



THE COURT OF APPEAL

Faherty, J.
Power, J.
Collins, J.

Neutral Citation Number: [2021] IECA 345
Record Number: 2021/67
High Court Record No. 2020/144MCA

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000
AND SECTION 160 THEREOF
AND IN THE MATTER OF THE WASTE MANAGEMENT ACT 1996
AND SECTION 58 THEREOF

BETWEEN/

JIM (OTHERWISE JAMES) FERRY

APPLICANT

- AND -

JOHN CAULDERBANKS T/a D&M SERVICES AND D&M ENVIRONMENTAL
SERVICES LIMITED T/a DM WASTE

RESPONDENTS

JUDGMENT of Ms. Justice Power delivered on the 21st day of December 2021

Introduction

1. This is an appeal from an Order of the High Court (O'Regan J.) adjourning the appellant's application brought pursuant to s. 160 of the Planning and Development Act 2000 (as amended) (hereinafter 'the Act of 2000'). The trial judge delivered judgment in the matter on 5 February 2021. On the same day, she made an order¹ that the within proceedings do stand adjourned for a period of twelve months. That was the only order made by the High Court in these proceedings.

¹ Perfected on 24 February 2021.

2. This appeal was heard on 25 November 2021 and the date when the matter will be back before the High Court is relatively proximate. The appeal is concerned only with the trial judge’s order adjourning the proceedings. The essential complaint made by the appellant is that she ought to have made an order—even an order that was subject to a stay—in respect of a finding she made concerning the existence of an unauthorised shed on the respondents’ property. This judgment is concerned with the question of whether, as a matter of principle, the trial judge was entitled to adjourn the proceedings in the manner she did.

3. The respondents have not cross appealed the trial judge’s order. They contend that the trial judge has, essentially, determined the s. 160 application *against* the appellant and that the order adjourning the proceedings was made only for the purposes of urging them to ‘*move matters along*’ in terms of the outstanding applications that are pending in respect of the planning status of their property.

Background

4. As a result of proceedings taken against him by Donegal County Council (‘the Council’), the appellant had his waste delivery and storage operation shut down, by order of the High Court in April 2017. In June 2019, he was committed to prison for nine weeks for failing to comply with a court order to disclose his financial circumstances. The respondents were hired by the Council to clean up and remove waste from the appellant’s site. The appellant feels aggrieved by what he considers to be double standards on the part of the Council in or about its treatment of him as distinct from its treatment of the respondents. In his view, the respondents have been operating their waste and recycling storage business in breach of the planning code and, thus, has been ‘unauthorised’ since in or about July 2018.

Legislative Provisions

5. Pursuant to s. 2(1) of the Act of 2000 and in relation to land an ‘*unauthorised development*’ means ‘*the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use*’. An ‘*unauthorised use*’ means:

“*in relation to land, use commenced on or after 1 October 1964, being a use, which is a material change in use of any structure or other land and being development other than –*
(a) *exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or*

(b) *development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34, 37G or 37N of this Act, being a permission, which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject.”*

6. Section 160 of the Act of 2000 provides, where relevant, as follows:

“160.— (1) *Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court . . . may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order 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, the following:*

(a) *that the unauthorised development is not carried out or continued;*

(b) *in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;*

...

(3) (a) *An application to the High Court or the Circuit Court for an order under this section shall be by motion and the Court when considering the matter may make such interim or interlocutory order (if any) as it considers appropriate.”*

7. Formerly, a person operating an unauthorised development or making unauthorised use of land could apply to the local planning authority for ‘retention’ of such a development or use. Case

number C-215/06 of the European Court of Justice (ECJ) resulted in the removal of that facility where the development would, otherwise, have required an Environmental Impact Assessment (EIA) or an Appropriate Assessment (AA) under the Habitats Directive.² Consequently, under the amended s. 34(12) of the 2000 Act, the planning authority is no longer empowered to accept an application for retention in respect of such a development.

8. However, the provisions of s. 177(C) of the Act of 2000 permit an application for leave to apply to An Bord Pleanála ('the Board') for substitute consent in certain circumstances, including, exceptional circumstances.³ For regularization to be permitted, an applicant must demonstrate to the Board the appropriateness of such an application.⁴ The provisions of s. 177(D)(1) permit an application for leave to apply for substitute consent in certain limited circumstances. The Board must be satisfied that an EIA, a determination as to whether an EIA is required, or an AA was or is required in respect of the development concerned and, where subsection (b) of that provision is engaged, it must further be satisfied that exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation by permitting an application for substitute consent.

9. In its decision to grant or refuse leave to apply for substitute consent, the Board must, pursuant to s. 177D(1B) set out the main reasons and considerations on which the decision is based with specific reference to the relevant criteria listed in Schedule 7 of the Planning and Development Regulations.⁵ The 'leave' stage thus involves a screening process and a determination.

² Council Directive 92/43/EEC.

³ That provision was inserted by the Planning and Development (Amendment) Act 2010.

⁴ In *An Taisce v McTigue Quarries Ltd.* [2018] IESC 54 the Supreme Court identified a procedural flaw in the leave stage, namely, the lack of public participation. This flaw was remedied by Part 2 of the Planning and Development and Residential Tenancies Act 2020 (which commenced in December 2020).

⁵ Planning and Development Regulations (Consolidated) 2001-2021.

Proceedings

10. The appellant brought an application pursuant to s. 160 of the Act of 2000 seeking orders:
- (i) prohibiting the respondents from continuing an unauthorised development at their site in Letterkenny, Donegal;
 - (ii) prohibiting the respondents from further developing their land as a waste and recycling unit, and
 - (iii) prohibiting the existence and use of previously permitted buildings as a waste facility.⁶

His application was grounded upon an affidavit sworn on 22 June 2020. In reply and on behalf of the respondents, Mr Caulderbanks swore an affidavit on 12 July 2020. The appellant then swore a further affidavit on 12 August 2020. The respondents replied by affidavits sworn, respectively, by Mr Caulderbanks and Mr Nealon on 21 October 2020.

The appellant's position

11. Essentially, the appellant claimed that at a time when inspections of his own facilities were carried out, he drew to the attention of the Council the fact that other waste operators, including, the respondents who operate a similar waste collection facility two miles from his former premises, were carrying out their businesses unlawfully. When the local authority engaged the respondents to remove waste and clean up his site, it did so at a time when they, the respondents, were (and still are) operating without any proper or valid planning permission.

12. In support of his claim concerning unauthorised development on the respondents' property, the appellant, pointed to the extensive history of their planning applications in respect of their premises at Labbadish, Co. Donegal. In particular, having regard to various invalid planning applications and the expiry of temporary permissions (which he did not exhibit), he argued that it was clear that the respondents were operating without valid planning authorisation since 2018. In this regard, he pointed to the fact that on 18 January 2018, the Council sent a warning letter to the

⁶ Emphasis here and throughout the judgment is mine unless otherwise indicated.

respondents pursuant to s. 152 of the Act of 2000 and that, subsequently, in June 2018, it issued two enforcement notices in respect of the facilities in question. Thereafter, however, he says the Council took no further action against the respondents. The materials he exhibited in support of his s. 160 application included an opinion of an engineer, Mr Kevin Martin, a report prepared by a Ms Kehely, a Planning Inspector with An Bord Pleanála ('the Board') and a Direction of the Board issued to the respondents and dated 7 February 2020.

The respondents' position

13. The respondents set out their case in affidavits sworn by their deponent, Mr Caulderbanks. Historically, their site at Labbadish was used as an industrial alcohol factory from prior to 1935 and in later years (1958/1959) was used to produce starch. Some elements of the original structures on the site remain. They claimed to have purchased the site from Ceimici Teoranta in 1980 for the purpose of storage and use as a scrap metal facility. Thereafter, the second respondent company was incorporated as a waste collection and storage facility in 1990. They claim to have operated their waste collection and recycling business for in excess of 30 years.

14. According to Mr Caulderbanks, the respondents made '*genuine efforts*' to regularise their planning status. He made several claims regarding the planning history of the property, but did not exhibit any grants of planning permission, choosing instead to adduce print-outs from the Council's website. In respect of the use of the property, he stated that on 9 June 1995, planning permission for the waste facility issued for a period of 10 years. He further claimed that on 13 April 2004, planning permission issued for a period of 10 years for the '*retention of activities and associated building for the completion of a new roof over the refuse transfer section of the facility.*' In terms of structures, he averred that on 28 May 2008, planning permission was granted '*for the erection of an extension to the existing commercial shed*' to cater for storage of glass, metals and paper for transfer to recycling companies and for the reroofing of an existing shed. This

permission, he claimed, was later extended to 27 May 2018 (under reference number 13/50276) but that the permitted extension did not proceed. He said that when he received a warning letter from the local authority in January 2018, he informed the Council that he would make an application to regularise the development but was advised that an application would have to be made to An Bord Pleanála.

15. Mr Caulderbanks averred that on 25 July 2018, the Board allowed a period of 12 weeks within which an application for leave to apply for substitute consent could be made. That application was lodged and then an inspector from An Bord Pleanála prepared a report dated 31 December 2019 ('the Inspector's report') having inspected the respondents' premises in June of that year. The deponent exhibited that report.

16. The Inspector's report outlines the planning history associated with the premises. It refers to several applications which were either withdrawn or deemed invalid and which are not directly relevant to this appeal. The relevant applications were:

- *Planning application reference: 94/1794 and ABP ref: PL05.096329*

An application for a temporary ten-year permission was granted on 27 October 1995 (on appeal) for retention of existing development including the storage of scrap metal, glass, wheelie bins, empty skips, baling scrap metal and cans and truck parking. Temporary permission for portacabins office and block wall to front. This was restricted to a three-year permission by the Board.

- *Planning application reference: 04/6015*

A ten-year temporary permission was granted on 13 April 2004 for retention of activities and associated buildings and completion of a new roof over waste transfer station. Activities similar to those set out above were included in addition to which permission was

granted for the collection of refuse for daily transfer to landfill and for the administration of business.

- *Planning application reference: 08/40101*

Permission was granted for a shed for storage of glass metal and paper for transfers, and for re-roofing of an existing shed. This was restricted to be within the parameters of the ten-year duration of the previous planning reference (04/6015) which required the removal of structures and the ceasing of use after ten years (that is by April 2014).

However, on 15 April 2013, an extension of the duration of permission for this development was permitted which, in the view of the Board's Inspector, expired, effectively, on 15 July 2018 or thereabouts.

17. Under the heading 'PA ref UD 1810' (Planning Authority reference Unauthorised Development 1810), the Inspector observed that a warning letter and two enforcement notices in respect of unauthorised use and buildings had issued. The respondents had engaged consultants to carry out a screening for AA in February 2018 and to prepare a Natura Impact Statement ('NIS') in August 2018. Ms Kehely stated:

"It is my understanding from the history files that permission for the activities expired with the lapsing of permission pursuant to 04/6015. The extension of duration of permission of a subsequent variation to that development does however confuse the planning status as there is an inherent conflict in permitting the continuance of something that has been specifically time-restricted."

18. The Inspector considered whether the respondents had or could reasonably have had a belief that the development was not unauthorised. In her view, they were, undisputedly, in receipt of planning permission for waste activities up to 2014. However, in relation to the shed, she noted

that permission for the construction of a shed structure was permitted in 2008 ‘*within the parameters of the temporary planning permission for 10 years*’. She observed that while the duration of that (parent) planning permission effectively expired in 2014, the planning authority had granted a five-year extension in 2013 to the 2008 permission resulting in permission up to 2018 on the site. She noted that the respondents then sought to regularise permission for the *activities*, but, by excluding a specific reference to seeking permission to retain the shed, the validity of their application was questioned. The Inspector stated that the respondents ‘*clearly held the view that the shed was not unauthorised*’ and she did not consider this to be unreasonable in view of the sequence and timings of permissions. However, in her opinion, ‘*the continuance of use of that shed as a waste facility*’ was not as clear-cut and did *seem* to run counter to the condition of the parent permission. Although the respondents had received a waste permit valid until 2022, the decision of the planning authority had clearly referred to ‘*the ceasing of waste recovery activities on the site*’ (see para. 17 above re planning ref: 08/40101).

19. In the Inspector’s view, the development was considered to fall within the scope of s. 177(C)(2) of the Act of 2000 as permission had previously been granted for the development in question. She noted that the respondents’ application for leave to apply for substitute consent was made under s.177 (C)(2)(b) on the basis that ‘*exceptional circumstances*’ exist.

20. On 7 February 2020, leave to apply for substitute consent was granted. The Board Direction stated that the application for substitute consent:

“*shall be in respect of the entire site, including all the structures in existence, and for the use that has taken place as a waste facility from the date of expiry of planning permission register reference number 04/0615 (that is, from the 12th day of April 2014) to the present date, and the application for substitute consent shall not be in respect of any continuance of this use or any further development of the site beyond the present date.*’ (Emphasis in original.) The Board further stated that ‘*any such continuance of use and/or future*

development shall be the subject of a separate planning application to the planning authority subsequent to a decision on the application for substitute consent”.

21. The second respondent submitted an application to the Board for substitute consent on 17 June 2020. On 25 June 2020, an application for permission for the continuation of a waste collection and recycling facility at the respondents’ premises was submitted to the Council—two days after the appellant had instituted these proceedings. At the date of the hearing before the High Court both applications were pending.

The High Court

22. Having summarized the affidavits and provided a synopsis of the Inspector’s report, the trial judge reviewed the jurisprudence on s. 160 applications. She referred to the judgment of the Supreme Court in *The County Council of the County of Meath v. Michael Murray and Rose Murray* [2018] 1 I.R. 189 in which McKechnie J. had observed that it would be in rare circumstances that the statutory procedure stipulated in s. 160 should not be utilised. The Supreme 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. It was not correct to equate s. 160 with the exercise of an equitable jurisdiction as the provisions thereof confer a completely new jurisdiction on the High Court. Neither interest nor harm was a requirement to such an application, nor was there a necessity to assess where the balance of convenience lies. The trial judge noted that McKechnie J. was satisfied that there is substantial public interest in planning enforcement and that he had set out the relevant factors to which regard should be had in the exercise of the court’s discretion upon hearing a s. 160 application.

23. The trial judge noted that the factors identified by McKechnie J. had been applied and amplified (at para. 85) by MacMenamin J. in *An Taisce v. McTigue Quarries Ltd.* [2018] IESC 54. These factors include:

- the nature of the breach;
- the conduct of the infringer and his attitude;
- the reason for the infringement;
- the attitude of the planning authority;
- the public interest in upholding the integrity of the planning and development system;
- the public interest such as employment or the importance of the underlying structure/activity;
- the conduct and if appropriate, personal circumstances of the applicant;
- the issue of delay;
- the personal circumstances of the respondent; and
- the consequences of any such order including the hardship and financial impact on the respondent and third parties.

24. The court also made reference to *Chapman v. United Kingdom* [2001] 33 E.H.R.R. 18 and to the judgment of Morris J. in *Fusco v. Aprile* [1997] IEHC 89. O'Regan J. observed that the Supreme Court in *Krikke v. Barranafaddock Sustainability Electricity Ltd.* [2020] IESC 42 had held that potential financial loss could be taken into account when considering whether or not to grant a stay on its order. Moreover, she observed, the court had recognised that developers should not benefit from developments that do not have permission as there is a public interest in preventing the accrual of such profits pending an appeal. It emphasised that unauthorised development is a serious breach of the criminal law and a matter of public concern.

25. The trial judge also had regard to the observations of Quirke J. in *Sean Quinn Group Ltd. v. An Bord Pleanála & Others.* [2001] 1 I.R. 505 who considered that before striking out an application (in that case an application for judicial review) a judge should be satisfied that the plaintiff had an ulterior motive in commencing the proceedings, had sought a collateral advantage beyond what the law offers and had instituted proceedings for purposes which the law does not

recognise as a legitimate use of the remedy sought. On the facts of *Quinn*, Quirke J. opined that the court may, and perhaps, should take into account the fact that *bona fide* litigants are often competing for scarce court time and that their interests should have precedence over the rights of parties who litigate points of law that are largely technical and often flimsy in substance and which are concerned only with private gain.

26. The finding of McKechnie J. in *Leen v. Aer Rianta* [2003] IEHC 101 was also considered by the trial judge who noted that once there exists a valid planning point, the motivation of an applicant in bringing proceedings is not relevant. She observed, however, that the court in that case was satisfied as to the *bona fides* of the respondent and had exercised its discretion in circumstances where the respondent was in the process of amending its position vis-à-vis the local authority.

27. Having summarised the respective submissions of the parties, the trial judge went on to make two findings regarding the appellant's claim of an alleged unauthorised development on the respondents' premises.

28. First, the judge considered that the appellant's expert, Mr Martin, had failed in his report to deal with the respondents' assertion '*that there has been no material change of use*' because there had existed an established pre-industrial use as of 1 October 1964.⁷ She noted that this assertion was identified in the Inspector's report but not entertained, understandably, in the judge's view, because the Inspector was dealing with an application for leave to apply for substitute consent. Noting the appellant's 'evidential burden', the judge found that a case of unauthorised development in terms of *use* had not been demonstrated.

29. In coming to this view, O'Regan J. observed (at para. 56 of the judgment) that none of the appellant's documents relevant to use, advanced an argument against the respondents '*in respect of the exempted use asserted by them*'. She considered that it had not been demonstrated that '*the*

⁷ Paragraph 8 of the Affidavit of John Caulderbanks sworn on the 21st day of October 2020.

exempted use has no role to play in the assessment of unauthorised use’ and, in this regard, made particular reference to the definition of an ‘*industrial process*’ as defined in Article 5(1) of the Planning and Development Regulations 2001. That term is defined as:

“any process just carried on in the course of trader business, other than agriculture, and which is

(a) for or incidental to the making of any article part of an article, or

(b) for or incidental to the altering, repairing, ornamenting, finishing, cleaning, washing, hacking, canning, adapting for sale, breaking up or demolition of any article, including the getting, dressing or treatment of minerals.”

30. Based on the ‘*wide definition*’ of an ‘*industrial process*’, the trial judge concluded that it had not been established, on the balance of probabilities ‘*that the respondent (sic) has not stayed within the use of the site . . . which pre-dated the coming into force of the planning legislation*’.

31. The second finding made by the trial judge concerned a structure (‘the shed’) on the respondents’ premises. She noted that there was a reference to ‘*permission for a shed structure*’ in the Inspector’s report. She also referred to a valuation report exhibited by the respondents which contained photographs identifying a number of shed structures on the premises. She observed that no attempt had been made to identify which shed structure was the subject matter of the condition requiring its demolition in 2018 nor was the planning permission, containing such a condition, before the court.

32. Based, predominantly, on the opinion expressed by the Inspector, the trial judge found (at para. 64) that ‘*the continued subsistence of the shed is not in conformity with planning permission and has been unauthorised since 2018*’. She observed that there was no sworn evidence to suggest that the Inspector was in any way inaccurate. She also referred to the fact that the respondents had not suggested that the relevant shed and planning condition for its demolition concerned the original structure which predated the planning legislation. Having made a finding (at para. 64) in respect of the unauthorised shed ‘*which should have been demolished in 2018*’, she went on to

observe (at para. 65) that in the absence of the relevant planning permission and the identification of the said shed, there was a significant lapse on the applicant's part in securing a section 160 order. She continued (at para. 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.”

The exercise of discretion

33. The trial judge then identified and considered, in turn, each of the matters to which she had regard in reaching her decision that the most appropriate order to make, in the exercise of her discretion, was an order adjourning the proceedings. In so doing, she had recourse to the factors set out by the Supreme Court in *Murray* and *An Taisce*.

34. In terms of its gravity and noting the ongoing attempts of the respondents to regularise their planning status, the trial judge considered that *the nature of the breach* in respect of the shed was ‘*material*’ and possibly material in respect of an unauthorised ‘*use*’. As to *the conduct of the infringer*, the judge was satisfied that the respondents had acted in good faith, noting that they had secured leave to apply for substitute consent and that their application for future planning permission was in a state of advanced readiness when these proceedings were instituted. The *reason for the infringement* due to a delay in regularising the planning status was accepted as being ‘*unfortunate*’. As to the *attitude of the planning authority*, the judge noted that two warning notices had issued and that the Council had not proceeded with a s. 160 application. She was mindful, however, that as a customer of the respondents, the Council was conflicted, but she noted that An Bord Pleanála had identified the existence of ‘*exceptional circumstances*’.

35. The trial judge accepted that *the public interest* in upholding the integrity of the planning and development system was a strong one. That said, she observed that the respondents employed a significant number of people and contributed to the proper management of waste in a substantial part of North Donegal and that there was no evidence of any environmental concerns in relation thereto.

36. Relying on *Leen v. Aer Rianta*, the judge considered that it was appropriate to deal with the appellant's motivation in the balancing exercise rather than dismissing his claim outright without an assessment (*Sean Quinn Group Ltd. v. An Bord Pleanála*). She gave rather extensive consideration to *the conduct and personal circumstances of the applicant*. She noted that he was a '*notorious environmental polluter*' and that his motivation was at best '*highly suspicious*' and, at worse, entirely disconnected from planning concerns. It was arguable that he was motivated by a personal grievance agenda, complaining, as he did, about the apparent disparity between the Council's treatment of him as compared to its approach to the respondents. The judge observed that the appellant had made unverified accusations of environmental pollution against the respondents whilst providing '*a sanitised version*' of his own planning and waste status. She noted that he had been imprisoned for a two-month period and that his social media posts demonstrated considerable antagonism towards those associated with the clean-up of his waste site. As to the timing of his motivation in bringing these proceedings, the judge suspected that they were instituted in the knowledge that the respondents had just applied to An Bord Pleanála for substitute consent.

37. Given that the appellant's complaints dated back to early March 2018, the trial judge considered that there was no adequate explanation for his *delay* in bringing the proceedings. She also found that there was nothing in *the personal circumstances of the respondent* to suggest avoidance of an order being made. As to *the consequences of any such order*, the judge was mindful of the potential adverse impact in Donegal, which included adverse employment

implications, if the respondents' business were to close. The only *other factors* to which the trial judge had regard were the developments in the legislative process and the associated jurisprudence which had contributed to the delay in regularising the planning status of the respondents' premises and she noted their ongoing engagement with the planning authorities.

38. In the circumstances, having balanced all the above factors and having noted that the interests of the public will be '*ever present on the enforcing side*' and will, most likely, '*stand first in the queue for consideration*', the trial judge made an order adjourning the proceedings for a period of twelve months '*to enable [the] application for substitute consent and the application for future planning permission . . . to take their course*'.

Issues on Appeal

39. Fourteen grounds of appeal were raised in the Notice of Appeal. In summary, the appellant claims that the trial judge erred in her finding of no unauthorised development by material change of use. Her decision in this regard, it is claimed, goes against the weight of the evidence and fails to have sufficient regard to the respondents' planning history. The appellant claims the respondents were '*studiously vague*' in their evidence and their silence was rewarded by the trial judge. The 'shed' had only a temporary permission which required that it be demolished before July 2018. The mere adjournment of proceedings for one year, without an immediate order, did not achieve a just balance of interests in the enforcement of the planning code.

40. The respondents point to the appellant's failure to particularise his claim concerning unauthorised use and his further failure to identify the particular 'works' that were alleged to have taken place without planning permission. The burden of proof, they submit, was on the appellant and he failed to discharge that burden. In their view, the trial judge was correct to find that no order should be made pursuant to s. 160 of the Act of 2000, having regard to the factors she considered in the exercise of her discretion.

Submissions

The appellant's contentions

41. To demonstrate their current breach of the planning code, the appellant refers to the respondents' planning history and their '*ever-doomed attempts*' to regularise their planning status. Their current use is not the subject of any declaration under section 5 of the Act of 2000 to the effect that it is exempted development. It was absurd, in the appellant's view, to suggest that there has been no material change in use of the respondents' premises and the judge's finding in this regard flies in the face of the increased activity at the site with no fewer than ten planning applications. The trial judge herself (at para. 44) had quoted from the Inspector's report where it was stated that permissions for use expired in 2018 notwithstanding the existence of a waste permit that is valid until 2022.

42. The appellant also relies on the two Enforcement Notices issued by the Council in June 2018 which, in his view, form part of '*the overall matrix*' in support of his claim of an unauthorised development. He contends that Enforcement Notice A clearly states that the use of the lands as a waste facility should cease and that Enforcement Notice B identifies the structures on this site which were to be demolished. In his view, the respondents have enjoyed an unfair advantage in the industry given that they have continued to operate notwithstanding the issuing of Enforcement Notices.

43. The appellant claims that the Inspector's opinion—that the respondents could not reasonably have believed that management of waste beyond January 2018 was not an unauthorised development—satisfies the onus of proof for the purpose of a s. 160 application. Whilst acknowledging that he had not furnished the court with copies of planning permission, such deficit or lack of proof, in his view, '*cuts both ways*'. There was, the appellant contends, an obvious failure on the part of the respondents to provide the court with the relevant planning permissions

which would have resolved, definitively, the question of any unauthorised development. Their failure so to do belied their general plea that they had no case to meet.

44. The judge, in the appellant's view, ought also to have had regard to the Board's Direction dated 7 February 2020 which has neither been quashed, challenged nor judicially reviewed. She ought to have granted the application by making a s. 160 order and, if necessary, placed a stay on that order, as had Simons J. in the High Court in *Krikke*.⁸

45. The appellant argues that the trial judge attributed undue weight to his alleged motivation in bringing the application. Whilst that is a matter to which a court may have regard, he submits that, in circumstances where the respondents have operated without planning permission since 2018, an order granting his application should have been made.

46. According to the appellant, the principal error of the trial judge was her decision to adjourn the matter rather than to make an order on foot of her finding of unauthorised development in respect of the shed. In his view, she should have invited the respondents to show which structures on its site have the benefit of extant planning permission and she should have put the case back for a short period of time for the purpose of filling whatever evidential lacuna she considered existed. Thereafter, he submits, the trial judge should have adjudicated on the s. 160 application and made an order for the demolition of the shed, once identified. It was open to the High Court to have made an 'unless' order or to have placed a stay—even one for a considerable time—on an order directing the demolition of the shed. Such an approach, in his view, would have been preferable to an order adjourning the proceedings as it would have better respected the integrity of the planning process.

⁸ The High Court judgment in *Krikke v. Barranafaddock Sustainability Electricity Ltd.* [2019] IEHC 825 was overturned by this Court because, *inter alia*, the Board had made a determination under s.5 that the development in question was unauthorised—a determination it had no jurisdiction to make.

The respondents' contentions

47. The respondents contend that the trial judge was correct and that her judgment should be interpreted as a final ruling refusing the s. 160 application. In their view, the adjournment of the proceedings for twelve months was no more than an *'incentive'* to them to *'move matters along'*. In this regard, they rely, in particular, on the trial judge's statement (at para. 66) to the effect that even if the use was unauthorised and even if the shed could be identified, *'no order should be made on foot of s. 160'* by reason of the factors to which the court had regard in the exercise of its discretion.

48. Additionally, the respondents contend that the proceedings herein are an abuse of process and, in this regard, place significant reliance on the appellant's *'lack of candour'*. They point to his delay in initiating proceedings claiming that this was aimed at achieving the maximum effect in his collateral campaign against them. In their view, s. 160 applications should not be made in response to an application for retention or for substitute consent. They decry the appellant's characterisation of his own history as a mere *'lapse in compliance'*, pointing to his illegal dumping of thousands of tonnes of household waste with consequent public remediation costs in the region of €5.8 million.

49. The respondents submit that there has been no material change to the established use of their property as an *'industrial premises'*. In their view, a grant of planning permission cannot encroach upon existing developmental rights and cannot put a recipient in a worse position than if permission had not been obtained. Further, they submit that it was only in the course of oral submissions that the appellant raised the issue of whether an unidentified structure (the 'shed') was authorised. They address each factor considered by the trial judge and contend that she was correct in her assessment as to where the balance of justice lay. In their view, the public interest weighs in favour of the refusal of relief because of the adverse impact on customers, employees and contractors which the grant of the s. 160 application would have and, further, because of the

public interest in preserving the integrity of that procedure as an instrument of environmental justice.

Issues for determination

Was it open to the High Court to adjourn the proceedings?

50. The first issue that falls to be addressed is whether, as a matter of law, the trial judge was entitled to adjourn the proceedings in the manner she did. The appellant has urged this Court to conclude that having made a finding of an unauthorised development in respect of the shed, it was incumbent on the trial judge to make a s. 160 order and that in failing so to do she erred in law. He accepted that had a s. 160 order been made, it could then have been subject to whatever stay (even a lengthy one) the trial judge may have considered appropriate. Respect for the integrity of the planning process, however, required that the application be granted.

51. I am not persuaded by the appellant's argument. It is clear from the High Court judgment that the trial judge was fully aware of the importance of compliance with the planning code and thus with respecting the integrity of the overall process. Moreover, she was under no legal obligation to determine the s. 160 application on the first occasion that it was moved before the High Court. The provisions of s. 160 of the Act of 2000 are clear and they expressly empower the court considering such an application '*to make such interim or interlocutory order (if any) as it considers appropriate.*'

52. Whilst, it may certainly be argued that an adjournment for twelve months falls somewhat outside the norm, I am satisfied that the decision taken, as a matter of law, was one that was open to the trial judge to take. It must be recalled that this was an application in which the appellant had sought final orders from the court without having placed before the judge any evidence which would have enabled her to make the orders requested. Without sight of the relevant planning permission and condition, the court could not identify the structure in respect of which the

appellant sought an order directing its demolition. It was the evidence placed before the court (a matter to which I shall return) that led the judge to state that it was ‘*not currently possible to make an order in respect of the relevant unauthorised shed*’. In those circumstances the essential objection made by the appellant—that the judge ought to have made an order requiring the demolition of the shed—is unimpressive.

53. Having examined the application and the material that was before her, the trial judge took the view that, notwithstanding her conclusion as to the existence of an unauthorised shed, the ‘most appropriate’ order for her to make was one adjourning the proceedings. It is clear that in so doing, she took into account the very particular circumstances of this case, namely, that (i) the respondents’ application for substitute consent had been accepted by the Board and was awaiting determination; (ii) their application to the local authority for an extension of planning permission could not be advanced whilst the issue of substitute consent was pending; and (iii) there was no evidence of significant or any harm being caused by allowing those applications to take their course. Moreover, in reaching her decision to adjourn the proceedings, the trial judge identified, correctly, all of the relevant factors that were required to be considered by reference to the authorities, most notably, the Supreme Court’s decision in *Murray*.

54. The case law in relation to an appellate review of a discretionary decision of the High Court is well settled. This Court pays great weight to the views of the trial judge, whilst recognising that, of course, the ultimate decision on an appeal is one for this court to make (see *Collins v. Minister for Justice* [2015] IECA 27 at para. 79). In relation to a decision to adjourn a matter, which is, clearly, a discretionary decision, a trial court is to be afforded a wide margin of appreciation and this Court should be slow to interfere with the manner in which such a discretion was exercised (see *Defender Limited v. HSBC Institutional Trust Services* [2019] IECA 337, para. 39).

55. A decision to adjourn a matter may be regarded, in principle, as falling within the ambit of case management, generally. Of particular relevance in this regard is the observation of Irvine J. in *Rice v. Muddiman* [2018] IECA 402 where (at para. 31) she stated: -

“An appellate court will only set aside what was, in this case, effectively a case management decision if the appellant can demonstrate that to fail to do so would call into question the proper administration of justice... A significant margin of appreciation must be afforded to a High Court judge ...”

56. There is no question of the proper administration of justice in upholding the integrity of the planning process being called into question by the trial judge’s decision to adjourn these proceedings. The order adjourning the case was made in the context of an application seeking final orders in the absence of the most basic of evidence. In circumstances where she found herself unable to make an immediate order, the trial judge was entitled to decide as she did. The decision to adjourn fell squarely within the significant margin afforded to the High Court judge. Before making her order adjourning the matter, the trial judge took into account the features that were pertinent to the case and she analysed, carefully, the relevant factors required to be considered when exercising discretion in the context of a s. 160 application. I am, therefore, satisfied that the order adjourning the proceedings was one which was reasonably open to the High Court to make and thus one with which this Court should not interfere.

Was the decision to adjourn tantamount to a refusal of the application?

57. In their submissions to this Court, the respondents have argued that although the trial judge decided not to make any order other than an order adjourning the proceedings, her judgment, nevertheless, should be regarded as a final ruling refusing, definitively, the appellant’s application for injunctive relief. In this regard, they have urged this Court to interpret para. 66 of the High Court’s judgment as being dispositive of the s. 160 application. The decision to adjourn the

proceedings for a year, in their view, was taken merely to exert some moral pressure on the respondents to progress their pending applications for substitute consent and/or extended planning permission.

58. I find the respondents' contention to be wholly implausible. I have already cited in full (at para. 33 above) precisely what the trial judge stated at para. 66 of her judgment. The respondents urge the Court to focus, in particular, on the latter part of the first sentence therein, wherein the judge stated 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 matters that fell to be considered in the exercise of the Court's discretion. They contend that this statement must be interpreted to mean that irrespective of any alleged unauthorised development, the trial judge was, in any event, refusing the application on a discretionary basis having regard to the principles stipulated in *Murray* (at p. 224 - 225) and in *An Taisce* (at para. 85).

59. In order for the respondents to prevail on this point, one would be obliged to take only one sentence from the judgment and to read it in isolation and divorced, entirely, from the background to and context of the overall decision of the court. I do not accept that the High Court judgment should be read in that way. When viewed as a whole, it cannot, reasonably, be said to constitute a final decision refusing, definitively, the appellant's application. The trial judge clearly decided that no order on the s. 160 application should be made as of the date of the delivery of her judgment. It would make no sense for a court to deliver a definitive decision refusing an application only to adjourn the same application to a later date. If the trial judge had considered her statement in para. 66 to be dispositive of the matter, then, as I see it, she would have said so and she would have refused the application *simpliciter*. This, she did not do. Moreover, if, as the respondents contend, a final order has been made, then the judge would, effectively, have become *functus officio* and one might reasonably have expected the respondents to have applied for their costs, having

defended, successfully, (in their view) the entire application. No such application was made as, self-evidently, the substantive matter of the s. 160 proceedings has not, as yet, been determined.

60. Whereas, arguably, the trial judge might have formulated, more precisely, her decision at para. 66 of her judgment, I am satisfied that, when viewed in the context of the judgment as a whole, she decided that she would not determine, definitively, the application *at that time*. Her analysis of the several factors to which she had regard in exercising her discretion, demonstrated why, notwithstanding her findings, she had come to the view that an order adjourning the proceedings was the most appropriate one to make in all the prevailing circumstances. Central to such circumstances was the fact that the respondents were in the process of seeking to regularise their planning status. Until that process was finalised, her decision on the s. 160 application would be postponed, precisely to allow the outstanding applications for substitute consent and planning permission to take their course.

61. I can accept that the trial judge may have attributed a disproportionate weight to the appellant's own egregious disregard for the environment. Apart from that, however, her analysis of the court's discretion, on the application of the *Murray* principles, was faultless. This was a case, *par excellence*, where the trial court was entitled to do precisely what it did and to adjourn the matter to enable the pending planning applications to take their course.

62. The final paragraph of the High Court judgment makes it clear that the judge was fully cognisant of the importance of the issue before her and of the fact that the interests of the public will be '*ever present on the enforcing side*'. Her express observation in this regard coupled with her decision to make only an order adjourning the proceedings, make it wholly implausible for the respondents to argue that she, effectively, disposed of the application and decided it, definitively, in their favour. On the contrary, the High Court retains seisin of this case and it will do so until it makes its final order on the s. 160 application. The matter was and remains listed for mention before that court on 4 February 2022.

Evidence and Findings

63. Earlier in this judgment I commented on the dearth of reliable evidence that was placed before the High Court in support of the appellant's application for final orders pursuant to s. 160 of the Act of 2000 (see para. 52). As a matter of law, the onus of proof was, quite clearly, upon him to adduce the evidence necessary to substantiate his claim (*Sweetman v. Shell E & P Ireland Ltd* [2007] 3 I.R. 13).

64. It is a striking feature of this case that, as already observed, the appellant omitted to put before the court the relevant grants of planning permission (with conditions attaching thereto) in respect of the allegedly unauthorised development of which he complained. Equally striking was the absence of any sworn expert evidence—whether from an architect, a planner or an engineer—in support of the application. The testimony of an appropriate expert produced on affidavit, is a common feature of planning enforcement proceedings.

65. The quality of the material placed before the High Court in support of the application was entirely unsatisfactory, to say the least. The material included an unsworn 'declaration' of an engineer, Mr Kevin Martin, whose alleged inability to visit the Board's or the Council's offices meant that his 'inspections' were conducted by way of online search facilities. Planning permissions are publicly accessible documents and—pandemic restrictions notwithstanding—could have been procured from the website of the local authority and exhibited on affidavit. Taken at its height, Mr Martin's unsworn opinion was that based on his 'desktop' review of documents '*it appears*' that there is not a valid planning permission for the respondents' waste storage and recycling facility and that the development '*seems not to be in compliance*' with planning legislation.

66. The appellant also exhibited the Inspector's report in support of his application. Whatever about the respondents' entitlement to exhibit that report as evidence of their successful application for leave to apply for substitute consent, there is no basis at all upon which it could be said that the

appellant was entitled to rely upon it as *evidence* of unauthorised development. It was, indisputably, hearsay and, as such, on its face was inadmissible. In failing to object to the report being admitted into evidence and, indeed, in relying on it themselves in answer to the claim, it could be argued that the respondents had waived any objection to its admissibility. As that argument was not made, this Court does not have to determine the admissibility of the report on this appeal. Suffice it to say, however, that the material before the High Court and on which the judge based her finding of unauthorised development was tenuous and of little probative value.

67. It follows that the finding of unauthorised development in these proceedings is problematic on several fronts. First, the trial judge found (at para. 64) that ‘*the continued subsistence of the shed is not in conformity with planning permission and has been unauthorised since 2018*’. She made that finding in the face of the appellant’s clear failure to put the relevant *planning permission* before the court. Absent sight of the planning permission, she had no way of knowing whether the shed’s existence was in conformity with or in breach of its terms.

68. Moreover, in concluding that the shed was unauthorised, the judge placed particular reliance on the somewhat ambiguous opinion of the Inspector as expressed in the report. That report has no statutory status⁹ nor was it prepared for the purpose of these proceedings. The Inspector did not swear an affidavit, nor could she have been cross-examined on her report. Any opinion she expressed was, as already noted, hearsay. *Simons on Planning Law* (3rd ed. 2021) points out that there are no grounds for admitting hearsay evidence in support of an application for final orders (*Dublin Corporation v. Sullivan, unreported, High Court, Finlay P., 21 December 1984, p.3*. See also *Furlong v A.F. & G.W. McConnell Ltd [1990] I.L.R.M. 48; Dublin Corporation v. McGowan [1993] 1 I.R. 405; and Fingal County Council v. Dowling and Peters [2007] IEHC 258.*)¹⁰ Yet

⁹Unlike, for example, a Declaration issued by the Board under s. 5 of the Act of 2000. However, even then, the Board’s jurisdiction under s. 5 does not extend to determining whether a particular development is unauthorised. In this regard, see *Krikke v. Barranafaddock Sustainability Electricity Ltd. [2021] IECA 217*.

¹⁰ Browne, D. *Simons on Planning Law*, (3rd ed., 2021) at 11-3501. Such evidence may be appropriate in the exercise of a discretion as to whether or not to grant an interlocutory application.

hearsay evidence was precisely the basis of the trial judge's finding of unauthorised development in this case. Having relied upon hearsay, she went on to attribute some weight to the fact that there was no sworn evidence to suggest that the (unsworn) opinion of the Inspector (which, arguably, carried no weight) was in any way inaccurate.

69. In view of the foregoing, I am led to conclude that the trial judge's finding of unauthorised development in respect of the shed is unsatisfactory and requires to be set aside. In such circumstances, the admissibility of the statements made by the Inspector in relation to the status of the development in question may be left for further argument before the High Court in due course.

70. The trial judge's second finding—that there has been no change of use—is also problematic, in my view. In approaching that issue, she observed (at para. 56 of the judgment) that the appellant's expert had failed to deal with the respondents' assertion '*that there has been no material change of use*' because there had existed an established pre-industrial use as of 1 October 1964.¹¹ Thereafter, she appears to have believed, erroneously, that the respondents were asserting an 'exempted use'—which their counsel made clear, they were not—and/or she confused the concept of 'exempted use' with that of a 'non-material change of use'. The trial judge went on to find '*that the applicant had not demonstrated that the exempted use has no role to play in the assessment of unauthorised use*' particularly having regard to Article 5(1) of the Planning and Development Regulations 2001. That Article, however, deals only with the definitions of terms relevant to Part 2 ('Exempted Development') of the Regulations and, as already noted, an exempted development was not being asserted. Having cited the definition of '*an industrial process*', the trial judge concluded that it had not been established, on the balance of probabilities '*that the respondent (sic) has not stayed within the use of the site . . . which pre-dated the coming into force of the planning legislation*'.

¹¹ Paragraph 8 of the Affidavit of John Caulderbanks sworn on the 21st day of October 2020.

71. Respectfully, in my view, the trial judge's finding in this regard cannot stand. Even if she had not been mistaken in her belief that an 'exempted use' was being asserted and/or had not confused 'exempted use' with a non-material change of use, on any construction of the respondents' activities, it appears rather implausible to suggest that the respondents' current use of the property has '*stayed within*' the scope of its former use as an alcohol and/or starch producing premises. *Prima facie*, the current and former use appear very different in planning terms. There was some discussion before us as to what the appropriate test for determining when a material change of use has taken place and, in particular, whether the correct approach is that taken by Barron J. in *Galway County Council v Lackagh Rock Ltd* [1985] I.R. 120 or that of Keane J. in *Monaghan County Council v. Brogan* [1987] I.R. 333. However, it does not appear necessary or appropriate to express any view on that issue on this appeal. The issue of material use was simply not addressed adequately by the Judge. She failed to consider, appropriately, the question of whether there had, in fact, been 'a material change' in use and thus fell into error. That error was compounded by her reliance only upon what she considered to be a '*wide definition*' of an 'industrial process'. To my mind, the trial judge's finding that there was no unauthorised use is flawed to the extent that it, too, is unsatisfactory and ought to be set aside.

72. For the avoidance of any doubt, nothing that I have said in relation to the problematic nature of the trial judge's findings detracts from the fact that she was entitled, in the circumstances that presented, to exercise her discretion to make an order adjourning the proceedings. Had her findings been faultless, that entitlement would have remained. Her discretion was exercised in accordance with the *Murray* principles and the order was made to enable the pending applications to regularise the respondents' planning status to take their course. Mindful of the importance of the public interest in enforcing planning and environmental law, the trial judge was not prepared to reject the application outright, even though she had expressed her reservations about the appellant's motivation and had made (albeit unsatisfactorily) a finding of no unauthorised use.

Being aware of the seriousness of the application before her, she took on board the fact that the respondents had sought to redress the matters complained of and were attempting to regularise their planning status. She was entitled to take that reality into account and to weigh it with other factors when reaching her decision. Notwithstanding the legal frailties in her findings the trial judge's decision to adjourn the proceedings cannot be impugned.

Adjourned application

73. When the matter is next before the High Court, the judge will be apprised of the progress, if any, that has been made in the processing of the respondents' outstanding applications. If by 4 February 2022 (or some date beyond then if further adjourned) the Board has granted substitute consent and the Council has granted the permission requested, then that will be the end of the matter. If, on the other hand, the outstanding applications are refused by the Board and/or the Council by 4 February 2022 (or some date beyond then if further adjourned), then the trial judge will be obliged to revisit the application and to consider the claim *ab initio*. At that stage the findings which have been set aside may be revisited before a final determination of the s. 160 application is made.

74. At that point of further consideration, the judge should, of course, provide a reasoned basis for whatever decision she makes, bearing in mind that it is the court, and the court alone, that is charged with determining whether an unauthorised development exists (*Murray*, p. 212). Her findings should be grounded upon reliable and verifiable evidence that either substantiates or repudiates the appellant's claims in respect of both aspects of alleged unauthorised development. I would observe in passing that there was very little meaningful debate about the admissibility and reliability of the evidence that was before the High Court on the last occasion. On the next occasion, the trial judge may expect to be assisted by detailed arguments on that issue. The parties and, indeed, the trial court are no doubt aware that admissible and reliable evidence is required to ground any finding which the trial court makes, bearing in mind that the burden of proof rests on

the appellant except, of course, in respect of any issues arising in relation to a claim of exempted development or limitation. (This case does not involve exempted development, nor does it appear to raise any issue in relation to limitation given that such planning permission as obtained in respect of ‘the shed’ expired in 2018 and the relevant statutory limitation period is 7 years.)

75. I have already commented on the evidential deficits that were apparent in these proceedings. Should such deficits persist when the trial judge comes to examine the matter afresh, I see no reason why the parties cannot provide the court with copies of relevant planning permissions and drawings that specify the activities or uses that are authorised or conditioned and the structures which either are or are no longer authorised by the planning authority. The absence of such documentation created an obvious difficulty for the court, on the last occasion. In the absence of assistance from the parties, the trial judge has the power to direct the furnishing of whatever additional evidence she considers necessary to enable her to decide on the application, mindful, as she no doubt will be, that the interests of the public will be ‘*ever present on the enforcing side*’ and most likely ‘*to stand first in the queue*’ for consideration.

76. In summary, if the respondents are successful in their pending applications to the Board and the Council then that should put an end to the matter. If they are unsuccessful, then the appellant’s application—which has been adjourned and not declined—can proceed to a final determination. At that point, there will be ample opportunity for both sides to assist the court in addressing any outstanding evidential deficits such that a final decision can be made grounded upon admissible and reliable evidence.

Decision

77. As matters stand, this is an application to allow the appeal of an order adjourning a statutory application under s. 160 of the Act of 2000. The appeal was heard on 25 November 2021. In

practical terms, this Court is asked to overturn an order adjourning an application, the net effect of which is to have that application back before the High Court on 4 February 2022.

78. For the reasons outlined above, I would refuse the appeal and allow the matter to proceed on the adjourned date. In refusing the appeal, I am mindful of the fact that the respondents have not cross appealed the order adjourning the application nor was it ever suggested to this Court that it should dismiss the application in its entirety.

79. Additionally, and for the reasons set out above, I would relieve the appellant of the finding that there was no material change in use and thus no unauthorised use. I would also relieve the respondents of the finding that there was an unauthorised development in respect of the existence of an unspecified structure on their premises.

80. In the circumstances, the Court will hear brief submissions, should the parties wish to make them, in relation to the question of the costs of this appeal. Either party may apply within fourteen days to the Office of the Court of Appeal to have the matter listed for a short hearing on costs.

81. As this judgment is being delivered electronically, Faherty J. and Collins J. have indicated their agreement with the reasoning and the conclusions reached in respect of this appeal.