely to be effective. Faced with such a possibility, and having found that it was possible for Roadstone to identify the relevant locations, it was in my view reasonable and within the jurisdiction of the court to fashion its order in such a way as to maximise its effectiveness. The appellants submit that the passage cited by the trial judge from *Evans Deacon Pty Ltd. v. Orekinetics Ltd.* (as cited by Kenneth Martin J. in *Process Minerals International Pty Ltd. v. Consolidated Minerals Pty Ltd.*) is not clear authority for the proposition that the court has jurisdiction to make ancillary orders of the sort made by the trial judge in this case. That may well be so, although it is of some interest to note that in that case Kenneth Martin J. stated, at para. 11: "*There is case authority to support the legitimacy of an inspection at a large scale manufacturing plant, including, if necessary, for the court to order a shutdown of a plant on the basis that it is a 'physical object for the purposes of RSC O 28'*", and in the previous paragraph he had noted that the applicant in that case had volunteered to pay whatever costs might result from the shutting down of the respondents' plant, estimated in the range of AU\$42,000 - AU\$52,000. In any case the relevance of the passage quoted by the trial judge is that it makes it emphasises "*the efficient and economical conduct of litigation.*" The court should not be in the business of making orders which will result in just the opposite, and in fashioning the order that she did, the trial

judge was ensuring that the order for inspection would serve its purpose as efficiently as possible, in the interests of all the parties to the proceedings.

70. However, this is not a *carte blanche* for the court, and any ancillary orders made for such a purpose must be reasonably necessary to give effect to the primary order for inspection, be expedient and within the capabilities of the parties and should not be unduly onerous or oppressive. What is onerous and oppressive will vary from case to case and relevant considerations in this regard would include the significance, financial and otherwise, of the issues raised by the litigation and the relative financial impact upon the party to whom the order is directed. In this case, the trial judge correctly identified that inspection by the respondents would be a catalyst to progress the litigation. The issues involved are of considerable financial significance, and while the trial judge did not conduct any financial appraisal of the means of the parties to whom the order was directed, it was reasonable in the circumstances to presume it would be within the means of the appellants to comply with her order without hardship (and the appellants have never suggested otherwise). Moreover, as mentioned she addressed the costs implications of the order in her observation that costs incurred in complying with the order would be costs in the cause.

Other grounds of appeal

71. This brings me to the other grounds of objection set out in the Notice of Appeal, which are summarised at para. 27 above. By these grounds the appellants claim that, even if the court had jurisdiction to make the order that it did, the trial judge erred in making the order for the following reasons.

Breach of fair procedures

72. This ground of appeal arises out of the fact that the relief granted by the court was not expressly sought in the Notice of Motion. However, this ground takes no account of the manner in which the hearing of the motion progressed and evolved. It was clear from a very

early stage that the locations within the quarries at which inspection and sampling might take place was a significant issue in the application before the court. The judgment under appeal records, at para. 14, that the appellants' solicitor had sworn an affidavit asserting that the application for inspection was premature in the absence of discovery. This affidavit was sworn in response to an affidavit sworn by the respondents' solicitor of 26th September 2016, wherein he averred:

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

It is clear therefore that from the earliest of stages (and well before the first judgment of July 2017) the identity of relevant locations within Roadstone's quarries was an issue in the application for inspection.

73. At para. 7 above, I quoted a passage from the first judgment of the trial judge of 28th July 2017, wherein the trial judge records that the respondents had asked the court to direct *“the first defendant to cooperate with the inspection by identifying the locations in its various quarries from which stone supplied to the plaintiffs had been sourced.”* The trial judge repeated this sentence almost verbatim in para. 16 of the same judgment. At para. 30 of the same judgment, the trial judge noted that *“...inspection of Roadstone's quarries would require interference in working quarries and would potentially require ancillary orders directing disclosure of various matters such as quarrying sites at the relevant times.”* It is hardly unfair to observe therefore that when the hearing resumed in July 2018, the appellants were on notice that the trial judge, at least, considered that the application before her included an application directing Roadstone to identify the locations in its quarries from which

materials were extracted and supplied to the respondents, by way of co-operation in support of any order for inspection the court might make pursuant to the substantive application for inspection.

74. No less than fifty one affidavits had been sworn and exchanged in connection with this motion and the related motion for production by the time of the resumed hearing of the motion in July 2018. Other affidavits, including affidavits sworn on behalf of the appellants make reference to the need to identify the relevant areas of the quarries from which samples could be taken. So, for example, in an affidavit dated 6th March 2018, Mr. Buckley avers:

“The Roadstone Quarries are fully operational and cover 1,150 acres of land. The Roadstone Quarries produce many millions of tonnes of product per annum. To allow parties unlimited access to the Roadstone Quarries to inspect and take samples throughout the quarries as proposed would pose a serious risk to the health and safety of attendees and would interfere to a very significant extent with Roadstone’s operations. It is, therefore, necessary to plan the sample locations to ensure that the sample locations are safely accessible in accordance with Roadstone’s health and safety procedures.”

In an affidavit dated 24th May 2018, Mr. Goodhue on behalf of the respondents averred:

“As indicated in the previous Affidavit of Professor Somerville, we are not seeking unlimited access to all parts of Roadstone’s quarries and, on the contrary, what is sought is access to those discrete areas of the quarries which are reasonably proximate to the areas of the quarries from which it is likely that stone infill supplied by Roadstone to the Plaintiffs between in or about April 2002 and in or about June 2007 derived.”

75. During the course of the hearing on 20th July 2018, when the court was hearing submissions about the motion for production of documents issued by the respondents, the

trial judge made the following observation in the course of an exchange with counsel for the appellant: “...*the whole purpose of the application is to ensure that the area of the quarry that is examined is the relevant area*” and later she said, in the context of the motion for inspection: “*The question is whether the court has a power under Order 50 to get you to assist as it were the plaintiff in relation to the inspection*”. The applications before the court did not finish on 20th July, and did not resume hearing until 23rd October.

76. On that date, there were lengthy exchanges between the trial judge and counsel for the appellants about the issue, with counsel for the appellants forcefully submitting that the application before the court did not “*translate into an application ... that Roadstone would have to identify locations where they had quarried*” and that counsel for the respondents had purported to make that application for the first time that day, in reply to counsel for the appellants. In response to that submission the trial judge said: “*The issue, in fairness to everybody, was really raised by me on the last day as to the nature and extent of my discretion under Order 50, Rule 4*”, and counsel agreed, and said that he had submitted on that occasion that such an order was unprecedented. There then followed a further exchange between the court and counsel in which the latter explained that compliance with such an order, while not impossible, would involve a huge undertaking, and he referred to affidavits of Mr. Buckley and Mr. Lenny, the solicitor for the appellants. The court then decided to adjourn the hearing to the following day, to allow the parties to make submissions to her on the jurisdiction of the court under O. 50, r. 4. Comprehensive submissions in this regard were then made by the parties the following day.

77. The following emerges from all of the above. From an early stage (well before the judgment of July 2017), the identity of relevant locations within the appellants’ quarries was an issue in the proceedings. A request of the respondents to the court to direct the appellants to cooperate with the order for inspection, by identifying relevant locations, was expressly

identified by the trial judge as such in her first judgment. It surfaced again in July 2018 at the resumed hearing and the appellants addressed the court on the issue at some length on both 23rd and 24th October 2018.

78. While the appellants say that they would have submitted an affidavit addressing the difficulties or even the impossibility of complying with such an order, had they known that the application for such relief was being sought, I would reject this argument for several reasons. Firstly, as is apparent, the issue was well signalled by the first judgment. Any doubt as to whether or not it was indeed an issue must surely have been eliminated by the conclusion of the resumed hearing in July 2018, and an affidavit addressing the issue could have been filed in time for the resumed hearing in October 2018, at latest (In fact the hearing was adjourned from July to October so as to allow the appellants an opportunity to deliver an affidavit on the respondents' production motion, and Mr. Buckley swore an affidavit for that purpose on 31st August 2018). Secondly, in October 2018, counsel addressed the court in some detail as to the task that would be faced by the appellants if such an order were granted. The judge was undoubtedly alert to these issues, as is clear from her comments about the costs that would be incurred by the appellants in complying with the order being costs in the cause, and more significantly, by granting the parties liberty to apply. Thirdly, insofar as the appellants now submit, on the basis of the affidavit filed by Mr. Glynn for the purpose of this appeal, that compliance with the locations part of the order is impossible (contrary to the findings of the trial judge, and leaving aside whether or not the appellants have appealed from that particular finding), that too is addressed by the granting of liberty to apply by the trial judge. Indeed, difficulties in complying with court orders is the *raison d'être* of giving parties liberty to apply. It is not difficult to see what the trial judge was trying to achieve. The litigation would clearly be progressed in a material way either by the

Roadstone identifying the relevant locations, or by bringing the exercise as far as it could before bringing the matter back to court for further directions.

79. For all of the foregoing reasons, I am of the view that any perceived procedural unfairness that there may have been, owing to the fact that there was no relief expressly sought seeking orders directing the appellants to identify specific locations in their quarries, were cured by the time the application finally concluded in October 2018, and by the safeguards built in to the order made by the trial judge. I would therefore dismiss this ground of appeal also.

Order neither necessary nor expedient

80. At the outset of consideration of this objection it is appropriate to recall that the order under appeal is an interlocutory order of a kind in the making of which the judge of first instance enjoys a margin of appreciation. It is useful to recall the words of Irvine J. in *Lawless v. Aer Lingus Group plc* [2016] IECA 235:

“22. The first matter to be briefly addressed in the course of this ruling is the court’s jurisdiction on this appeal. This is an appeal against an order made by the High Court judge in the exercise of her discretion in relation to an interlocutory matter. This is not a re-hearing of that application and that being so this court should afford significant deference to the decision in the High Court. It is nonetheless clear that if an appellate court can detect a clear error in the manner of the approach of the High Court judge it is of course free to interfere with that decision. Further, even if the appellant cannot identify such an error the appellate court may nonetheless allow an appeal if satisfied that the justice of the case can only be met by such an approach. The Court is able to do this because it has available to it all of the affidavit evidence that was before the High Court at the time the original interlocutory decision was made. The role of the appellate court in this regard is set out in the decision of this

court in Collins v. Minister for Justice, Equality and Law Reform [2015] IECA 27 and by McMenamin J. in Lismore Homes Ltd. v. Bank of Ireland Finance Ltd. [2013] IESC 6.

23. However, it seems to me that all too often parties who are somewhat dissatisfied by interlocutory orders made in the High Court seek to use this Court as a venue to re-argue their application de novo in the hope of persuading this court to exercise its discretion in a somewhat different fashion from that which was adopted by the High Court judge at the original hearing. That is a practice which I believe is not to be encouraged. In order for this Court to displace the order of the High Court in a discovery matter the appellant should be in a position to establish that a real injustice will be done unless the High Court order is set aside. It should not be sufficient for an appellant simply to establish that there was a better or more suitable order that might have been made by the trial judge in the exercise of their discretion.”

81. It must also be remembered that the order made by the trial judge was one made by her in the course of case managing these proceedings, for which she had had responsibility for a considerable period at the time she heard the application. Accordingly the deference to be accorded to the trial judge in her consideration of and decision on the application applies *a fortiori*. As Collins J. observed in an earlier decision in these same proceedings (see *Ballymore Residential Limited & Anor. v. Roadstone Limited & Ors.* [2021] IECA 167, para. 6):

“Appellate courts have also recognised that case management is likely to be an entirely hollow exercise unless appropriate judicial restraint is exercised on appeals from case management decisions made by the High Court. As it was put by Clarke J in Dowling v Minister for Finance [2012] IESC 32, an appellate court ‘should only intervene if there is demonstrated a degree of irremediable prejudice created by the relevant case

management directions such as could not reasonably be expected be remedied by the trial judge (or at least where the chances of that happening were small) and where therefore, unusually, the safer course of action would be for this Court to intervene immediately to alter the case management directions.’ (at para 3.5)”

82. It is with those principles in mind that I will address the objections to the order considered from this point onwards.

83. Dealing first with the question of necessity, the trial judge concluded that inspection and sampling facilities were necessary in light of the defence delivered on behalf of the appellants, which puts the respondents on full proof of their claim. She also observed that until inspection and sampling take place, the respondents will not be able to answer the notice for particulars raised by the appellants as to the presence and extent of each defendant’s stone in each house manifesting pyritic heave (these replies had been delivered, following upon inspection of the quarries, by the time this appeal came on for hearing). She had regard to concerns expressed by the appellants that the respondents had not identified any locations in the quarries from which they proposed to take samples, which the appellants feared could give rise to multiple inspections. The solution that the trial judge devised to address this issue was to require the appellants to identify the relevant locations, rather than have inspection deferred until after discovery as the appellants submitted was the appropriate course. The trial judge was concerned to progress the litigation, and considered this to be the best way of achieving that objective. She addressed the concern of the appellants about multiple inspections by noting in her order “*the undertaking of the Plaintiffs that in the event that the First Named Defendant is directed to identify ... the relevant locations in [its quarries] from which the stone supplied by the First Named Defendant to the Plaintiffs for use in the Drumnigh Wood Estate was extracted ... that they will not seek to conduct any further*

inspections in the [quarries] either in these proceedings or in the parallel subrogated proceedings being maintained by Liberty Insurance.”

84. As originally advanced, this ground of appeal was concerned with the expedience and necessity of the order for inspection, including that part of the order that required Roadstone to identify locations within the quarries from which stone was supplied by Roadstone for use in the Development. Once the appeal against the order for inspection was withdrawn, this ground of objection became concerned only with the locations part of the order. Since the order for inspection now stands unimpeached, there can be no doubt at all, even on the appellants’ case, that, in order to give effect to that order, it was necessary either for the respondents to identify the relevant locations in the quarries themselves, or to have them identified by the appellants. Otherwise the inspection of the quarries would be an almost random exercise, giving rise, *inter alia*, to the very risk identified by the appellants themselves, i.e. the need for repeated inspections. Since the trial judge declined to make an order for production of documents (the appellants having opposed the application of the respondents), the only remaining means of identifying the relevant locations in the quarries, at the time of granting the order for inspection, was to direct the Roadstone to do so. For these reasons, I am of the view that the locations part of the order was necessary.

85. The appellants further argue that the order was not expedient; on the contrary, it is oppressive, requiring Roadstone to collate and analyse large volumes of different categories of documentation, and then to form a view on the basis of that documentation as to the locations in the quarries from which stone was extracted and delivered to the Development. In an affidavit sworn on 1st July 2019, Ms. Elizabeth Upton, of Arthur Cox, the appellants’ solicitors, avers that the appellants’ costs incurred up to that point in time in providing documents and information to the respondents was of the order of €90,000, and had taken

up 200 hours of management time. The costs incurred included services provided by various IT suppliers and an aerial mapping company.

86. It must be acknowledged that the locations part of the order required a significant amount of work and expense on the part of the appellants. However, all of that must be seen in the following context. Firstly, the proceedings themselves involve more than thirty houses, and potentially very significant claims for damages. There are related proceedings (the subrogated proceedings, involving 50 or more houses) and as the judge pointed out, it is within the control of the appellants to ensure that just one inspection occurs to address all proceedings. So the stakes involved are potentially very high, and whatever work is involved in complying with the locations part of the order must be seen in that light. The court is also entitled to have regard to the fact that the parties to the proceedings are substantial and well-resourced entities, and, so far as Roadstone is concerned, that it has both the financial resources and personnel resources required to comply with the order. Of course, this of itself does not entitle a court to impose expense on such litigants, or entitle a court to do so lightly, but as I indicated above, it is a factor a court may reasonably take into account when considering an order of the kind made by the trial judge in this case, if only from the point of view of being assured that the party concerned can comply with the order without hardship. Seen in that light, the locations part of the order may reasonably be considered to be expedient, and not oppressive, as claimed by the appellants.

87. Moreover, a very considerable amount of the work undertaken and expense incurred by Roadstone in endeavouring to comply with the order of the trial judge must overlap with work undertaken and expense incurred in complying with any order for discovery that may be made in the proceedings as against the appellants. Obviously, in saying this I am not intending in any way to pre-empt the outcome of any discovery application which must be

adjudicated upon on its own merits, but if this is correct, to one extent or another it further weakens the argument that the order made by the trial judge was not expedient.

88. In any case, the trial judge addressed this issue by pointing out that the expenses incurred by the appellants in complying with the locations part of the order will be costs in the cause, and recoverable by the appellants in the event that they are successful in defending the proceedings. Conversely, if the costs involved were initially borne by the respondents, and they subsequently succeeded in the proceedings, they would be entitled to recovery of the same as costs in the cause. Thus, the impact of the locations part of the order as regards which party must bear the cost of compliance with it is arguably neutral in the final analysis.

89. The appellants also claim that it is impossible to comply with the locations part of the order, and that the order requires Roadstone to form a view as to the relevant locations, exposing the appellants to the risk of being found to be in breach of the order if the respondents subsequently contend that it has failed to identify the correct locations. The appellants point to the fact that the order is not qualified in any way (notwithstanding their request to the court that should be made subject to the caveat "*insofar as possible*"). The appellants claim that it is impossible to comply with the order because large sections of the quarries from which stone was extracted are now, for all practical purposes, voids by reason of the scale of quarrying activities in the intervening years. The locations as such no longer exist. However, even if in one sense this is true, it is, in another sense a spurious argument. Taken to its logical conclusion, there would be no point in inspection at all. It is unsurprising that after so many years of quarrying activity since the construction of the Development that the quarries would have altered substantially in the meantime. It is not difficult to see how this could create difficulties in taking samples such that the experts employed by the parties can be satisfied that the samples taken are taken from the same sources or equivalent sources from which stone was supplied by Roadstone to the respondents, but that is a matter for the

experts employed by the parties and if matters had proceeded as directed by the trial judge, it would have been for them to try and agree an appropriate protocol to ensure, as far as possible, that the samples taken were taken from those areas that correspond, as closely as possible, to the areas from which stone was previously supplied by Roadstone to the respondents, for use in the Development.

90. The same applies in relation to another difficulty identified by Mr. Glynn in his affidavit. This difficulty arises from the fact that once quarried, stone from different locations in the quarries is stockpiled for up to six months, with the result that reviewing delivery dockets and comparing them to blast records corresponding to the same days as the delivery dockets does not necessarily identify the location within a quarry from which stone supplied on any given day was extracted. By reference to three random examples taken in the different quarries, Mr. Glynn demonstrates this difficulty. On the dates concerned, in one quarry 36 different possible locations from which stone was extracted were identified, in another 22 different locations were identified and in the third example 6 different locations were identified. Mr. Glynn discusses how this difficulty might be addressed, and how it might be possible to narrow the possible locations involved, but he avers that, based on the information available, it will not be possible to identify the locations from which stone was extracted and supplied to the Development, and he does not understand how the trial judge concluded that this is possible. He concludes his affidavit by saying that the appellants have provided the blasting records, delivery dockets and extraction plans to the respondents, and that the appellants have no objection to the inspection proceeding subject only to the finalisation of an agreement on an inspection protocol, in respect of which discussions were, at the time of completion of his affidavit (20th June 2019) at an advanced stage.

91. While the affidavit of Mr. Glynn persuasively discusses the difficulties in identifying the locations within the quarries from which stone was extracted and supplied for use in the

Development, the answer to these difficulties, as I have already mentioned, is that the trial judge gave the parties liberty to apply. While it was argued that it would have served no purpose for the appellants to exercise the liberty to apply, given that the trial judge had rejected the caveat to the order proposed by the appellants, i.e. that it be qualified by the use of the words “*insofar as possible*”, that argument in my view is misconceived. There is a world of a difference between considering an advance application to qualify her order on the one hand, and considering whether or not to vary her order in the light of the very detailed and well-reasoned affidavit of Mr. Glynn prepared *after* Roadstone has attempted compliance with the order on the other. It is idle to speculate now, but what may be said is that the exercise of the liberty to apply may well have resulted in a variation to the order which would have addressed the concerns of the appellants to their satisfaction. Viewed in that light, the order cannot be considered oppressive, as contended by the appellants. I would therefore reject this ground of appeal also.

Reversal of burden of proof

92. The appellants argue that the effect of the order is to require them to make admissions, thereby reversing the burden of proof. They also argue that the order constitutes an order to furnish information under the guise of an order for inspection.

93. Taking this latter point first, while it is true to say that it requires the appellants to furnish information, it is for the limited purpose only of identifying locations, to give effect to the order for inspection. Once that purpose is satisfied, the effect of the order is spent. For this reason, it seems to me that it is more accurate to characterise it, as the trial judge did, as an order made to give effect to the order for inspection, rather than an order made for the provision of information which might be used against the appellants in the proceedings.

94. In their defence, at para. 12(b) the appellants plead:

“It is admitted that the first defendant supplied stone infill and crushed rock products to the plaintiffs for use in the Drumnigh Estate but no admission is made as to the quantities and specification of the products supplied or the use to which those products were put.”

By identifying locations in the quarries from which stone was extracted and delivered by Roadstone to the respondents, Roadstone will be doing no more than has already been admitted in the defence and will not be making any concessions regarding the quality or fitness for purpose of the goods supplied. There is therefore no question of any reversal of the burden of proof. I therefore reject this ground of appeal also.

Did the trial judge make findings, in para. 25 of her judgment, that can and should be set aside if the court were satisfied that such findings were made in breach of fair procedures?

95. This question arises out of the fifth ground of appeal, which in turn arises out of the appellants’ dissatisfaction with para. 25 of the judgment under appeal. While para. 25 is set out in full at para. 23 above, it is expedient to set it out again for the purpose of consideration of this ground of appeal:

“25. This court first became involved in the case management of these proceedings in May, 2017, when it first heard the plaintiff’s application for inspection pursuant to O. 50, r. 4. At that point, the pleadings were at the stage where the statement of claim had been served. In the period since then, the only progress made in the substantive claim has been to have the defences delivered and the pleadings closed. This is despite the fact that the case has been before the court on 25 occasions in that period. There have been nine mention dates, three judgment dates and a full 13 hearing days. The hearing days have been spent essentially dealing in one form or another, with Roadstone’s objections to the progression of this claim. The court has a growing impression that

Roadstone is deploying a strategy to hinder, impede and delay the progress of this claim by any lawful means at its disposal. In our adversarial system of civil litigation well-resourced litigants can quite readily clog the system with multiple applications, should they choose to do so. Just because they can, does not mean they should or that they should be permitted to do so. Courts must be vigilant to ensure, as best they can, that their scarce resources which are provided for the benefit of society at large, are not monopolised or disproportionately used to serve the ends of wealthy litigants, whose interest may be to hinder or impede litigation rather than ensuring its efficient and economical conduct.”

Submissions of appellants on fifth ground of appeal

96. I have summarised, at para. 27(4) above, the ground of appeal arising out of this paragraph. In essence, however, the appellants complain that the findings contained in this paragraph (such as they are) were made in breach of fair procedures because at no stage, either during the course of the hearing of the motion or following the delivery of the judgment by the trial judge, were the appellants afforded the opportunity to address her on these issues. Moreover, the findings are based on inaccurate facts and ought to be set aside.

97. It is submitted that the statement that “*the hearing days have been spent essentially in dealing in one form or another, with Roadstone’s objections to the progression of this claim*” is factually inaccurate. This is addressed in an affidavit sworn by Ms. Elizabeth Upton on behalf of the appellants on 11th June 2019, for the purpose of placing evidence before this Court regarding the procedural history of these proceedings, in connection with this ground of appeal. Ms. Upton points out that nine motions have been brought in the case, only two of which were brought by the first named appellant, and it was not even a party to three other applications. Six of the motions were issued by the respondents. Of the 25 occasions referred to by the judge when the matter was before the court, three of those dates were dates

on which matters were listed for judgment, and nine of them were dates when the case was simply in for mention. Also included are dates dealing with motions brought by the respondents for production and discovery. The motion for production was dismissed, and the discovery motion did not proceed.

98. Other issues are also raised. Initially, the motion for inspection concerned six quarries of the appellants, but was then reduced to three. The respondents claimed, inaccurately, that they needed inspection to draft a statement of claim. There were also complications brought about by the fact that the respondents chose, in addition to issuing these proceedings, to join the appellants as third parties to three of the homeowner proceedings, and the judge herself stated that the respondents could not “*ride two horses*” (although it must be observed that the appellants failed in their attempt to have these proceedings dismissed, both at first instance and on appeal to this Court).

99. The appellants contend that the trial judge afforded them no opportunity to address her on these issues causing her to have an inaccurate impression as to the conduct of the litigation by the appellants, and that this in turn fed into her decision to grant the order for inspection. All of this, it is argued, occurred in breach of fair procedures, and aside from the immediate impact on these proceedings, causes the appellants unfair reputational harm, not least because the comments were made by the trial judge who has been case managing the proceedings over a number of years.

100. While this ground of appeal does not relate directly to any specific order made by the trial judge, the appellants submit that there is authority for the proposition that an appellate court may set aside findings made on an inaccurate factual basis and that were arrived at in breach of fair procedures.

101. The appellants referred the court to three authorities, *NALM v. Middleview Ltd.* [2017] IECA 290, *Defender Ltd. v. HSBC France* [2020] IESC 37 and *Seredych v. Minister for*

Justice and Equality [2020] IESC 62. In *Defender*, the trial judge had been critical of the parties and their representatives as regards the conduct of the litigation, and in particular for failing to seek trial of a preliminary point of law, which, if determined in favour of the defendants would be decisive of the proceedings and avoid a six month trial. In the Supreme Court, O'Donnell J. (as he then was) addressed this criticism as follows at paras. 23 and 24:

“... It is apparent that the judgment is replete with references to the importance of case management and contains some critical observations on the practices of lawyers and parties in relation to litigation. I completely agree that trial courts are not passive observers of litigation, and have to manage litigation effectively, but it remains the parties' litigation, which the court is managing. Thus, a court can: readily fix time for the delivery of pleadings and the identification of issues; insist upon clarity in what is and is not alleged; encourage realism in that regard by indicating there will be consequences in costs for unnecessarily raising or contesting issues; limit the length of submissions and, in some cases, the number of expert witnesses; and insist on realistic estimates of the time to be taken. Experienced trial judges can insist on realism where it is lacking, require efficiency, and encourage practicality.

24. But there is no reason to deprecate private parties seeking to litigate claims in courts when they cannot resolve them otherwise. That is, indeed, a core function of the administration of justice. An important part of the administration of justice is that a party, in particular the losing party, should believe that his or her case was fairly ventilated and considered. That does not mean that, in some cases, a judge may not consider that it is necessary to determine that an issue which one party seeks to raise does not properly arise in the case, or may not intervene to direct that an issue be determined where there is a clear benefit in doing so and a real likelihood that it may determine the proceedings or, at least, considerably shorten them....”

102. In *Seredych*, the Supreme Court (Baker J.) was highly critical of the trial judge for making comments, both in his principal judgment and in a separate judgment refusing leave to appeal, about counsel for the parties. Baker J. considered that the comments called into question both the professional integrity and competence of counsel on both sides, remarking, at para. 94:

“In particular the judgment on the leave application contained a number of quite remarkable and personally insulting comments regarding the competence and trustworthiness of counsel for the State and the professional competence of both senior counsel.”

The counsel concerned were identified by their names, and neither had the opportunity to respond. At para. 98, Baker J. said:

“Such comments have no place in a judgment. The relationship between counsel and the court must be one of mutual respect. The judge is in a particular position of power and can damage or destroy a career with a remark made in court or in a written judgment. Equally a judge can cause personal distress, not just because the judge holds a position of power, but also because he or she is held in high esteem by the profession and generally by members of society.”

103. Baker J. went on to observe that while there may be occasions when a judge may doubt the integrity of counsel or his or her professional competence, in a written judgment, that should not be done lightly and without affording the lawyer concerned the opportunity to respond and defend his or her reputation and professional competence.

104. *Middleview* is a decision of this Court (Ryan P.) handed down on 26th October 2017. Ryan P. identified fourteen grounds of appeal, including two grounds relating to findings concerning the evidence of a witness which the trial court had described as being misleading. Following upon his initial judgment, the trial judge heard submissions on the issue, but

refused to revise his judgment, and delivered a further written judgment explaining why he did not consider it necessary to do so. However, he accepted that the witness concerned had not intended to mislead the court. At para. 49, Ryan P. stated:

“49. There is a fundamental distinction between the approach of this Court to the substance of appeal and to the complaints by the appellants in respect of the second judgment. It is understandable that the appellants would wish to have the adverse comments that the judge made about Mr. [] set aside. However, the hearing at which the trial judge permitted his original judgment to be revisited was not as I understand in any sense a re-hearing. It was an application at the request of a party to the judge that he would reconsider a particular section of his judgment. The present appellants did make clear that they were not seeking to secure a different outcome to the case, but merely to apply for a reconsideration of the comments about Mr. []. The judge was free to entertain the application or to refuse to do so, in his discretion. He was satisfied to revisit the matter and he then delivered a further judgment. I think that a wide margin of appreciation has to be allowed to the court of trial in such circumstances. The judge is entitled to express views about the evidence in the case before him. When matters come before the court on affidavit and it transpires that errors are made, many judges will think it appropriate to comment and criticise and even to make severe criticisms. In regard to comments that are not necessary for the appeal, I think that the Court of Appeal should be slow to embark on an evaluation of the validity of observations and comments made by the trial judge in the course of a judgment unless there is some apparent error of law or fact or that there is some otherwise exceptional circumstances where justice seems to require it. Even if the court might take a different view on written material including affidavits, there is a zone in which the trial judge is free to express his or her view and that will sometimes

include expressions of irritation or exasperation about things the judge thinks are wrong or should have been done differently or better. Appeal courts would be full with cases in which the decision was not being challenged, but rather something that the judge said or did would be the matter of debate. So, it seems to me that this Court should be careful to ensure that we spend our time on matters that are in dispute between the parties as affecting liability of one or the other in respect of legal wrongs. My approach, therefore, to this part of the appeal is reluctant and hesitant. This is not because I do not appreciate Mr. []'s concern that his reputation might be impaired by things that the judge in the High Court said about him. It is simply that my conception of the function of this Court reflects a severe limitation on our capacity to endeavour to put right what he may consider to be erroneous in what the judge said."

105. While this decision is not very helpful to the appellants' arguments on this issue, they very correctly drew it to the attention of the Court. While acknowledging that it is not helpful, they make two points about the decision. The first is that the decision does not close out a review by an appellate court of criticisms of the parties in all circumstances. It is submitted that even within the parameters of what was stated by Ryan P., an appeal court may review comments made by the trial judge where there is an error of fact and there are exceptional circumstances such that justice requires such a review.

106. Secondly, the appellants submit, the decision in *Middleview* has been overtaken by the subsequent decisions of the Supreme Court in both *Defender* and *Seredych*, which now more accurately represent the approach an appellate court should take in such matters.

Submissions of respondents on fifth ground of appeal

107. The respondents reject the claim that para. 25 of the judgment contains a recitation of the procedural history of the proceedings and notes that the appellants have taken no issue with the detailed procedural history set forth in the judgment in paras. 2 – 24.

108. The respondents deny that evidence or submissions were required in order for the trial judge to express the views that she did in para. 25. The trial judge had extensive knowledge of the proceedings and the procedural conduct of the appellants having case managed the proceedings since October 2017. In so far as any evidence was required by the trial judge for those conclusions, that was to be found in the enormous volume of affidavits before the court.

109. The respondents submit that the appellants could not reasonably have expected the trial judge to have invited submissions on these conclusions having regard to the extent of their opposition to the proceedings which on this application the trial judge found to be “*spurious*”. Moreover, it is submitted that a statement by the trial judge that she had a “*growing impression*” as regards the strategy of the appellants does not constitute an adverse finding against the appellants. Furthermore, the court is entitled to form such impression as it did.

110. As a matter of law, the contention that parties to proceedings are entitled to make submissions to the court about their conduct in the proceedings before they can be criticised by the court or before the court delivers its judgment is misconceived and at variance with the constitutionally mandated function of the court to administer justice between all litigants, and the inherent powers of the court, including its inherent power to control its procedures.

111. Furthermore, the appellants make no reference at all to para. 26 of the judgment of the trial judge in which she stated:

“26. The court's impression as to Roadstone's strategy was strengthened during the hearing of this application, by an exchange which it had with Roadstone's counsel. The court, having found during the course of the hearing, that inspection and sampling are necessary on the facts and the pleadings, asked counsel whether Roadstone accepted that inspection was necessary in principle, and were merely asking the court

to delay inspection until after discovery, so that a more focussed inspection could occur. Counsel informed the court that Roadstone was reserving its right to challenge the necessity for inspection, even after discovery had been completed. The court indicated that if that was Roadstone's position there was little point in delaying inspection until after discovery. Having sought time to take instructions, counsel informed the court that he had been unable to get instructions as to whether Roadstone accepted in principle that inspection was necessary and was merely seeking a delay in execution, until discovery was completed. Offered the opportunity to take instructions on the matter overnight and revert if he obtained instructions, to that effect, counsel did not return. The position therefore, appears to be that Roadstone does not accept the court's finding that inspection is necessary but nonetheless wants the court to delay issuing an order directing inspection until discovery is complete, at which point it will seek to argue the whole inspection motion de novo. ..."

112. As to the authorities, it is submitted on behalf of the respondents that the most relevant of the authorities is *Middleview* and that the matters giving rise to the comments of the Supreme Court in *Defender* and *Seredych* are entirely distinguishable from the matters now complained of by the appellants. In *Defender* the complaints of the parties arose from the fact that the trial judge directed the trial of a preliminary issue at the outset of the proceedings, against the wishes of the parties. It was in that context that certain critical remarks were made by the trial judge. In *Seredych*, the comments that were made concerned the lawyers representing the applicant in the proceedings, rather than the litigants, as here. On the other hand, it is submitted that *Middleview* is analogous and deals squarely with this ground appeal. On the basis of *Middleview*, this Court should not engage in any evaluation of the observations made by the trial judge in para. 25.

Discussion and conclusion on fifth ground of appeal

113. In making the observations that gave rise to this ground of appeal, the trial judge observed that “*there have been nine mention dates, three judgment dates and a full thirteen hearing days. The hearing days have been spent essentially dealing in one form or another, with Roadstone’s objections to the progression of this claim...*”. In the very detailed analysis of the proceedings up to the date of her affidavit of 11th June 2019, Ms. Upton summarises, at para. 54 thereof, the subject matter of the hearing dates as follows:

- “• *The first application for inspection took three days. This application was against Roadstone and Murphy Concrete and was also opposed by Murphy Concrete, who instructed Senior Counsel to appear and make submissions.*
- *Judgment was delivered in the motion for inspection on 28 July 2017. An order for inspection was not made against Roadstone. An order for inspection was, however, made against Murphy Concrete.*
- *The hearing of the motions to compel replies to particulars took two days. A motion was issued by both Roadstone and Murphy Concrete and counsel for Murphy Concrete moved the motions for particulars on its behalf.*
- *Judgment was delivered in the motions for further and better particulars on 29 January 2018. The Court ordered Roadstone and Murphy Concrete to deliver their defences but adjourned the motions with liberty to re-enter on the basis that they were entitled to seek replies to the outstanding particulars prior to the hearing of this matter.*
- *Three hearing dates were taken up with Roadstone’s motion to strike out, from 30 May 2018 to 2 June 2018.*
- *Judgment was delivered in the motion to strike out on 26 June 2018.*
- *The renewed application for inspection came on for hearing on 19 July 2018. It did not finish on that date because the court also had to hear Ballymore’s motion*

for production. Counsel for Ballymore moved the motion for production on 20 July 2018.

- *The renewed application for inspection and the motion for production resumed on 23 October and ran for two days.*
- *Judgment in the renewed application for inspection was delivered on 21 February 2019.”*

114. The analysis of Ms. Upton makes it plain that the appellants have been responsible for the issue of just two out of the nine motions that have been issued in the proceedings. By my calculations, those motions, being the motions to strike out and a motion to compel replies to particulars, took up five out of thirteen hearing days. From a statistical viewpoint, this in and of itself does not suggest an obstructive approach to the litigation by the appellants and I think it must be acknowledged the appellants have not, on any view of the history of the proceedings, “*clogged*” the process with multiple applications . But bare statistics rarely, if ever, tell the complete story. The manner in which a party responds to the proceedings and interlocutory applications brought by other parties is likely to be just as informative of its approach to the litigation as are the steps it initiates. This is where it becomes particularly difficult for an appellate court to undertake a review of comments such as those made by the trial judge, without undertaking a complete review of the evidence and the transcripts. This is especially so when those comments were made by the judge who has gained an intimate acquaintance with what are complex proceedings of long duration by reason of her involvement in the case management of the proceedings This is not the function of an appellate court. As Ryan P. observed in *Middleview*: “*Appeal courts would be full with cases in which the decision was not being challenged, but rather something that the judge said or did would be the matter of debate*” if objections of this kind are sustained on appeal.

115. As the respondents point out, the trial judge expressed particular frustration (in para. 26 of her judgment) that the appellants would not concede, even in principle, the necessity for inspection, even if it had to await discovery. This occurred at a case management hearing on 26th July 2018 when the trial judge asked counsel for the appellants whether or not the appellants accepted that there would have to be an inspection. Counsel replied that she did not have instructions to give an answer. The trial judge afforded the appellants' legal advisors the opportunity to obtain such instructions (including the opportunity to mention the matter to her the next day) and expressly informed counsel that the answer to this question would be "*extremely material to the court's determination*". Nonetheless, the appellants' legal advisors were unable to obtain instructions, and did not return the next day. It has to be said that the failure on the part of the appellants to concede, even in principle, that inspection of the Roadstone quarries was necessary, even if it had to await discovery, was very difficult to understand and one can well imagine why the trial judge found this frustrating after five days of hearing (at that point in time) and having had to consider up to 51 affidavits and exhibits.

116. As far as the authorities referred to the Court are concerned, I do not see any inconsistency between the decision of Ryan P. in this Court and the decisions of the Supreme Court in *Defender* and *Seredych*. *Defender* makes it plain that parties to proceedings should not be criticised merely for litigating claims which they cannot resolve. No such criticism was made of the appellants here, express or implied. *Seredych* makes it clear that judges should not subject lawyers to insulting remarks regarding their competence and integrity, and where a judge contemplates such criticism, should not do so without affording the lawyer concerned the opportunity to respond and defend his or her good name. Counsel for the appellants fairly makes the point that litigants too are entitled to their good name, and that in this case the appellants were subjected to criticisms regarding their approach to these

proceedings, without being afforded an opportunity to reply. Nonetheless, the remarks in *Seredych* were of quite a different character to those made by the trial judge in this case, which were much more closely connected to the manner in which the proceedings were being conducted.

117. I agree with counsel for the respondents that *Middleview* is the most analogous of the three authorities to which the Court has been referred. As I have said above, the Court is, in effect, being asked to review not a finding or an order made by the trial judge, but an impression that she has formed. As Ryan P. observed in *Middleview*, the “*Court of Appeal should be slow to embark on an evaluation of the validity of observations and comments made by the judge in the course of a judgment unless there is some apparent error of law or fact or that there is some otherwise exceptional circumstance where justice seems to require it.*” Even if this Court might take a different view on the facts, that in itself is not sufficient for this Court to intervene, for the reasons articulated by Ryan P. in para. 49 of his judgment (see para. 104 above).

118. A recent decision of this Court in which the grounds of appeal included complaints about comments made by the trial judge (in that case) both during the course of the hearing and in his judgment, is also instructive. In *Dully v. Athlone Stadium Limited* [2021] IECA 337, a judgment of the Court, it was held at paras. 124 - 126 as follows:

“124. Each ground of objection falls to be examined having regard to the fact that a Judge must be given a wide power to exercise discipline over the conduct of proceedings before him or her, to intervene to prevent time wasting and otherwise to take such steps as are necessary to enable the efficient disposition of the proceedings before the Court. A Judge must not only be free to assert that authority, but as part of that same exercise must be free to express during the proceedings or in his or her

judgment criticism of parties, of their counsel, of their solicitors or of their witnesses where this is believed by the Judge to be merited.

*125. Of course (as O'Malley J. has recently explained in addressing comments by a Judge during the course of a trial) unnecessarily trenchant or insulting criticisms should be avoided, the Court must take account of the fact that carelessness with language may lead to unintended affront and upset and 'judges should avoid using opprobrious words about a party, or his or her professional representatives, **unless the situation appears to call for it**' (Murphy v. DPP [2021] IESC 75 at para. 68; [original emphasis]).*

126. However (as the highlighted words from the judgment of O'Malley J. and the decision in Seredych both make clear) none of this prevents the delivery of a judgment which expresses, forcefully if believed necessary, the judge's assessment of the manner in which the case has been conducted before the Court and, it follows, the making of such criticisms – even if found to be overly severe or ultimately unjustified on the facts – will not in themselves constitute a ground on which a judgment is set aside. To make out a case of the kind suggested by these grounds of appeal, the comments must, whether alone or in conjunction with other features of the judgment or conduct of the hearing, themselves present clear unfairness such as to undermine the findings reached in the judgment, or to demonstrate animus, or be such that a reasonable bystander would reasonably apprehend such bias. That reasonable bystander must, obviously, be fully informed and aware of what happened during the trial itself.”

119. The impression formed by the trial judge as to the strategy of the appellants is one gleaned from her extensive involvement in the proceedings and would be almost impossible for this Court to review, even if it were disposed to do so, without conducting a detailed assessment of all of the proceedings up the date of the judgment under appeal. It is clear

from *Middleview* and more recently the decision of this Court in *Dully* that trial judges are entitled to express their views about the manner in which litigation has been conducted in their judgments and that they enjoy a wide margin of appreciation in doing so. In this case, the comments made by the trial judge fall well short of providing any basis for intervention by this Court, not least having regard to the contents of para. 26 of her judgment, about which no complaint has been made. Accordingly, I reject this ground of appeal also.

Summary of conclusions

120. Notwithstanding the inspection carried out by the respondents at the Roadstone quarries in September 2019, in circumstances where the order of the High Court of 11th April 2019 remains extant and has not been complied with by Roadstone, the order is capable of affecting the rights of the parties in the proceedings, and in such circumstances the appeal cannot be considered moot.

121. Order 50, r. 4 RSC is broad enough to confer jurisdiction of the High Court to make such ancillary orders as are reasonably necessary and expedient to give effect to an order for inspection made pursuant to O. 50, r. 4, subject to the constraints set out in para. 68 above.

122. The order made by the trial judge in this case was necessary and expedient in order to give effect to the order for inspection. Contrary to the arguments made by the appellants, it was not made in breach of fair procedures and did not have the effect of reversing the burden of proof in the proceedings.

123. Having regard to the submissions made on behalf of the respondents that the respondents will not be seeking any further inspections of the Roadstone quarries, it is appropriate that the stay placed upon the order of the High Court, by this Court, in May 2019 should be continued indefinitely, pending further orders (if any).

124. The comments made by the trial judge at para. 25 of her judgment do not constitute findings that are capable of being set aside.

125. The appeal is dismissed and the order of the High Court of 11th April 2019 is affirmed. I will set out now my provisional views as to costs, which is that since the respondents have been wholly successful in this appeal, the appellants should pay the costs of the respondents, to be adjudicated in default of agreement. If the appellants wish to contend that a different order as to costs should be made, they may, within fourteen days of the delivery of this judgment, contact the Office of the Court of the Appeal and request a short oral hearing at which submissions will be made by the parties in relation to the appropriate order for costs. The appellants should note that in the event that they are unsuccessful in altering the provisional order for costs which I have indicated, then they may be required to pay the costs of the additional hearing.

126. Faherty and Collins JJ. have expressed their agreement with this judgment.