THE HIGH COURT

[2021] IEHC 97

[Record no. 2020/144 MCA]

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000 AND SECTION 160 THEREOF
AND IN THE MATTER OF THE WASTE MANAGEMENT ACT 2006 AND SECTION 58 THEREOF

BETWEEN

JIM (OTHERWISE JAMES) FERRY

APPLICANT

AND

JOHN CALDERBANKS T/A D&M SERVICES AND D&M ENVIRONMENTAL SERVICES LIMITED T/A DM WASTE

RESPONDENTS

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 5th day of February, 2021

Issues

1. The within matter comes before the Court on foot of a notice of motion on behalf of the applicant of 23 June 2020, in which the applicant is seeking three orders pursuant to s.160 of the Planning and Development Act 2000 (as amended) (the P&D Act) and is further seeking two orders pursuant to s.58 of the Waste Management Act 1996 (as amended) (the 1996 Act). The application is grounded upon an affidavit of the applicant of 22 June 2020.

2. The orders sought under s.160 of the P&D Act are:

   (1) To prohibit and restrain the respondents from continuing the formally authorised but since 15 July 2018, at the least, unauthorised development at Labbadish, Manorcunningham, Letterkenny, Co. Donegal.

   (2) To prohibit and restrain the respondents from further unauthorised development by use of the lands as a waste and recycling storage facility.

   (3) To prohibit and restrain the existence and use of previously permitted buildings as a waste facility.

3. In oral submissions counsel on behalf of the applicant identified the first two reliefs as being the relevant reliefs and indicating that the third relief was not as important and/or was in any event captured by the first two reliefs.

4. Insofar as the 1996 Act is concerned, initially the position adopted in submissions was to suggest the Court might take note of the fact that not enough evidence was available to the applicant to secure the reliefs, and therefore counsel was not pressing for any relief under these headings of claim. It was not until in response to the reply on behalf of the respondents that the applicant ultimately withdrew his claim under the 1996 Act.

5. The securing of an early hearing date was based upon an application made on behalf of the applicant to the effect that the within matter was urgent. However, it is acknowledged on behalf of the applicant that the nature of the urgency was never identified either in the papers submitted to the Court or in making the application to the

Court for an early trial date. This is a matter of interest in or about assessing the motivation of the applicant in maintaining the within proceedings.

Applicant's first affidavit

6. In the grounding affidavit aforesaid the applicant advises the Court "for the sake of openness and transparency" that he had previously been involved in proceedings in respect of the failure to remove waste stored, and in breach of a waste permit facility condition on a site operated by him/his former company. As a consequence of proceedings brought by Donegal County Council against the applicant, delivery and storage of waste at his site was stopped by order of the High Court in April 2017.

7. The applicant asserts that during the course of the inspection and investigation, over an extended period by Donegal County Council into his facility, he brought to the attention of officials from the County Council, in or about June or July 2018, that there was illegal activity by other waste operators, in particular the respondents herein. The applicant asserts that notwithstanding every effort to deal with the waste on his site, due to pressure and focus on him by the local authority, it became impossible for him to comply with the removal and disposal of the stored waste within a two-month period as directed by the Court. As a consequence he was committed to prison for a nine-week period by order of 26 June 2019.

8. Following the closure of the applicant's business, the respondents were hired by the County Council to remove a substantial amount of waste from the applicant's site. The applicant asserts that the respondents were operating without proper or valid planning permission, and the respondents benefitted from this arrangement with the County Council to the tune of several hundred thousand euro, and also charged the Council double the going rate. The applicant asserts that because of the concentration and focus by the Council on him and his activities, he was unable to concentrate on other operators within the industry until recent months.

9. At para. 8 of the affidavit the applicant suggests that the respondents have continued to operate illegally since May 2018, although he also suggests that it is his belief that the respondents have not had proper planning permission for further activities since 2014. In support of the assertion that planning permission was not available to the respondents since 2014, the applicant relies on an application by the respondents to the County Council in 2014 for the continuation of a waste storage and recycling transfer station, and all associated developments. The applicant states that the application was rejected as being incomplete, and his exhibit in this regard is confined to the letter from the authority identifying that the application was incomplete on the basis of the attached check list.

10. It appears that the respondents made a fresh application for planning permission to the County Council in 2014, and this too was rejected on the basis of an assertion that the development description was inaccurate. In the memo from the local authority exhibited, it states that the current permission for the buildings etc. on site expires on 12 April 2014.

11. At para. 12 the applicant identifies that the respondents made an application in 2008 which was granted for a five-year period, and there was a subsequent extension to that permission by order of 18 April 2013. Correspondence from the local authority is exhibited. At para. 13 the applicant identifies that the respondents made a further application in 2015 for retention permission in respect of all buildings and use of the site and the applicant refers to correspondence in support of this assertion. The 2015 application was also rejected.

12. The applicant exhibits a letter from his engineer Kevin Martin dated 21 June 2020, who inspected online plans and other documents on file in the local authority offices and expressed the view that the respondents' development "seems not to be in compliance with Planning Legislation" and "appears to be an Unauthorised Development". In para. 8 of the engineer's letter it is stated that the operation of the waste facility of the respondent has been deemed unauthorised by An Bord Pleanála.

13. At paras. 16 and 17 the applicant identifies that following an application by the respondents, An Bord Pleanála granted leave to apply for substitute consent by order of 7 February 2020.

14. The applicant refers to correspondence between his solicitor and the solicitors for the defendants in June 2020, wherein the applicant states that the respondents are believed to be engaged in unauthorised works and use without a current waste facility permit, and sought an immediate undertaking to cease all works and activities, failing which the within proceedings would be instituted. The applicant's solicitor's letter of 9 June 2020 and subsequent communications prior to the institution of the proceedings are exhibited.

15. It is clear from the applicant's exhibits that in support of his application he is relying on An Bord Pleanála's inspector's report of 31 December 2019, and the subsequent order of An Bord Pleanála granting leave for leave to apply for substitute consent of 7 February 2020.

Replying affidavit

16. In a replying affidavit of Mr. Calderbanks on behalf of the respondents of 12 July 2020, the deponent details the planning history of the site and his various attempts to secure further planning permission following from his initial application for permission in 1995, with an order issuing on 9 June 1995, in particular his efforts to secure permission in 2014 and 2015. The deponent identifies that the County Council sent a warning letter to him pursuant to s.152 of the P&D Act on 18 January 2018, and this was responded to on 25 January 2018 advising that an application to regularise the development would be made.

17. In February 2018 the respondents produced an engineering report which concluded that an Appropriate Assessment was not required, however, the Council was of the view that an application for substitute consent would have to be made to An Bord Pleanála. Details of the efforts made to advance the matter are set forward in the affidavit, however, notwithstanding such efforts two enforcement notices were served on the respondent by

the County Council on 26 June 2018, one in respect of alleged unauthorised use, and the other in respect of an alleged unauthorised shed.

18. Further details are included in the affidavit as to the progress of the application for substitute consent and the affidavit refers in detail to An Bord Pleanála's planning inspector's report, aforesaid, of 31 December 2019. Ultimately, an application for substitute consent was made to An Bord Pleanála on 17 June 2020, and thereafter on 25 June 2020 the respondents lodged an application for ongoing permission with the County Council.

19. The deponent refers to the existence of a waste collection permit under the 1996 Act which remains current to 2022. The deponent detailed that the respondents employ 25 employees and service a wide range of domestic and commercial customers so that a closure of the business would have substantial adverse consequences for such customers and employees.

20. The deponent identifies that the applicant has had multiple convictions since 1979 in relation to illegal dumping, and in fact was refused a waste collection permit in 2014 on the basis that he "was not a fit and proper person to run such a business". The investigation into the applicant commenced in November 2016 with the Council finding an estimated 28,000-36,000 tonnes of buried waste on the applicant's site and several more thousand tonnes strewn about the lands. There was toxic liquids oozing from the waste and a wall had been built to shield the waste. The applicant did not apparently involve himself in the remedial works required to his site which will cost in or about €5.8 million.

21. The deponent says that the applicant has developed a personal grievance against the respondents and that the within s.160 and s.58 proceedings are part of an expansive campaign of retribution carried out by the applicant since the County Council discovered his illegal dump. The deponent refers to para. 5 of the applicant's affidavit which he says contrasts with the affidavits which were lodged by him in the enforcement proceedings by Donegal County Council, wherein he averred that he had fallen short, had not been forthcoming, nor did he fully cooperate with the Council.

22. The deponent refers to evidence of double accounting identified by forensic accountants in the proceedings maintained against the applicant, and refers to and exhibits various newspaper reports which characterise the applicant's behaviour as fraudulent. The deponent expresses the view that there is a collateral purpose to the within proceedings, and other proceedings instituted by him against other waste operators. The deponent refers to the applicant's Facebook account of 2017 where he made allegations publicly against *inter alia*, the respondents and suggested a conspiracy between the respondents, other waste operators, and Donegal County Council, which the deponent says are scandalous and false.

23. Insofar as the applicant averred that the relentless and all-consuming pursuit of him by the planning authority accounts for the delay in instituting the within proceedings, the

deponent points out that the applicant found the time to pursue a failed political career and also instituted costly judicial review and other proceedings.

24. At para. 74 the deponent suggests that the reason why the within proceedings became very urgent, as identified in the applicant's solicitor's letter of 9 June 2020, was because it was likely that substitute consent might be granted. Mr. Calderbanks says no particular concerns are set out in the applicant's affidavit to demonstrate the basis for the granting of the relief claimed, and suggests that in fact if the relief claimed was granted this could cause environmental concerns by leaving several thousand private individuals without a waste collection service. The deponent says that the High Court is not a proper platform for a grievance agenda and this application pursuant to s.160 should not be used to pursue such an agenda.

25. The exhibits identified by the respondents support the contentions made by Mr. Calderbanks in his affidavit concerning the asserted lack of cooperation by the applicant, ongoing management breaches, double accounting, failure to comply with various court orders, publishing material on social media, and otherwise asserting conspiracy relative to the asserted illegal activity on the part of the respondents, between the respondents and the County Council and others. In this regard, for example, in his Facebook account posting of 31 December 2017 the applicant refers to the illegal dumping on the part of the respondents and concludes with the statement "2018 WILL BE JUSTICE FOR JIM YEAR. TIME TO FIGHT BACK". This followed earlier posts claiming that Mr. Calderbanks was not a fit and proper person, and asserting dirty tricks were used to put the applicant out of business.

26. It is apparent from the High Court orders exhibited, relative to the Donegal proceedings against the applicant, that by order of 25 April 2017 a period of two months was afforded to the applicant to remedy the buried waste status of his site, and that the subsequent order for committal of 26 June 2019 was based on the applicant disobeying the order of 13 November 2017, in relation to the provision of a proper financial statement to be provided by him within a four week period.

Applicant's second affidavit

27. By replying affidavit of 12 August 2020 the applicant responded to the affidavit aforesaid of Mr. Calderbanks. In para. 2 the applicant suggests that it is for the respondent of the within proceedings to show lawful compliance with both planning and waste management acts, and suggests that the respondents are put on full proof of all such matters. The applicant repeats his assertion that the respondents' development has not had planning permission since 2014, is an unauthorised development, and being unauthorised any waste permit falls away.

28. Paragraphs 5-10 of his response deals with the assertion that the waste permit of the respondents has no validity, however, this aspect of the matter has been abandoned by the applicant.

29. Paragraph 10 suggests that the respondent is on full proof in establishing that parts of the original structure of 1958/1959 remain on the respondents' site. The applicant repeats his assertion that there is unregulated discharges into the Corkey River and he has been advised of same by some unidentified third party. The applicant complains extensively of the difference in treatment of the applicant and the respondents by Donegal County Council.

30. He suggests at para. 22 that officials in Donegal County Council may have been complicit in the respondents' belief that enforcement action could not lawfully be taken. This is followed at para. 27 by suggesting that a member of the County Council has provided the respondents with a false instrument capable of misleading agencies and customers into believing that the facility has a valid permit. The applicant argues that neither the County Council agreement to stay its enforcement nor the applications for either substitute consent or future planning affords permission.

31. Although in oral submissions the applicant is relying on An Bord Pleanála's inspector's report, at para. 32 of his affidavit the applicant takes issue with many of the conclusions. He suggests that the report is a distortion of facts relative to the nature of the permit available to the respondents. The deponent suggests that other complaints by third parties have been made against the respondents, however, the only evidence in this regard is a letter from Donegal County Council to the applicant of 12 March 2018 which supports the applicant's assertion that he made a complaint in or about this time to Donegal County Council who stated it was not at liberty to discuss live cases, and that the cases were active and in process.

32. Insofar as the applicant's conduct is concerned he states that there was no lack of candour or delay by him, that he made every effort to comply with the court orders in the Donegal proceedings, and he does not believe his application before the Court presently is brought out of vengeance or malice. In the final paragraph of this affidavit the applicant states that the respondents' personalised attack on him is unwarranted.

33. Included in the exhibits in this affidavit is a follow-on investigation report of Mr. John McFeely of 25 June 2018 (investigation report of 18 January 2018 not being referenced further), wherein Mr. McFeely, Executive Planner, refers to a prior assessment to the effect that the lands of the respondents as a waste transfer station are operating without the benefit of permission, and there has been a failure by the respondents to comply with condition one of planning permission reference number 04/6015 insofar as the structures permitted under the said permission have not been removed, and he recommends enforcement action against the respondents.

Final respondent affidavits

34. The final affidavits herein are affidavits on behalf of the respondents both dated 21 October 2020, by Mr. Calderbanks and, by Ted Nealon, Environmental Geologist. Mr. Nealon in his affidavit refutes the assertions made by the applicant concerning the waste management permit.

35. In Mr. Calderbanks' affidavit of 21 October 2020, at para. 3 he denied that the development is unauthorised and denies various assertions made by the applicant relative to the waste permit held. At para. 8 it is stated that the original factory premises continues to exist and that this premises was formerly an alcohol factory. The deponent argues that there has not been a material change of use since in or about 1935 and accordingly the present use is not unauthorised. Insofar as asserted discharges into the Corkey River is concerned, the deponent indicated that samples are taken by the County Council every two months and the results thereof are satisfactory. The deponent expands on his view that the within proceedings have been brought for a collateral purpose and are therefore an abuse of process.

General

36. On 18 January 2018, Donegal County Council issued a warning letter to the respondents in respect of an asserted unlawful development and this was ultimately followed up by the service of two enforcement notices of 12 June 2018, requiring cessation of the use of the respondents' lands as a waste facility without the benefit of permission, and requiring demolition of the structures granted retention permission under planning permission reference 04/6015. Although there is a site map of the respondent holding attached to the second enforcement notice aforesaid, the enforcement notice does not identify if it is the Council's position that all buildings on site are to be demolished, or one or more of same, and if so which structures.

37. Both parties are relying on An Bord Pleanála's inspector's report of 31 December 2019 of Ms. Kehely together with the subsequent An Bord Pleanála decision of 7 February 2020 granting leave to apply for substitute consent, in support of their respective positions, although in addition both parties have issues with the same report, for example, the content of the applicant's second affidavit expresses misgiving on the report, and the respondents point out that on the issue of an unauthorised development it is not for either the inspector or the Board to make such a determination but rather this is a matter solely within the preserve of the Court. The applicant relies on the report to the extent that it identifies that there is unauthorised development on the respondents' site and the respondents rely on the report to the extent that although the report suggests that it is the use of the site which is unauthorised in parts, the report also acknowledges historic and ongoing industrial use of the site.

38. It is common case that Donegal County Council did not proceed further with any application under s.160 or otherwise following the service of the enforcement notices aforesaid.

39. Within An Bord Pleanala's inspector's report there is a site description which identifies at para. 1.8 that the site was originally used as an industrial alcohol factory which dates from prior to 1935, and in later years 1958/1959 was used for the production of starch, with elements of the original structure remaining. The planning authority made submissions to An Bord Pleanála to the effect that the respondents appear to have been unaware that the temporary permission vis-à-vis use and buildings expired with the

respondents continuing with the operation on site. The County Council indicated that the facility required regularisation. The planning history was identified as set out previously.

40. At p.8 of 23 of the report it is noted that the development was then currently unauthorised to the extent of the continued existence and use of previously permitted buildings as a waste facility. It was noted at para. 6.1.4 that the history file refers to issues relative to battery storage, scrap metal, and unsurfaced ground with considerable objections to the nature of the activity. The more recent history files were not submitted as part of the file. It was noted that the likelihood of any aspect of the environment being significantly affected was nil. At p.11 the inspector characterised the development as essentially comprising a continuation of waste facility, previously permitted on a former established industrial site. The need for an Environmental Impact Assessment was screened out.

41. At p.13 the site was identified as an established agri-industrial site associated with food processing and in more recent decades adapted for waste storing and transfer. It is stated that the nature of the use is such that it is consistent with established land use (it is noteworthy from the respondents' point of view that paradoxically the inspector considers the use consistent with established land use nevertheless also considers the use to be unauthorised).

42. At p. 18 the inspector notes that there are buildings comprising sheds that were required to be demolished, although there was a difference in interpretation of the permission for the sheds.

43. At p. 19 under the heading of whether the respondents could reasonably have the belief that the development was not unauthorised, it is noted that the respondent was "undisputably (sic) in receipt of planning permission for waste recovery activities up to 2014" with permission for the construction of a shed structure permitted in 2008, with a five-year extension to continuation of use being granted in 2013, resulting in permission up to 2018 on site, at which time it is suggested that the applicant sought to regularise permission for the activities, but, by excluding a reference to seeking permission to retain the shed, the validity of the application was questioned. It is noted that the respondents clearly held the view the shed was not unauthorised, and the inspector did not consider that to be an unreasonable proposition. However, the continuance of use of the shed as a waste facility was not as clear cut, although it did seem to run counter to the condition of the parent permission.

44. The inspector notes that the permission for use clearly expired in 2018 notwithstanding a waste permit for up to 2022. It is noted that the respondents made immediate efforts to regularise the situation by seeking retention of the shed (despite disagreeing with the need for this aspect). However, because of changes to regulatory provisions in relation to the requirement for an Appropriate Assessment the planning authority was unable to afford retention permission. The inspector states that while there is some potential confusion over the permission up to 2018, the respondents however could not reasonably

have been of the belief that management of waste beyond January 2018 was authorised development.

45. At p. 20 the inspector states that *inter alia*, the respondent has carried out unauthorised development by exceeding the time limit of permission (it is not clarified in the context of this statement as to whether or not reference has been made to use alone, or use and structures). The inspector considered that the planning history and consistent efforts to comply with the planning acts has had an unfortunate consequence, restricting the regularisation in view of the parallel changing regulatory context:

> "Regard also should be had to the well-established waste related operations on an Agri-industrial factory site, the regulatory control already in place in respect of environmental impacts and on the limited capacity for a significant material change in impacts arising between the authorised and unauthorised development on site. I consider it reasonable that the applicant had a reasonable expectation that the site was capable of being regularised under a Section 34 retention application".

46. It was considered that exceptional circumstances exist to permit leave to make an application for substitute consent.

47. In the order of An Bord Pleanála of 7 February 2020 which followed the inspector's report aforesaid, the Board indicated that it considered:

> "that the applicant had carried out unauthorised development but that, in the particular circumstances of this case, such should not be a bar to the granting of leave to apply for substitute consent, having regard to the planning history…".

Statutory provisions

48. Section 160 of the P&D Act provides:

> "(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate…"

This jurisdiction to grant relief pursuant to s.160 is dependent upon the court making a finding of an unauthorised development in accordance with s.160 aforesaid.

49. Unauthorised development is defined in s.2(1) as meaning:

> "…in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use."

Jurisprudence

50. *The County Council of the County of Meath v. Michael Murray and Rose Murray* [2010] IESC 25.

A. In this judgment of McKechnie J. in the Supreme Court, the Court was dealing with an appeal under s.160 of the P&D Act where the High Court had ordered the removal of a dwelling house. At para. 33 the Court noted that in the past the section was intended as a type of "fire brigade" section, however, the Court was of the view that s.160 in its terms was much more expansive than the previous version, and expressed the view that it would be in rare circumstances that the stipulated statutory procedure should not be utilised. The Court noted that the major objective behind the legislative process is the desire that issues of planning and control should be dealt with effectively and efficiently, and in the most expeditious way possible. The Court was of the view that equitable principles did not control, dominate, or have supremacy within, or over the statutory provision. It is not correct to equate s.160 with the exercise of equitable jurisdiction, and the provisions of s.160 confer a completely new jurisdiction on the High Court. This view dates back to *Mahon v. Butler* [1997] 3 IR 369, where the existence of a discretion was acknowledged but could only be found within the parameters of the section itself. Furthermore, neither interest nor harm is a requirement, nor is there a necessity to assess where the convenience lies.

B. The Court quoted from *Morris v. Garvey* [1983] IR 319 involving a case where planning permission had been granted but had been exceeded. Henchy J. in that case was disparaging of developers who proceeded with unauthorised development at such a speed and to such an extent as would (they hoped) enable them to submit successfully that the Court's discretion should be exercised in their favour. Henchy J. found such conduct is not a good reason for not making an order requiring work to be carried out in such circumstances.

C. McKechnie J. was satisfied that there is a substantial public interest in planning enforcement and at para. 88 he highlighted the sanctions imposed for unauthorised conduct. The interest of the public will be ever present on the enforcement side.

D. At para. 90 the Court set out, having considered the case law, the factors which would play into the exercise of the court's discretion which factors were applied and amplified by McMenamin J. in *An Taisce v. McTigue Quarries Limited*, [2018] IESC 54 at para. 85:

(1) The nature of the breach;
(2) The conduct of the infringer and his attitude;
(3) The reason for the infringement;
(4) The attitude of the planning authority;
(5) The public interest in upholding the integrity of the planning and development system;
(6) The public interest such as employment or the importance of the underlying structure/activity;

(7) The conduct and, if appropriate, personal circumstances of the applicant;
(8) The issue of delay;
(9) The personal circumstances of the respondent; and,
(10) The consequences of any such order including the hardship and financial impact on the respondent and third parties.

E. The above list was not intended to be exhaustive and the weight to be attributed is to be determined by the circumstances of a given case.

F. At para. 54 the Court indicated that the moving party undertakes the onus of establishing its stated position to the necessary evidential and legal threshold required in order to obtain an order under s.160. In that case the Council was bringing the proceedings and its view as to a breach was relevant, however, the ultimate decision of authorised or unauthorised in the enforcement context is that of the court and no presumption whatsoever arises in any way.

G. At para. 56 the Court also dealt with s.5 of the 2000 Act (where An Bord Pleanála identifies if a particular activity is development or exempted development) with the Court being satisfied that a mere determination under s.5 without more, and simply on that basis could not be sufficient to secure an order under s.160 – one must go further and establish the unauthorised nature of the underlying development.

H. The Court quoted from *Chapman v. United Kingdom* [2001] 33 EH RR 18 which quote included the following:

> "The Court will be slow to grant protection to those who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site. For the Court to do otherwise would be to encourage illegal action to the detriment of the protection of the environmental rights of other people in the community."

It is noteworthy that in the matter before *McKechnie*, J. the development was considered "particularly flagrant and completely unjustified on any basis." In the events, the Court did uphold the High Court order under s.160 and provided a period of twelve months to comply with the order.

51. Insofar as the conduct of the applicant might play into the court's discretion, the applicant in the instance case relies on *Fusco v. Aprile* [1997] IEHC 89, a judgment of Morris J. In that matter enforcement proceedings were brought by the applicant and proceedings were also commenced by the local authority, however, the local authority proceedings were compromised on the basis of an undertaking given by the respondent to discontinue the unauthorised use of the premises. The applicant pressed on with his proceedings as he wished to personally police any order that might be obtained. The respondent resisted the claim in part on the basis of the applicant's want of compliance with the planning code. The Court acknowledged such problems, however, the Court was satisfied that the applicant had made no secret whatsoever of the problems and placed them fairly before

the Court. The Court was satisfied that there was nothing in his conduct to demonstrate a lack of *bona fides* on his part.

52. In *Krikke v. Barranafaddock Sustainability Electricity Limited* [2020] IESC 42, the issue concerned the increase in diameter of windmills over that for which planning permission was secured. At para. 105 of the judgment it was noted that it was correct to take into account potential financial loss considering the balance of judgment vis-à-vis the granting of a stay. However, the Court also recognised the principle that developers should not benefit from developments that do not have permission on the basis that there is a public interest in preventing the accrual of such profits pending an appeal. The Court also re-emphasised that unauthorised development is a serious breach of the criminal law and is a matter of high level public concern.

53. *Seán Quinn Group Limited v. An Bord Pleanála & Ors*. [2001] 1 IR 505.

A. In this judgment of Quirke J., a motion to strike out the plaintiff's claim for declaratory relief against the defendant who had previously granted planning permission to a third party was heard. Prior proceedings were instituted by another person and the plaintiffs were making covert payments to a group connected with those prior proceedings which were compromised. The Court was satisfied the plaintiff actively concealed its participation in the prior proceedings and no adequate explanation was forthcoming. The Court was satisfied that the plaintiff's sole objective was to further its own commercial interests and it had not been argued or even suggested that the plaintiff was attempting to avoid damage to the environment.

B. Quirke J. expressed that before he could accede to the strike out application he should be satisfied by way of evidence that the plaintiff in commencing the proceedings has an ulterior motive, sought a collateral advantage beyond what the law offers, and had instituted the proceedings for purposes which the law does not recognise as a legitimate use of the remedy which has been sought. In the circumstances of that case the Court opined that courts may and perhaps should take into account the interest of *bona fide* litigants who regrettably must often compete for comparatively scarce court time in order to have matters which are often of considerable importance litigated to a conclusion, and it is desirable and consistent with public policy that the interests of such *bona fide* litigants should have precedence over the rights of parties who wish to litigate points of law which sometimes are wholly or largely technical in nature, and often flimsy in substance for purposes unconnected with public benefit, and wholly concerned with private gain. The Court was satisfied that the plaintiffs had commenced the proceedings in a cynical, calculated and unscrupulous fashion for the sole purpose of seeking a commercial advantage over its competitor.

54. In *Leen v. Aer Rianta* [2003] IEHC 101 a judgment of McKechnie J., the issue concerned a matter where planning permission had been granted to the respondent, however, subject to a condition that a premises was not to be occupied until agreement had been effected.

The motive of the applicant in bringing the proceedings was highly questioned and was said to be unrelated to valid planning reasons, and his sole desire was to use any means possible to prevent Shannon Airport being available to transit troops from the U.S. It was noted that such a person does not have to have a connection with the development and does not have to be adversely affected in a personal way by an unauthorised development once there exists a valid planning point, as a consequence whereof the motivation of the applicant in bringing the proceedings was not relevant. His motive was relevant to the exercise by the Court of its discretion when it comes to considering the relief it might grant. The Court was satisfied as to the *bona fides* of the respondent and in those circumstances the Court exercised its discretion given that the respondent was in the course of amending its position in dealing with the local authority. The Court also confirmed that the court was required to take into account the individual circumstances of each case and apply the law to those circumstances.

Submissions

55. As mentioned earlier the applicant relies on his own assertions of an unauthorised development, together with the various documents herein before outlined on behalf of the local authority and An Bord Pleanála, in or about his establishment of an unauthorised development by the respondents both as to use, and as to maintaining the structures for the purposes of that use on the respondents' site. No document evidencing prior planning permission(s) granted to the respondents is before the Court.

56. The applicant also relies on the letter of opinion herein before detailed of Mr. Kevin Martin, Engineer, of 21 June 2020, wherein the letter expresses the opinion that the development seems not to be in compliance with planning legislation. As this letter is based on an online inspection of plans and other documents of the planning authority only, clearly the opinion did not deal with the respondents' assertion in para. 8 of the affidavit on behalf of the respondents of 21 October 2020, that there has been no material change of use. The respondent is of the view that there has been no material change of use because there was an established pre-industrial use as of 1 October 1964. Such an assertion is also identified in An Bord Pleanála's inspector's report, however, no conclusion or assessment is made in respect of that assertion. It does appear to me understandable that the inspector did not entertain further the assertion that an existing use, prior to 1 October 1964, governed the current use given that the inspector was dealing with an application for leave to apply for substitute consent.

57. The respondent points out that by applying for planning permission or substitute consent, any existing use which may have been available to the respondent is not lost having regard to the matter of *Fingal County Council v. William P. Keeling & Sons Limited* [2005] IESC 55, to the effect that an application for planning permission and nothing more does not give rise to an estoppel in respect of, *inter alia*, an exempted development.

58. Although the applicant in his second affidavit as aforesaid suggests at para. 2 thereof that it is for the respondents to show compliance with the planning code, and at para. 10 thereof suggests that the respondent is on full proof that the original structure of circa. 1959 remains on site, nevertheless, it is clear from the jurisprudence aforesaid that the

onus of proof of an unauthorised structure is on the applicant who bears the evidential burden of establishing sufficient evidence to secure the requisite order under s.160.

59. The applicant has suggested that there are gaps in the respondents' planning history and refers to these gaps as effectively the basis why the evidence put forward by the applicant is not more fulsome. The applicant seeks to fix the respondents with liability in respect of such gaps in or about the within proceedings, however, it does not appear to me that it is appropriate to weigh these gaps against the respondents in proceeding with a determination as to whether or not the use at present is unauthorised as is it in conformity with the applicant's evidential burden.

60. In the circumstances therefore none of the documents before the Court on behalf of the applicant in order to secure the s.160 order, relevant to use, advance an argument against the respondents in respect of the exempted use asserted by them. It appears to me that the applicant has not demonstrated that the exempted use has no role to play in the assessment of unauthorised use in particular when one has regard to Article 5(1) of the Planning and Development Regulations 2001 where definition for industrial process is defined as meaning:

> "any process which is carried on in the course of trade or business, other than agriculture, and which is -
>
> (a) for or incidental to the making of any article or part of an article, or
> (b) for or incidental to the altering, repairing, ornamenting, finishing, cleaning, washing, packing, canning, adapting for sale, breaking up or demolition of any article, including the getting, dressing or treatment of minerals."

61. Given such a wide definition for an industrial process it does not appear to me that the applicant has established on the balance of probabilities that the respondent has not stayed within the use of the site (as identified by An Bord Pleanála's inspector's report), which predated the coming into force of the planning legislation.

62. It is accepted by the Court that neither the waste permit under the 1996 Act nor the pending applications before An Bord Pleanála and the local authority create any use entitlement under the planning code in favour of the respondents.

63. In relation to the issue as to the unauthorised structure, the reference regarding same in An Bord Pleanála's inspector's report is by way of reference to "permission for a shed structure" (see p. 19 of 23) and further a reference is made to "the shed" in that report. The respondents exhibit a valuation report of the property, and as part of that exhibit, certain photographs are included which identify a number of shed structures on the premises. No attempt has been made to identify which shed structure is the subject matter of the condition requiring demolition thereof in 2018. Furthermore, the planning permission containing such a condition has not been tendered to the Court.

64. Given the content of the inspector's report vis-à-vis the shed, without demur from the respondents, and further given that the respondents have not suggested that the relevant

shed and planning condition for demolition thereof is in respect of the original structure which predated the coming into force of the planning legislation, it does appear to me on balance that the continued subsistence of the shed is not in conformity with planning permission, and has been unauthorised since 2018 – there is no sworn evidence before this Court to suggest that the findings of the inspector in the report of 31 December 2019 are in any way inaccurate.

65. Although therefore the evidence before the Court is to the effect that there subsists on the respondents' site a shed which should have been demolished in 2018, in the absence of the relevant planning permission and identification of such shed, there is a significant lapse on the applicant's part in securing an order under s.160.

66. Even if I am incorrect insofar as the finding that it has not been demonstrated that the use of the premises is unauthorised, and/or that it is not currently possible to make an order in respect of the relevant unauthorised shed within the curtilage of the respondents' site, nevertheless, I am satisfied that even if the use is unauthorised and the shed is identified, no order should be made on foot of s.160 having regard to the following matters to be considered in the exercise of the Court's discretion. (See para. 90 of the decision of McKechnie J. in *The County Council of the County of Meath v. Michael Murray and Rose Murray* [2010] aforesaid and para. 85 of *An Taisce v. McTigue Quarries Limited*, [2018]):

(1) The nature of the breach:

In respect of the shed (and possibly also in respect of the use), the breach cannot be considered minor, technical, or inconsequential but rather material. The breach cannot be considered to be gross given the findings in the inspector's report of 31 December 2019 to the effect that an Environmental Impact Assessment is not required, and further given the ongoing attempts by the respondents to regularise the planning status since 2018.

(2) The conduct of the infringer:

I am satisfied that the respondents have acted in good faith and have made various applications to the local authority, including prior to the institution of the within proceedings having secured leave from An Bord Pleanála on 7 February 2020 to apply for substitute consent, and also prior to the institution of the within proceedings have lodged the application for such substitute consent. It is clear from the date line that the application for future planning permission was lodged on 25 June 2020, and therefore was in a state of advanced readiness to be lodged by the date of institution of the within proceedings on 23 June 2020.

(3) The reason for the infringement:

Neither indifference nor culpable disregard is engaged. The inspector's report identifies the delay in securing permission as being "unfortunate" - this occurs to me to be a reasonable categorisation of the reason for the infringement.

(4) The attitude of the planning authority:

In this matter the planning authority did serve two warning notices as aforesaid, however, did not proceed further with a s.160 application as was pointed out by the respondents. However, Donegal County Council is a customer of the respondent, in particular relative to the illegal dumping on the applicant's former site, and accordingly there is a risk of conflict of roles in such circumstances. On the other hand, An Bord Pleanála by its order of 7 February 2020 has identified exceptional circumstances on the part of the respondents.

(5) The public interest:

Of significant importance is that there is a strong public interest in upholding the integrity of the planning and development system. This interest is somewhat tempered by the fact that the respondent is a significant employer of some 25 staff and some 25,000 customers, and therefore does contribute to the proper management of waste in a substantial area of North Donegal. There is no evidence of pollution so as to heighten the public interest because of environmental concerns.

(6) The conduct and personal circumstances of the applicant:

I am satisfied that the applicant is a notorious environmental polluter in Donegal. Notwithstanding two extensive affidavits the applicant makes brief reference only to an assertion of a polluting discharge into a local river without any support whatsoever. The motivation of the applicant is at best highly suspicious, and at worst is entirely disconnected with any planning concerns but rather motivated by a personal aggrievance agenda as demonstrated by him, in particular in his second affidavit where he complains about the disparity in treatment by the County Council of him as opposed to the respondents. The applicant has also made claims in his affidavit evidence without any due regard to the veracity of his assertion, for example, hearsay evidence as to unregulated discharges entering the Corkey River at para. 12 of his second affidavit, together with his argument that the waste permit of the respondents has fallen away because of a lack of planning permission.

Although the applicant has suggested in his affidavit of 22 January 2020 that he discloses adverse details as to his own planning history in the interests of openness and transparency, I am satisfied that he has furnished the Court with a sanitised version of his planning and waste status, for example, he suggests that he was incarcerated for nine weeks because he could not comply with his clean-up obligations within a two-month period, whereas it is clear from the relevant committal order that this was not the reason for his incarceration, but rather

because he did not comply and assist with a disclosure of his financial circumstances. The social media posts of the applicant also demonstrate considerable antagonism towards all parties associated with the clean-up of his waste site including the respondents.

In my view, the motivation of the applicant relative to the timing and expression of urgency to hear the within proceedings is highly suspicious also - the proceedings were instituted in the knowledge that the respondents had in fact applied to An Bord Pleanála for substitute consent, and it is difficult therefore to avoid the inference that the urgency in respect of the proceedings was not motivated by a desire to seek compliance with the planning code but rather motivated from a fear that the respondents planning status would be remedied prior to the hearing of the applicant's complaints. I am satisfied that it is appropriate to deal with the applicants motivation in this balancing exercise (as per *Leen v. Aer Rianta* [2003]) as opposed to dismissing the applicant's claim without such an assessment (as per *Sean Quinn Group Limited v. An Bord Pleanála & Ors*. [2001]), in particular as there is some support for the complaints of the applicant in the local authority enforcement notices of 26 June 2018.

(7) Delay and acquiescence:

The applicant has suggested that the respondents have been in breach of planning since in or about 2014, or 2018 at the latest. It is clear from the exhibits in the affidavit evidence of the applicant that he communicated with Donegal County Council complaining of the respondents' site at least by March 2018 (the applicant exhibits a response from Donegal County Council of March 2018 referring to the applicant's recent communication). The applicant also states that he brought the alleged breaches on behalf of the respondent to the attention of Donegal County Council during their investigation of him. The complaints made by the applicant to Donegal County Council were made in or about June or July 2018. The applicant states that he was distracted from maintaining the within proceedings until June 2020 because of the focus of Donegal County Council on him. However, it is clear from the social media exhibits that the applicant took the opportunity to vent publicly against the respondents' site use and development and indeed he appears to have run for local elections during this period. In these events I am satisfied that an inadequate explanation for the applicant's delay has been forthcoming.

(8) The personal circumstances of the respondent:

There is nothing in the personal circumstances of the respondent to suggest to the Court that any factor arises which might avoid an order being made.

(9) The consequences of any such order:

I am satisfied that if the respondents' environmental management and waste services business closed it would result in potential adverse impacts in Donegal,

and adverse employment implications would also arise notwithstanding that the extent thereof may not stretch to the 25 personnel as suggested by the respondent (some staff may be continued/alternate site may be available/secured).

(10) Other factors:

Developments in the legislative process and associated jurisprudence have clearly contributed to the delay in regularising the planning status of the within site. The respondent has had ongoing engagement with the planning authorities.

Conclusion

67. In the circumstances therefore, and in particular having regard to para. 89 of the judgment of McKechnie J. in *The County Council of the County of Meath v. Michael Murray and Rose Murray* [2010] aforesaid to the effect that the interests of the public will be ever present on the enforcing side and most likely will stand first in the queue for consideration, the most appropriate order to make would be to adjourn the within proceedings for mention only for a period of twelve months to enable an application for substitute consent to An Bord Pleanála, and the application for future planning permission to Donegal County Council take their course.