APPROVED **[2023] IEHC 587**

THE HIGH COURT

2022 197 MCA

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

TESCO IRELAND LTD

APPLICANT

AND

STATELINE TRANSPORT LTD

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 13 November 2023

INTRODUCTION

1. This matter comes before the High Court by way of an application for a planning injunction pursuant to Section 160 of the Planning and Development Act 2000. The proceedings relate to the unauthorised use of lands at Compass Distribution Park, Santry, Co. Dublin for the purpose of storing shipping containers. The volume of containers is estimated at between 1,500 and 2,000 units. These are

stacked in towers of five or more containers. This unauthorised use has been ongoing since early 2020, i.e. a period of almost four years.

2. The lands are owned by Tesco Ireland Ltd ("*Tesco Ireland*"). The lands are the subject of a ten year lease granted by Tesco Ireland to Stateline Transport Ltd ("*Stateline Transport*"). Tesco Ireland has instituted the within proceedings against its own tenant, Stateline Transport, in circumstances where Tesco Ireland has been served with an enforcement notice, *qua* the owner of the lands, by the local planning authority, Fingal County Council.

3. These proceedings were allocated a hearing date of 5 October 2023. On that date, the court was informed that the proceedings had been compromised as between the parties. The respondent, Stateline Transport, is consenting to orders in terms of paragraphs 1 and 2 of the originating notice of motion, i.e. a declaration to the effect that the use of the lands is unauthorised development and an injunction directing that the unauthorised development cease. Counsel for the applicant, Tesco Ireland, indicated that his client is consenting to a stay on the injunction for a period of up to twelve months. Counsel was careful to acknowledge that the decision on whether or not to grant a stay was ultimately a matter for the court.

4. Counsel for the respondent then explained that the purpose of seeking a stay until October 2024 is to allow the respondent time to complete the purchase of an alternative site and to obtain planning permission for the use of that site for the storage of shipping containers. The application for a stay was advanced by reference to an affidavit belatedly sworn on behalf of the respondent by one of its directors which suggested that the immediate cessation of the unauthorised use would result in a "*catastrophic knock-on effect on the freight business*

generally". This affidavit was filed without prior leave of the court on 5 October 2023, i.e. the day of the hearing.

5. The proceedings were adjourned to allow the respondent to file further affidavits in support of the application for a stay. The court directed that the Attorney General be put on notice of the proceedings in his capacity as guardian of the public interest and afforded an opportunity, if desired, to make submissions to the court. A similar direction was made in respect of the Planning Authority, Fingal County Council.

6. The application for a stay was ultimately fixed for hearing on 6 November 2023. Prior to that date, the Office of the Chief State Solicitor confirmed that the Attorney General did not intend to make submissions. The Planning Authority has set out its views in open correspondence and counsel attended on its behalf at the hearing to answer any queries that the court might have.

CHRONOLOGY

7. The key events in the chronology are set out in tabular form below:

January 2020	Stateline Transport enter into occupation of the lands
7 December 2020	Warning letter issued by Planning Authority
5 August 2021	Enforcement notice issued by Planning Authority
29 July 2022	Section 160 proceedings instituted by Tesco Ireland
29 November 2022	Application for retention permission
20 January 2023	Planning Authority refuses retention permission
15 February 2023	Appeal to An Bord Pleanála (no decision yet)
5 October 2023	Hearing date for Section 160 proceedings
6 November 2023	Hearing of application for a stay

FACTORS RELEVANT TO EXERCISE OF DISCRETION

8. A court has a statutory discretion to defer, or even withhold, relief under Section 160 of the Planning and Development Act 2000. The existence of this discretion represents an important counterweight to the fact that there is no *locus standi* requirement under the section: an application may be brought by "*any person*" irrespective of whether they are directly affected by the impugned development or not.

9. The factors relevant to the exercise of this statutory discretion have been authoritatively summarised by the Supreme Court as follows in *Meath County Council v. Murray* [2017] IESC 25, [2018] 1 I.R. 189, [2017] 2 I.L.R.M. 297 (at paragraph 92):

> "(i) the nature of the breach: ranging from minor, technical, and inconsequential up to material, significant and gross;
>
> (ii) the conduct of the infringer: his attitude to planning control and his engagement or lack thereof with that process:-
>
> - acting in good faith, whilst important, will not necessarily excuse him from a s. 160 order;
> - acting *mala fides* may presumptively subject him to such an order;
>
> (iii) the reason for the infringement: this may range from general mistake, through to indifference, and up to culpable disregard;
>
> (iv) the attitude of the planning authority: whilst important, this factor will not necessarily be decisive;
>
> (v) the public interest in upholding the integrity of the planning and development system;
>
> (vi) the public interest, such as:-

- employment for those beyond the individual transgressors; or
- the importance of the underlying structure/activity, for example, infrastructural facilities or services;

(vii) the conduct and, if appropriate, personal circumstances of the applicant;

(viii) the issue of delay, even within the statutory period, and of acquiescence;

(ix) the personal circumstances of the respondent; and

(x) the consequences of any such order, including the hardship and financial impact on the respondent and third parties."

SECTION 160 AND THE PUBLIC INTEREST

10. The recent case law from the Supreme Court has emphasised that there is a strong public interest in upholding the integrity of the planning and development system. This aspect of the public interest has to be weighed in the balance against any countervailing public interest asserted such as, relevantly, any assertion that an unauthorised development involves the provision of an important infrastructural facility or service. Even then, the case law indicates that an asserted public interest of this type will not be sufficient, in and of itself, to justify a stay. Rather, the public interest will have to be combined with an *additional* discretionary factor such as, for example, the minor nature of the infringement or the *bona fides* of the developer. A stay will ordinarily only be granted where the purpose of same is to allow the developer time to regularise the status of the unauthorised development, i.e. by making an application for retention planning permission or by putting in place some measure to ensure compliance with an existing planning permission.

11. This point is illustrated by the judgment in *Leen v. Aer Rianta* [2003] IEHC 101, [2003] 4 I.R. 394. On the facts of that case, the High Court (McKechnie J.) declined to grant an immediate injunction restraining an ongoing breach of planning permission by the operator of Shannon Airport. The operator was in breach of a planning condition which required the provision of a suitable method for the treatment and disposal of the effluents to which the permitted development was likely to give rise. The purpose of the stay had been to allow time for the provision of a waste water treatment plant for the airport.

12. The exercise of the court's discretion was informed both by the "*devastating effect*" which the closure of the international airport would have on the wider community and by the fact that the developer had acted at all times in a *bona fide* manner in that it was actively seeking a solution to the effluent disposal problem. The judgment refers, in particular, to the frequent and repeated contact by the developer with the local authority in this regard.

13. The High Court emphasised that, absent a finding that the developer had acted in a *bona fide* manner, it would have granted an immediate injunction. The position is summarised as follows at paragraph 37 of the reported judgment:

> "This quite evidently is a most unsatisfactory position and if I had any doubt as to its *bona fides* I would have a considerable sense of unease at the appearance of this court allegedly being circumscribed in its duty to uphold and enforce the planning code. In the strongest terms could I say that if the attitude, behaviour or motive of the respondent in this case had been analogous with or comparable to the behaviour of the respondents in *Curley v. Galway Corporation* (Unreported, High Court, Kelly J., 11th December, 1998), I would have, irrespective of the consequences, granted the injunction sought. I see every reason why there must be equality of enforcement under this code: its very integrity so demands. Respect cannot be insisted upon from some and yet not demanded from others; otherwise, disrepute will follow and the entire regime will suffer.

> However, it is also the situation that I must take into account the individual circumstances of each case and, to those, apply the law as I see it. Otherwise, the value which one is espousing, namely equality, would, paradoxically, be unattainable."

14. The circumstances of the present case are distinguishable from those of *Leen v. Aer Rianta* in four crucial respects. First, the respondent in the present case has not acted in a *bona fide* manner. The respondent has engaged in a deliberate breach of the planning legislation. This point is elaborated upon under the next heading below.

15. Secondly, the supposed public interest in the unauthorised development in this case falls well short of that engaged in the continued operation of an international airport. The implications for the wider community of closing down Shannon Airport were self-evident. By contrast, the evidence here fails to establish that the economic effects of the closure of the unauthorised container storage facility are such that it would be in the public interest to allow the unauthorised use to continue unabated for a further twelve months.

16. Thirdly, there was evidence before the High Court in *Leen v. Aer Rianta*, in the form of a report from the Environmental Protection Agency ("*EPA*"), to the effect that the quality of the receiving water had not deteriorated as a result of the effluent discharge. The court described this as an "*extremely important factor*" which had "*quite an influence*" on the exercise of the discretion. The court expressly granted liberty to the applicant to re-apply if the quality of the receiving water should adversely change.

17. Finally, the purpose for which a stay is sought in this case is entirely different from that in *Leen v. Aer Rianta*. This point is elaborated upon under the next heading below.

DISCUSSION AND DECISION

18. The principal issue arising for determination in this judgment is whether the alleged public interest in allowing the unauthorised use of the lands to continue, until such time as the respondent itself can provide an alternative container storage facility, justifies the imposition of a stay on the order restraining the use.

19. The purpose for which a stay is sought in the present case is entirely different from that in *Leen v. Aer Rianta* and the other cases where a stay had been granted on public interest grounds. Here, the purpose of the stay is not to allow the planning status of the unauthorised development to be regularised but rather to allow time for the respondent itself to relocate to an alternative site. Not only is there no planning permission for the container storage facility, but retention permission has actually been refused by the Planning Authority on grounds including material contravention of the development plan, adverse impact on residential amenity and potential traffic hazard. This decision is under appeal to An Bord Pleanála. However, the purpose of the stay is not to await the outcome of that appeal, but rather to allow time to the respondent to complete the purchase of an alternative site and to obtain planning permission in respect of that site. The imposition of a twelve-month stay on the restraining order on this basis would be tantamount to the High Court setting itself up as a rival planning authority and licensing the unauthorised use on a temporary basis.

20. In this regard, it is salutary to say something about the parties' understanding of the benefit of obtaining a stay. Counsel on behalf of Tesco Ireland frankly acknowledged that the "*realpolitik*" is that there is now "*no prospect whatsoever*" of a prosecution being pursued against Tesco Ireland for any

alleged failure to comply with the enforcement notice. Even if a prosecution were to be pursued, it is said that a conviction was unlikely. This is because Tesco Ireland anticipate that the District Court would consider that they had a full defence under Section 156(7) of the Planning and Development Act 2000 by dint of their having instituted the within proceedings seeking to restrain the unauthorised development. This section provides that it shall be a defence to a prosecution for the defendant to prove that they took "*all reasonable steps*" to secure compliance with the enforcement notice.

21. Tesco Ireland perceive this benefit to accrue notwithstanding that, were a stay to be granted, the unauthorised use would continue unabated for a further twelve-month period, with Tesco Ireland, presumably, continuing to accept rent from Stateline Transport pursuant to the lease in the interim. Put otherwise, the grant of a stay is perceived as having the effect of *immunising* both Tesco Ireland and Stateline Transport from criminal prosecution notwithstanding the continuation of the unauthorised use.

22. The parties are, in essence, seeking the imprimatur of the High Court to the continuation of the unauthorised use of the lands for a period of twelve months. This is said to be justified on the basis that the immediate implementation of the order would cause catastrophic economic effects. With respect, the question of whether an otherwise unauthorised development should be allowed to continue on a temporary basis is more properly a matter for the regulatory authorities than for the courts. Provision is made under the Planning and Development Act 2000 for the possibility of planning permission being granted on a *temporary* basis. In the event that the continuation of an unauthorised development was genuinely needed in the public interest, then it would be open, in principle, to the developer

to apply to retain the development on a temporary basis pending the availability of a more suitable alternative site. The local planning authority and An Bord Pleanála could then adjudicate upon the merits of the temporary retention application. It might be decided that the need for the particular development was so pressing that it would be consistent with proper planning and sustainable development to grant permission on a temporary basis notwithstanding that the particular site might be suboptimal. Crucially, any such decision would be made, following public participation, by the expert bodies to whom that task has been entrusted by the Legislature. Moreover, conditions could be attached to the temporary planning permission to regulate matters such as, relevantly, traffic management and public health and safety. The affidavit evidence in the present case indicates that the unauthorised development has resulted in a very significant increase in traffic in and around the premises.

23. Alternatively, in the event of a genuine urgency, it might be open to the executive branch of government, as an interim measure, to exempt a particular form of development from the need to obtain planning permission. This might be done pursuant to Section 4 of the Planning and Development Act 2000. The exemption might be made contingent on the development meeting prescribed conditions. It is more appropriately a matter for the executive or legislative branch to suspend the regulatory requirements than for the judicial branch to do so.

24. The least satisfactory outcome is for the courts to be asked to license the continuation of an unauthorised development by imposing a stay on injunctive relief pursuant to Section 160 of the Planning and Development Act 2000. The effect of such a stay in a case, such as the present, where there is no planning

permission in existence is that the unauthorised development would be allowed to continue free from any planning control.

25. For the reasons which follow, it would not be a proper exercise of the court's statutory discretion to impose a stay on the injunctive relief to which the respondent has consented.

26. The only discretionary factor asserted which might, potentially at least, weigh in favour of the imposition of a stay is the supposed public interest in the continued provision of container storage facilities at the site. However, having regard to the particular circumstances of the present case, this factor cannot prevail against the countervailing public interest in upholding the integrity of the planning and development system. First, this is a case of a wholly unauthorised development, as opposed to one involving a breach of planning permission. The effect of the imposition of a stay would be that the unauthorised use would be allowed to continue free from any planning control. There would be no enforceable conditions in place regulating matters such as, for example, traffic management or public health and safety issues. There would be no restriction on, say, the height to which the containers might be stacked.

27. Secondly, the purpose of the stay is not to allow time for the regularisation of the planning status of the lands. Rather, the court is being invited to license the unauthorised use on a temporary basis in circumstances where the Planning Authority has refused retention planning permission. As discussed above, it would be inappropriate for the court to set itself up as a rival planning authority. It is telling that the respondent did not seek to rely on the supposed public interest in the context of its application to the Planning Authority for a retention planning permission. If there is a genuine need for the development in the public interest,

then one would have expected this point to be front and centre of the planning application. The proper forum for adjudicating on whether the continuation of the container storage might be justified on a temporary basis in the public interest was before the Planning Authority.

28. Thirdly, it is in any event doubtful whether a public interest of the type asserted here would ever be sufficient, in isolation, to justify the imposition of a stay. The case law indicates that a public interest of this type is only effective when combined with an *additional* discretionary factor. There are no additional discretionary factors in the present case.

29. Finally in this regard, the evidence in respect of the supposed public interest is unconvincing. This is discussed at paragraphs 42 to 60 below.

30. The factors against the imposition of a stay are as follows. The first factor is the serious nature of the breach of planning control. Here, a large-scale commercial development has been carried out without any planning permission at all. The development represents a material contravention of the zoning objectives for the lands. The Planning Authority, in its decision refusing retention permission, has indicated that the development may create a potential traffic hazard.

31. The second factor is the conduct of the respondent. The breach of planning control can only have been conscious and deliberate. This is not a case where there might have been a legitimate doubt as to whether the development was authorised by the terms of an existing planning permission or whether it might represent a form of exempted development. Rather, the relevant lands were put to use for the storage of upwards of 2,000 shipping containers without any semblance of lawful authority. This use has continued unabated in the teeth of an enforcement notice issued by the Planning Authority (5 August 2021) and in

the teeth of these injunctive proceedings (29 July 2022). The respondent only conceded the case on the morning of the hearing (5 October 2023).

32. The fact that this is a large-scale commercial development is also relevant in assessing the conduct of the respondent. Whereas a court might be prepared to show some leeway to a breach of planning control in a domestic context, different considerations apply where a respondent is engaging in commercial activity and is deriving a profit from its wrongdoing. See, for example, *Dublin Corporation v. Maiden Poster Sites Ltd* [1983] I.L.R.M. 48 and *Cork County Council v. Slattery Pre-cast Concrete Ltd* [2008] IEHC 291. In the absence of evidence to the contrary, it is to be presumed that a commercial entity has legal and planning advice available to it and will be aware of its obligations under the planning legislation. Indeed, the breach of planning control in the present case is so obvious that it should have been apparent to the directors of the respondent even without professional advice.

33. There was considerable delay on the part of the respondent in making an application for retention permission. The application was not submitted until 29 November 2022, i.e. almost two years after the warning letter had been served by the Planning Authority.

34. For completeness, it should be observed that if and insofar as the affidavit belatedly filed on behalf of the respondent by its planning consultant is intended to suggest that it is appropriate for a developer not to cease unauthorised development in response to a warning letter or for a planning authority to hold off instituting enforcement proceedings until an application for retention planning permission has been made this is incorrect as a matter of law. Section 162 of the Planning and Development Act 2000 expressly provides that

no enforcement action shall be stayed or withdrawn by reason of an application for permission for retention of unauthorised development or the grant of that permission. It is also unacceptable for the occupier of lands to fail to make any formal written response to the receipt of a warning letter or an enforcement notice. All of this reflects poorly on the respondent.

35. There was some suggestion at the hearing before me that the directors of the respondent were entitled to rely on the "*permitted user*" clause under the lease as providing assurance. With respect, this submission is untenable having regard to the express provisions of Clause 5.4 of the lease as follows:

> "No warranty
>
> Nothing in this Lease shall be deemed to constitute any warranty by the Landlord that the Premises or any part thereof are authorised under the Planning Acts or otherwise for use for any specific purpose."

36. It was the obligation of the respondent to ensure that it had the requisite planning permission.

37. The third factor relevant to the exercise of the court's statutory discretion is the attitude of the Planning Authority. The Planning Authority, in its decision to refuse retention permission, identifies a number of significant concerns in respect of the unauthorised development. Planning permission was refused for the following reasons:

> "(1). The subject site is located within the 'ME' Metro Economic Corridor zoning objective under the Fingal Development Plan 2017 – 2023, the objective of which is to 'Facilitate opportunities for high-density mixed-use employment generating activity and commercial development and support the provision of an appropriate quantum of residential development within the Metro Economic Corridor'. 'Road Transport Depot' and 'Cargo Yard' are listed as 'Not Permitted' under zoning objective 'ME' Metro Economic Corridor. As such the development would materially contravene the provisions of the Fingal

Development Plan 2017 – 2023 and would contravene the Metro Economic Corridor zoning objective for the area and, as such would be contrary to the proper planning and sustainable development of the area.

(2). The development by virtue of its height, scale and proximity to site boundaries is considered to be visually dominant and intrusive in the street scene and landscape and give rise to a negative impact on the visual and residential amenity of the area generally and of neighbouring dwelling by way of overbearance, overshadowing and loss of light and would therefore be contrary to Design Guidelines for Business Parks and Industrial Areas set out in table 12.7 and objective DMS103 of the Fingal Development Plan 2017-2023 and therefore contrary to the proper planning and sustainable development of the area.

(3). No Appropriate Assessment Screening Report or drainage information has been submitted with the planning application therefore it has not been adequately demonstrated to the satisfaction of the Planning Authority that the development on site would not have a significant effect on any European sites or be prejudicial to public health having regard to the lack of information submitted with the planning application.

(4). Inadequate information has been provided to enable the Planning Authority to fully assess the transportation aspects of the proposal. In the absence of such information the proposal would be contrary to the proper planning and sustainable development of the area and could lead to the creation of traffic hazard.

(5). The development if permitted by way of retention permission would set an undesirable precedent for other similar developments, which would in themselves and cumulatively seriously injure the visual and residential amenities of the area and would be contrary to the proper planning and sustainable development of the area."

38. The position in respect of appropriate assessment is addressed as follows in the Planning Authority's report on the retention application:

"Impact on Natura 2000 sites – Screening for Appropriate Assessment

The subject site is located approximately 90m north of the Santry River which discharges to Dublin Bay to the east. The North Dublin Bay SAC (000206), South Dublin Bay SAC

> (000210), North Bull Island SPA (004006) and South Dublin Bay and River Tolka Estuary SPA (004024) are connected to the subject site via the Santry River. It is noted that whilst the description of development as stated in the submitted particulars refer to the retention of use for the storage of empty containers on the site, an online search has indicated that the applicants offer their clients a spray-painting and steam cleaning service to update old containers at the container yard. Given the foregoing, the extensive hardstanding area, associated groundworks and the absence of any drainage information submitted with the application, it is considered that an Appropriate Assessment Screening Report should have been submitted in order to determine that there is no likelihood of significant effects on any European sites during the operation of the Proposed Project, and to determine the (*sic*) if there are other plans or projects that will act in combination with the Proposed Project to have a significant effect on European sites."

39. The fact that the Planning Authority has raised significant concerns in respect of the unauthorised development, including concerns in relation to residential amenity and potential traffic hazard, is, obviously, a matter to which the court must afford weight. Moreover, the fact that the Planning Authority has been unable to determine that the unauthorised development would not have a significant effect on any European Site raises issues of EU law. The court's discretion to allow a potential breach of EU law to continue unabated is limited: *An Taisce v. McTigue Quarries Ltd* [2018] IESC 54, [2019] 1 I.L.R.M. 118.

40. The Planning Authority was invited to make submissions to the court on the question of a stay. The Planning Authority whilst being careful to acknowledge that the decision on whether or not to grant a stay is ultimately a matter for the court, have set out their views as follows in a letter dated 13 October 2023:

> "The length of the stay is also of concern to the Council in circumstances where the Council maintains the following concerns about the development at issue (which were expressed in a letter dated 29th September 2022 which we understand has been exhibited in the above proceedings), namely that:

> (i). The development at issue is ongoing and occurring on a large/commercial scale. There are no development controls in place (such as in the form of conditions) as there is no planning permission in place.
>
> (ii). A potential health and safety risk arises regarding the stacking of the shipping containers in the manner that is occurring on the subject site.
>
> (iii). The increase of such use of the subject site has created significant impacts on the residential amenities of adjoining properties (west of the site) on account of the noise emissions and dust from trucks and light spill from the site.
>
> (iv). Concern arises regarding the suitability and appropriateness of the subject site to cater for the amount of storage containers contained therein.
>
> (v). Concern arises regarding the proximity of the storage containers on the subject site relative to the M50.
>
> […]
>
> The Council's position is that any stay granted should be expressly for the purpose of the wind-down of the Stateline operation on the subject Lands and not be for the purpose of further seeking retention permission or with a view to making a profit from the unauthorised development over that 12-month period. There is currently no detail as to how the wind-down of the operation is to take place. Subject to the ultimate view of the Court, the Council respectfully suggests it would be appropriate and of benefit for Stateline to provide details in respect of how the wind-down of the operation is to take place. For example, regarding the proximity of the storage containers on the subject site relative to the M50, the Council considers that that issue is something that should be addressed as soon as is possible and not towards the end of any period of a stay (if one is granted by the Court)."

41. These are all valid concerns. The Planning Authority's point that there are no development controls in place is especially well made. As explained earlier, the distinguishing feature of the present case is that—in contrast to *Leen v. Aer Rianta*—there is no planning permission in force. The Planning Authority's point in respect of the potential health and safety risk arising from the high stacking of the shipping containers is also well made.

EVIDENCE RELIED UPON BY RESPONDENT

42. The respondent's contention that there is a public interest in the continued operation of its container storage facility only arose as an issue in the proceedings at the hearing date (5 October 2023). This issue is not raised in any detail in the affidavits filed in defence of the proceedings. Tellingly, this supposed public interest does not feature as part of the application for retention permission.

43. The exchange of affidavits in these proceedings had closed many months ago, prior to the allocation of the hearing date and the case should have been ready for hearing well in advance of 5 October 2023. Notwithstanding this, the respondent has been shown indulgence and allowed to file a number of late affidavits in support of its contention that the immediate closure of its container storage facility would have "*catastrophic*" economic effects.

44. The principles governing the approach to be taken to expert evidence have recently been restated by the Court of Appeal in *Duffy v. McGee* [2022] IECA 254. The following points are germane to the present proceedings. First, an expert witness is there to assist the court, not to decide the case, and the court has no obligation to accept the evidence of any particular expert, even where it is uncontradicted. Secondly, the duty of an expert witness to assist the court overrides any obligation to any party paying the fee of the expert. Thirdly, an expert witness should state the facts or assumptions upon which his or her opinion is based and should not omit to consider material facts which could detract from their concluded opinion. Finally, an expert witness is not entitled simply to accept without question the instructions of his or her client and thereby

proceed to offer what must necessarily be a blinkered opinion. The court is entitled to expect that experts will apply their critical faculties and their expertise to the case being made by their clients.

45. The principal affidavit relied upon by the respondent has been sworn by an economist. This affidavit exhibits a report prepared by the economist ("***the economist's report***"). At the direction of the court, a supplemental affidavit was filed on behalf of the respondent which exhibited the briefing material furnished to the economist and upon which his report is based ("***the briefing note***").

46. Before turning to the content of the economist's report, it is necessary to say something about the units of measurement. The economist's report uses the unit of measurement "***TEU***" when reckoning the number of containers. This term refers to twenty-foot equivalent units, i.e. a twenty-foot container is 1 TEU, and a forty-foot container is 2 TEU. Thus the capacity of the respondent's storage facility is described in the economist's report as 4,000 TEU as opposed to 2,000 containers.

47. The economist's report estimates that the respondent's container storage facility accounts for 31.5 per cent of the total supply of storage and treatment facilities for shipping containers for commercial shipping companies relating to Dublin Port facilities. It should be explained that this represents the respondent's share of the available storage capacity rather than the percentage of Dublin Port-passing containers actually handled by the respondent. On this latter measure, the respondent's proportion of the market is smaller. The economist acknowledges that extrapolation from the statistics of Dublin Port Company suggests, conservatively, that the respondent handled only 19 per cent of Dublin Port-passing containers in the year 2022. The report contains a number of

hyperlinks, one of which takes the reader through to the website of Dublin Port Company. The economist relies on certain statistics published on that website.

48. The central tenet of the economist's report is that the loss of the storage capacity at the respondent's facility will result in increased costs for Irish importers and exporters, raising prices for end-users in the Irish Republic and for export customers. The economist's report posits three alternative routes for the displaced empty shipping containers as follows:

> "The first alternative involves moving containers for intermediate storage at more remote sites and bringing them back to the Port for re-distribution to the exporters. The second alternative involves rerouting shipments of exports out of other commercial Ports in the Republic and Northern Ireland. The third alternative is to ship empty containers out to the closest UK port, Port of Liverpool."

49. The economist then attributes a notional additional cost per unit to each of these three alternatives of €300, €600, and €1,100, respectively. No explanation is given as to the source of these figures. The report estimates that, depending on the precise permutations, the aggregate additional costs for a twelve month period would be between €29 million and €40 million.

50. As an aside, there might be an error in the spreadsheet used to estimate additional costs. The economist's report refers to the respondent having handled 33,204 shipping containers "*in*" and 33,579 shipping containers "*out*" of its facility during the year 2022. This amounts to 66,783 movements but does not equate to 66,783 individual containers having been stored. This is because a container which has been stored in the facility will be counted on both its way in and way out. Conversely, the spreadsheet appears to take the base as 66,783 containers. At best, the spreadsheet is ambiguous.

51. The economist's report concludes by offering the opinion that the cessation of the respondent's operations "*before it can relocate to new facilities can lead to a systemic shock for Irish markets, trade flows, producers, and consumers*".

52. From a legal analysis, the key question is not the ability of the respondent itself to provide an alternative container storage facility but rather the response of the market. The economist's report does not address, in any detail, the question of whether alternative storage capacity might be provided *by another economic undertaking* in substitution for the lost capacity of the respondent.

53. No explanation has been provided to the court as to why it is that if the consequence of the loss, for a twelve-month period, of the respondent's storage capacity of 4,000 TEU has the potential to increase shipping costs by an amount estimated between €29 million and €40 million, another economic undertaking would not arrange to secure a suitable site, even on a short-term basis, to provide alternative facilities. The rental cost of the respondent's existing facility is only €80,000 per annum.

54. Nor has the likely response of Dublin Port Company been addressed in the economist's report. As explained below, it is apparent that Dublin Port Company is, in any event, proposing to provide additional storage capacity of 4,000 TEU. If it genuinely is the case that the loss of the respondent's capacity is likely to lead to a "*systemic shock*", then presumably the provision of this additional capacity would be expedited (if, indeed, it is not already available).

55. There are a number of discrepancies between the economist's report, on the one hand, and the respondent's briefing note and the public statements of Dublin Port Company on its website, on the other, which lessen the confidence which can be placed in the economist's report. The most significant of these discrepancies is

in relation to the proposed increase in the container storage capacity provided by Dublin Port Company. The briefing note provided by the respondent to the economist refers to this proposal and indicates that storage for an *additional* 3,000 containers (6,000 TEU) is proposed. This tallies, to an extent, with the information on Dublin Port Company's website which refers to an intention to provide a *second* empty container depot by early 2023, with a storage capacity of 4,000 TEU. The intentions of Dublin Port Company in relation to the provision of container storage capacity are directly relevant to the question of the impact of the closure of the respondent's facility. Were Dublin Port Company to expand container storage capacity by the provision of an additional 4,000 TEU (over and above the 6,000 TEU already provided at Dublin Inland Port), this would cancel out the loss of the respondent's capacity of 4,000 TEU. Yet, Dublin Port Company's proposal is not addressed at all in the economist's report, despite having been flagged in the briefing note. The version of the table setting out details of the estimated container storage capacity in the economist's report omits this detail notwithstanding that it had been included in the corresponding table in the briefing note. Counsel was unable to explain this discrepancy to the court.

56. The omission from the economist's report of any reference to the proposed additional capacity to be provided by Dublin Port Company is inexplicable and undermines the confidence which the court can place on the report. It should be recalled that the briefing note had not initially been provided to the court and was only provided in response to a direction of the court. But for this direction, the court would not have been apprised of the highly material fact that Dublin Port Company has proposals to provide additional storage capacity.

57. It is apparent from the terms of the economist's report that, in respect of certain crucial matters, the economist is relying, uncritically, on information provided to him directly by the respondent. The report appears to proceed on the working assumption that unless a facility is located within a 25 minute driving radius of Dublin Port, it will be uneconomical to operate. This figure is derived from the briefing note prepared by the respondent and has not been independently validated or confirmed by the economist. The most that is said in the economist's report is that "*minutes count in the world of high efficiency and low risk tolerances of international trade*". It is difficult to understand the application of this statement to what Dublin Port Company describes as "*mountains of slow-moving empty containers awaiting export*". Indeed, it is apparent from the respondent's own briefing note that the loading and unloading of containers is measured in weeks not minutes.

58. Even allowing that this supposed 25 minute driving radius might be accurate, there is no evidence before the court that there is a shortage of sites within this area which would be suitable for use as a container storage facility. Indeed, the respondent's own evidence suggests that there are "*numerous sites*". The position is stated as follows in the affidavit of a chartered surveyor filed on behalf of the respondent (at paragraphs 4 and 5):

> "I set about identifying suitable sites which had 'General Employment or industrial' zoning objectives that were within 25/30 minutes' drive or approximately 25 kilometres of Dublin Port. I had been informed by the Respondent that such distance from Dublin Port was the maximum whereby the commute of freight companies would remain financially viable.
>
> Although my colleagues and I identified numerous sites – that were considered and discussed on a weekly basis with the Respondent – the process was challenging. The majority of the targeted sites were under development assessment by

> various developers. A number of bids were made on several sites until a transaction was eventually agreed with a vendor in May 2023. The Respondent requested an early closing but the vendor would not agree to deliver vacant possession earlier than the 1st of July 2024. I am informed by the Respondent that the sale is due to complete on the 31st of October 2023 and that a planning application will be lodged with the Council immediately thereafter."

59. It appears that the difficulty encountered by the respondent was not the identification of sites with suitable land use zoning but rather that there may have been other potential bidders for those sites. The respondent has now entered into a contract to acquire a site for an undisclosed purchase price.

60. In conclusion, the respondent has failed to put before the court evidence which indicates, on the balance of probabilities, that the economic effects of the loss of the container storage capacity provided by the respondent are such that it would be in the public interest to allow the unauthorised use to continue unabated for a further twelve months.

CONCLUSION AND PROPOSED FORM OF ORDER

61. The use of the lands for the storage of shipping containers represents unauthorised development. It involves a material change in the use of the lands and has been carried out without the requisite planning permission. This much is conceded by the respondent.

62. Accordingly, orders will be made in terms of paragraphs 1 and 2 of the originating notice of motion. The application for a twelve-month stay on the orders is refused. For the reasons explained, this court will not lend its imprimatur to the continuation of a wholly unauthorised development for a further period of twelve months. There are no discretionary factors engaged which would justify a stay. Rather, the public interest in upholding the integrity

of the planning and development system dictates that the application for a stay be refused. (See, in particular, paragraphs 25 to 41 above).

63. It is proposed to allow the respondent a period of six weeks within which to remove all of the shipping containers from the lands. I will hear counsel further on the precise detail of this transitional period and as to what traffic management measures and safety measures may need to be put in place. The Planning Authority is at liberty to suggest suitable controls.

64. It should be explained that failure to comply with the final form of order could constitute a contempt of court. I will, accordingly, hear submissions as to whether a statement, pursuant to Section 53 of the Companies Act 2014, should be included in the final form of order indicating that the directors of the respondent company could be liable to a process of attachment and their property to sequestration should the order be disobeyed by the company.

65. The proceedings will be listed before me on Thursday 16 November 2023 at 10.30 am.

Appearances

David Dodd for the applicant instructed by Ogier Leman LLP
Gary McCarthy SC and Barry Mansfield for the respondent instructed by Maguire McErlean LLP
Stephen Hughes for Fingal County Council instructed by the Law Agent

Approved