

THE ATTORNEY GENERAL

at the relation of

FRANK MCGARRY & OTHERS

v.

SLIGO COUNTY COUNCILJudgment delivered by Mr. Justice McWilliam the 21st day of December 1983.

This case arises out of a proposal by the Defendant to establish a waste disposal dump in a sand and gravel pit (hereinafter called the quarry) situated in an area of considerable scenic beauty containing one of the largest concentrations of megalithic tombs in Europe. It is probable that there are other megalithic remains under the surface of the ground and the surrounding areas may contain antiquarian items providing further information with regard to the prehistoric community and the start of agriculture. It is accepted by all the distinguished witnesses who gave evidence that this is an exceptionally important area archeologically. The importance of the area has recently been emphasised to archeologists throughout the world by work done by Professor Goran Burenholt at the site of the megalithic cemetery at Carrowmore between the years 1977 and 1982.

The quarry is separated from the cemetery by a public road but it is likely that the cemetery originally extended over the sites of the present road and quarry as there are records of two monuments having formerly existed

on the site of the quarry. These two monuments appear to have been removed or destroyed about 180 years ago. The nearest to the quarry still existing is about 41 or 42 feet from the edge of the quarry but across the road from it.

These proceedings were instituted by plenary summons dated 11th July, 1983, issued on behalf of the five Plaintiffs other than the Attorney General claiming an injunction restraining the Defendant from using the quarry for the purposes of the proposed refuse dump. Alternatively, the Plaintiffs seek an injunction restraining the Defendant from using the quarry for waste disposal pending the preparation by the Defendant of a plan for the disposal of waste in accordance with the provisions of the European Communities (Waste) Regulations 1979, S.I. 390 of 1979. These Plaintiffs also claim damages for nuisance and other relief.

On 25th July, 1983, on a motion by the Plaintiffs, an interlocutory injunction was granted restraining the Defendant or its servants or agents from entering the quarry for the purpose of developing, opening, preparing or using the same as a refuse dump or pithead.

In November, 1983, the Attorney General was added as a party to the proceedings and an amended statement of claim and defence were delivered.

It is accepted that no material of archeological interest is now to be

found within the present boundaries of the quarry.

The Defendant, having become concerned about the inadequacies of its arrangements for waste disposal, was for some years prior to 1983 investigating the possibility of a site alternative to that shared by it with the Sligo Corporation at Finisklin in the harbour area of Sligo. This site had become completely filled and has for a considerable time been wholly unsatisfactory and the dump there has, to all intents and purposes, been unmanaged by either authority and is generally accepted to constitute a nuisance. The Defendant also has control of a much smaller site at Ballymote and, although the dump there is better managed than the dump at Finisklin, it also is in a most unsatisfactory state. Several sites alternative to Finisklin were considered by the Defendant but were rejected as unsuitable for one reason or another.

The quarry appears formerly to have been owned and worked by a Mr. Harte for many years. The ground immediately to the North of the quarry had also been quarried but this part belonged to a Mr. Devaney whose son, Mr. Bernard Devaney, gave evidence and stated that he got this ground from his father and reclaimed it about twenty years ago by filling it with builders' waste to a depth of about ten feet, thereby bringing the surface to a height about twenty-five or thirty feet below the level of the road beside the quarry. Mr. Bernard Devaney also assisted Mr. Harte in working his quarry and eventually

purchased it from him for a sum of £9,000 and became registered as owner of it in September, 1978.

Mr. Devaney stated in evidence that, in 1980, the Industrial Development Authority asked him to take industrial waste from two factories in Sligo because the Finisklin dump had then been closed for industrial waste. Shortly afterwards Mr. Devaney started a profitable business accepting industrial waste for disposal in the quarry, while continuing to take out sand and gravel. He stated in evidence that the Defendant's lorries collected some of this material from the quarry for use on the roads. Presumably the County Manager as chief executive officer of both the Defendant and Sligo Corporation had some responsibility for the closure of the Finisklin dump for industrial waste and was aware of the use Mr. Devaney was making of the quarry.

In or about the same time Mr. Devaney applied for a haulage licence to carry waste but this was refused and he then entered into negotiations with the Defendant through the County Manager for the sale of the quarry for the purposes of a general dump. As Mr. Devaney was asking for £200,000 for the quarry, the negotiations fell through at this time. The negotiations were resumed in February, 1982, and resulted in a lease of the quarry by Mr. Devaney to the Defendant dated 20th January, 1983, whereby the quarry was demised to the Defendant for the term of one year from 1st January, 1983, at the rent of

£4,000. The Defendant was also given an option to purchase the quarry for £100,000, the option to be exercised not later than 31st December, 1983. The consideration for this option was a further sum of £5,000. On 1st February, 1983, the County Manager, on behalf of the Defendant entered into an agreement with Mr. Devaney whereby Mr. Devaney was engaged by the Defendant as a contractor to manage the refuse dump in the quarry for the period of one year from 1st February, 1983, in consideration of a further sum of £5,000 to be paid by quarterly instalments. Paragraph 9 of this agreement contained the unusual clause that the contractor should, if so required by the Defendant, assist the Defendant in resisting and opposing any objections or protests from any parties to the use of the refuse dump as such whether arising through legal proceedings or otherwise.

Notwithstanding the lease to the Defendant and the management agreement, Mr. Devaney continued, for reward, to accept industrial waste and continued operating the quarry. The evidence of both the solicitor for the Defendant and Mr. Devaney is that there was some sort of verbal agreement allowing Mr. Devaney to draw material from the quarry notwithstanding the lease to the Defendant. It also seems to have been agreed verbally that Mr. Devaney was to be allowed to continue to receive and charge for the deposit of industrial waste. Neither of these agreements was witnessed by any written document.

Although the monuments are National Monuments under the guardianship of the Commissioners of Public Works, the Commissioners were not consulted before the lease and agreement were executed. The County Manager explains this omission by saying that there are no monuments in the quarry. This is, of course, correct. But the National Monuments Advisory Committee, set up by the Defendant under the provisions of section 22 of the National Monuments Act, 1930, was not consulted either. Nor were Bord Failte, An Taisce, the Royal Society of Antiquaries of Ireland or the Donegal-Sligo-Leitrim Regional Tourism Organisation consulted. All of these bodies wrote to the Defendant criticising the proposed dump as soon as news of the proposal was made public through the local paper. In reply to the Tourism Organisation the Secretary to the Defendant protested against the criticism of the proposal and stated that no useful purpose would be served by explaining the Defendant's proposals.

It appears from the evidence of the County Manager and from the form of the agreement of 1st February, 1983, that it was then intended to operate the dump at an early date and a letter from Mr. Devaney indicates that dumping had commenced at that time but had been discontinued, probably from 28th February, 1983 in pursuance of a resolution to that effect passed at a meeting of the Defendant. Possibly this resolution was passed as a result of the protests by the various organisations.

Essentially, the Plaintiffs' claim is made on four grounds:-

- (1) That the Defendant's proposals will constitute a nuisance or nuisances, either public or private or both.
- (2) That the operation of the dump would be a contravention of the Co. Sligo Development Plan of 1979.
- (3) That the operation of the dump would necessitate a contravention of section 14 of the National Monuments Act, 1930.
- (4) That the operation of the dump would be a contravention of the European Communities (Waste) Regulations, 1979.

The anticipated nuisances include, principally, the offensive nature of a visible refuse dump in an area of great importance to archeologists and to tourists and to all members of the public who visit the locality in large numbers both on account of the archeological remains and the scenic attractions. In addition it is urged, and a considerable amount of evidence was adduced to support the contention, that the increased traffic of lorries to and from the quarry on the narrow roads in the area will obstruct the ordinary traffic of the residents and tourists and others. No reference was made by either side to the lorry traffic which must have used these same roads for the carriage of the industrial waste to and the transport of sand and gravel from the quarry. It is further urged, and the evidence with

regard to the dumps at Finisklin and Ballymote gives considerable grounds for apprehension, that there will be an infestation of vermin, mainly rats, and of seagulls; the rats being particularly objectionable in themselves and the gulls being objectionable in that they tend to spread refuse round the adjoining land. It is also anticipated that there will be offensive smoke and smells, that there will be litter spread around this world-famous cemetery and the surrounding countryside by being blown from the quarry or falling off vehicles carrying refuse to the dump, by the activities of scavengers, and by people who adopt a procedure known apparently as "fly-tipping" who bring refuse to a dump and, if they find it closed, deposit the rubbish in any available spot nearby. Finally, it was very strenuously argued on behalf of the Plaintiffs and equally strenuously refuted on behalf of the Defendants, with expert evidence being tendered on each side, that there will be noxious liquids leaching from the dump into the subterranean water which provides the source for the wells of the original Plaintiffs and others. At some stage in 1983, presumably after the objections to the Carrowmore dump had been made and possibly after the institution of these proceedings, the Defendant produced what is entitled a Preliminary Draft Waste Management Plan, 1983. I am not satisfied as to the accuracy of this plan because, in the section headed "Existing Waste Collection Service", the



dump at Ballymote is described as being well maintained. The photographs of the face of the tiphead at Ballymote which have been put in evidence and the evidence with regard to the numbers of rats at this site completely contradict this statement, although the portions of the site which have been filled already and covered over are obviously satisfactory.

Shortly before the hearing of the action, the Defendant prepared a Draft Management Plan for the Carrowmore Landfill Site. I am satisfied that this plan would not have been prepared had it not been for the institution of the proceedings, but this plan does provide for very comprehensive safeguards for the management of the dump and the County Manager stated in evidence that these safeguards would be put into operation if the quarry were to be used for a dump. If these safeguards were to be properly operated, I am of opinion that no actionable nuisance would arise. On the other hand, to operate them will undoubtedly be very costly and it may be found impracticable to embark on such an enterprise with the funds presently available to the Defendant. In particular, it has been estimated that the cost of accurately ascertaining the effect of the proposed dump on the underground water will be in the region of £15,000. As I understand the evidence of the officials of the Defendant it is not now proposed to use the quarry as a dump until such tests have been carried out, whatever may have been the original intention.

As the Defendant has had the right to occupation since February, 1983, it is difficult to see why these tests, if originally intended to be made, have not been carried out during the present year. The County Manager explains this by saying that the injunction of 25th July prevented the tests being carried out. This is an unsatisfactory explanation in view of the period which had elapsed between the date of the lease and the date of the injunction and the failure of the Defendant to consider its responsibility for the dumping by Mr. Devaney after the granting of the injunction. The conclusion is almost inevitable that there would not have been any complete and expensive hydrological tests had these proceedings not been commenced.

I have been referred to a number of provisions in the Development Plan of 1979. Generally speaking, these provisions refer to the importance of preserving the archeological and historical remains, the amenities of places of natural beauty or interest, and, in particular, refer to the cemetery as being unique both in Ireland and in Europe. There has been a conflict of expert evidence as to the effect of the dump, if properly managed, on the amenities of the area, but I have formed the opinion that the proposed dump does not conflict with the provisions of the development plan if the proposals in the draft management plan are closely observed. The quarry in its present condition is certainly not an amenity and I accept the evidence that

the amenities of the area will be improved when the quarry is filled and covered over. But this will take a long time and it is depressing to think that the operation of the dump in this area will continue for about thirty years.

My attention has been directed to the sub-heading "Proposed Action" at page 184 of the development plan where it is stated, at paragraph 2, that action will be investigated as to declaring the land in and around the cemetery an unauthorised gravel pit and seeing that extraction ceases there as soon as possible. How this can be reconciled with the continued purchase and haulage by the Defendant of material from the quarry is difficult to understand.

I am of opinion that the proposed dump does not necessitate any contravention of section 14 of the National Monuments Act, 1930. There is no evidence that there is any threat to the fabric of any of the surviving monuments and I am of opinion that filling the quarry does not constitute excavating, digging, ploughing or otherwise disturbing the ground in proximity to the monuments, within the meaning of the Act.

Paragraph 3 (1) (b) of S.I. No. 390 of 1979 provides that a holder of waste shall not dispose of it in a manner which would endanger health or harm the environment or, in particular, which would

- (i) create risk to water, air, soil, plants or animals,
- (ii) cause a nuisance through noise or odours, or
- (iii) adversely affect the countryside or places of special interest.

I have dealt with most of these matters already. On the evidence given before me, I do not consider that there will be any appreciable nuisance from noise and, if the provisions of the Draft Management Plan are enforced, I do not anticipate any nuisance from odours. As already stated, an unsatisfactory aspect of the project is the length of time it will take to complete but, as against this, it has not been suggested that there is, at present, any restriction on the owner of the quarry from continuing to work it or enlarge its size.

It is only proper to refer to certain aspects of the attitude shown by some of the Plaintiffs to the preservation of the amenities of this region although it is not relevant to my decision. The Plaintiffs complain of disturbance of the ground in proximity to the National Monuments yet one of them erected a building most unsuitable to the area and very close to a well-preserved monument. Another of the Plaintiffs, or his family, appear to have worked a sandpit close to some of the monuments in the cemetery.

I was referred to a number of cases. In the circumstances of the present case the most relevant seems to me to be that of Attorney-General (Boswell) v.

Rathmines & Pembroke Joint Hospital Board (1904) 1 I.R. 161 in which

Fitzgibbon, L.J., said at page 272 that the decision depends on the facts proved in the particular case with due regard to the opinion of experts so far as they are founded on facts.

Under the circumstances of this case which I have set out, I am of opinion I should refuse to grant the relief sought but I will direct that the full report of the hydrologist employed by the Defendant shall be furnished by him to the solicitor for the Plaintiff at the same time as it is furnished to the Defendant and I will give liberty to apply in this action.

*Herbert R. McWilliam*