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# THE COURT OF APPEAL
# CIVIL

**Court of Appeal Record Number: 2023/307**
**High Court Record Number: 2022/197MCA**
**Costello J.** **Neutral Citation Number [2024] IECA 46**

**Noonan J.**

**Butler J.**

**IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS, AND IN THE MATTER OF AN APPLICATION PURSUANT TO S.160 OF THE PLANNING AND DEVELOPMENT ACT, 2000, AS AMENDED**

**BETWEEN/**

**TESCO IRELAND LIMITED**

**APPLICANT/**
**RESPONDENT**

**- AND -**

**STATELINE TRANSPORT LIMITED**

**RESPONDENT/**
**APPELLANT**

**JUDGMENT of Ms. Justice Butler delivered on the 23rd day of February 2024**

## Introduction

**1.** This appeal raises issues concerning the treatment by the High Court of the affidavit of an expert witness on behalf of the appellant whose evidence was not opposed or

contradicted by the other party to the proceedings. These issues arise in the context of the appellant's reliance on the public interest in seeking a twelve month stay on an order made by the trial judge (Simons J. [2023] IEHC 587) under s.160 of the Planning and Development Act 2000 (as amended) ("PDA"). The order made under s.160 declared a development carried out by the appellant, namely the use of certain lands in Dublin 9 for the commercial storage of shipping containers, to be an unauthorised development and required that unauthorised development to cease. Simons J. granted a four week stay in the event of an appeal to this court and, thereafter, allowed a period of six weeks for the removal of the containers currently present on site. In a judgment dated 13 November 2023, he refused the requested stay which would have postponed the requirement to remove the containers until October 2024.

**2.** The appellant contends that there is a public interest in allowing the continued use of the site for its business which it claims is an important part of the transport logistics infrastructure in this country. Due to a shortage of container storage space in Dublin, it is contended that the costs and delays which will arise if its customers have to look further afield for suitable storage facilities could present a systemic shock to Ireland's imports and exports, with catastrophic effects for the regional and wider Irish economy, producers and consumers. It is contended that in considering this issue, the High Court did not correctly apply the principles applicable to the exercise of its discretion under s.160 as set out by the Supreme Court (McKechnie J.) in *Meath County Council v. Murray* [2018] 1 IR 189 ("the *Murray* principles"). Under this rubric the appellant complains that the trial judge attached insufficient weight to the fact that the applicant in the s.160 proceedings, Tesco Ireland Limited ("Tesco"), did not oppose the stay and attached too much weight to the views of the planning authority (Fingal County Council, "Fingal") which was not a party to the

proceedings although it had been served with the proceedings by Tesco and afforded the opportunity to participate.

**3.** In order to address these issues, it is necessary to look briefly at the factual background to the case and the procedural route which has led to this appeal. I will also, for convenience, address the relevant portions of s.160 and set out the principles applicable to the exercise of discretion under that section as stated in *Meath County Council v. Murray* (above) although these were not seriously disputed by either of the parties appearing on the appeal. I will then address the issues raised grouping the grounds of appeal under four broad headings.

**Factual and procedural background**

**4.** The appellant has been in occupation of the subject site which comprises approximately two acres located adjacent to the M50 at a business park in Ballymun since January 2020. The lands are owned by Tesco which runs a distribution centre (with the benefit of planning permission) on adjoining lands. Tesco entered into a lease with the appellant on 18 February 2020. It appears that shortly after entering into occupation of the site, the appellant commenced a large-scale commercial operation involving storage of the type of freight containers used for the international transport of goods by sea. The containers are typically either 20 or 40 feet in length and, at any given time, the appellant has between 1,500 and 2,000 of these containers on the site stacked up to six or seven units high.

**5.** It is not disputed that the appellant does not have and never had planning permission for this development notwithstanding that it entered into a 10 year lease in respect of the site. The appellant appears to have spent approximately €850,000 on works to the site to facilitate its business. Invoices for work described as *"extension to the existing yard"*, *"surfacing works"* (which included the excavation and laying of compacted surface and screenings), and for the installation of portacabins with water and waste connections, of external lighting

on lamp posts and of pillars for CCTV are exhibited. It is difficult to regard the making of such a significant investment in a site which did not have planning permission for the business the appellant was running on it as anything other than a deliberate breach of the planning laws. The flagrant nature of this breach is evident from the fact that much of the expenditure occurred after a warning letter had been served and that it continued even after an enforcement notice had been served.

**6.** Although the papers before the court do not indicate how this development came to the attention of the planning authority, on 7 December 2020, Fingal sent a warning letter under s.152 of the PDA to both Tesco and the appellant. That letter outlined the view of the planning authority that unauthorised development, i.e., the creation of a commercial yard and the commercial use of the lands without planning permission, was ongoing at the site. It advised that the matter was the subject of investigation by the planning authority which could result in enforcement action being taken. The letter invited the recipients to make submissions or observations within four weeks. Tesco duly responded to Fingal, but the appellant did not do so. Notwithstanding the limited legal effect of a warning letter, I regard the service of such letter as important because it clearly put the appellant on notice that its development was potentially unauthorised and that action might be taken in respect of it. The appellant has never disputed the fact that the development is unauthorised. The high point of its explanation, as it were, is to point out that it regarded the use of the lands as permissible under the terms of its lease. The terms of the lease, of course, have no bearing on the planning status of the lands. In circumstances where the unauthorised nature of the development is not disputed, it is surprising, to say the least, that on being warned of the possibility of enforcement, the appellant did not take steps to rectify the planning status of the site on which it was carrying out such a sizable commercial enterprise.

**7.** Instead, on 5 August 2021, Fingal proceeded to serve an enforcement notice under s.154 of the PDA on both Tesco and the appellant. This required the removal of all metal containers, associated vehicles and equipment from the site within four months of the date of the notice (i.e. by 4 December 2021). Within this four-month period Tesco's solicitor wrote to the appellant in circumstances where Tesco itself had received *"no meaningful response"* from the appellant to its attempts to arrange a meeting to discuss the enforcement notice. The solicitor advised that the appellant's non-compliance with the planning laws was a breach of covenant under the lease which could lead to its forfeiture. Correspondence continued throughout November and December 2021 until, on 18 January 2022, the appellant, through its solicitors advised Tesco that it intended to make an application for retention permission in respect of its development. Notwithstanding this, no application for retention was made at that time. In the absence of any progress, Tesco instituted these s.160 proceedings on 29 July 2022.

**8.** Fingal was served with a copy of the original proceedings on 4 August 2022. It responded to Tesco's solicitors by letter dated 29 September 2022. That letter set out the planning concerns that Fingal had with the unauthorised development which largely mirrored the reasons later relied on for the refusal of retention permission. It is clear that Fingal understood this letter might be exhibited in the proceedings, as indeed it was. Fingal asked to be kept informed of the progression of the case, noting that it was not a named party.

**9.** A replying affidavit was sworn by a director of the appellant, Paul Brady, on 3 November 2022 in which he expressly accepted that the development was unauthorised. The case made on affidavit was that the use of the land for the storage of containers was permitted under the lease, that the appellant had made a considerable investment in the site and that Tesco, as owner of the site, had declined to make an application to the planning authority for *"non-conformance user"* (sic) but instead had attempted to forfeit the lease. Mr. Brady

makes two somewhat conflicting averments regarding the appellant's application for retention permission. At para. 30 he states that the appellant's planning consultants were due to submit a planning application to Fingal on 4 November 2022 (i.e., the following day) whereas at para. 45 he says that in order to regularise matters the appellant *"has now sought planning permission from Fingal"* which suggests that the planning application had already been made. In fact, neither averment is correct and a planning application was not submitted to Fingal on behalf of the appellant until 29 November 2022, some three weeks later.

**10.** In an averment which prefigures the arguments made on the application for a stay, Mr. Brady states (at para. 46 of the affidavit):

> *"If the planning application is refused, the respondent will be constrained to remove the shipping containers from the premises. This would be a significant and time consuming process, particularly as the respondent currently has no alternative site to store the containers. The respondent is one of a small number of depot providers for empty shipping containers in Ireland, and any disruption of the operation of the premises will result in significant consequential disruption for Irish supply chains that are already overstretched due to the combined effect of the Covid-19 pandemic and Brexit. This disruption would not only affect the respondent, but also consumers, shipping companies and hauliers."*

**11.** It may be useful at this point to explain the nature of the appellant's business and the constraints potentially applying to the relocation of that business. Given its island status, freight - in the sense of the transport in bulk of goods - usually arrives in Ireland by sea. Imported goods are delivered to ports in large shipping containers owned by shipping companies. These containers may spend a number of days in the port whilst they are being unloaded. The same containers are used to export goods from Ireland and, again, may spend a few days at port whilst being reloaded. However, there may be, and frequently is, an

interval between the arrival of the container and its reuse and consequent departure. In some instances, depending on the nature of the goods carried, containers may have to be cleaned and disinfected to a particular standard before they can be reused. The appellant provides a storage facility for these empty shipping containers until the shipping companies wish to reuse them. It also provides cleaning and, apparently, painting services. There are constraints which operate to limit the locations which may be suitable for such a facility. Firstly, any such facility must be reasonably proximate to the port which it serves in terms of travel times. The appellant puts this at 25 mins (i.e., within 25 minutes of Dublin Port) but there is no independent evidence offered to support that figure. In addition, such a facility requires good transport links. The shipping containers are large and unsuitable for transport along smaller roads.

**12.** As noted, an application for retention permission was made on behalf of the appellant on 29 November 2022. That application was refused by Fingal on 20 January 2023 for five reasons. Counsel for the appellant argues since that decision is under appeal, the reasons for refusal should not be taken into account by the court as the planning merits of the development remain to be determined by An Bord Pleanála. Whilst this is broadly correct and certainly it is not a function of any court to attempt to assess planning merits, in my view the fact of refusal and the reasons therefor do have some bearing on the question of whether a stay should be granted. At this point it is potentially relevant that two of the five reasons for refusal were based on information submitted with the application being inadequate to enable the planning authority to determine certain issues (appropriate assessment (AA) screening, transport and traffic impact). Given that it took the appellant over ten months from the point at which it told Tesco it was going to make a planning application before it submitted the application, it might be expected the application would include all of the information necessary to enable the planning authority to decide the key planning issues.

**13.** The appellant appealed the refusal of retention permission to An Bord Pleanála on 15 February 2023. Unfortunately, due to delays in An Bord Pleanála the appeal had not been determined before the hearing of this appeal. The appellant places significant reliance on this and complains that the trial judge erred in determining that the appellant lacked *bona fides* in circumstances where the current delay is not of its making. Whilst this is correct insofar as it goes, the criticism of the trial judge's characterisation is somewhat audacious when account is taken of the fact that the appellant delayed for nearly two years after receipt of the warning letter and nearly fifteen months after receipt of the enforcement notice before applying for retention permission, by which time it had been carrying out an admittedly unauthorised development on the site for nearly three years.

**14.** The proceedings were listed for hearing on 5 October 2023. On the day before the hearing the parties reached a settlement under which the appellant consented to a declaration and an order requiring cessation of the unauthorised use described at para. 1 of this judgment. Agreement was also reached in respect of the payment of Tesco's costs. Para. 4 of the Terms of Settlement provides as follows:

> *"While strictly a matter for the High Court, the applicant will consent to an application for a stay on the order in paragraph 2 if moved by the respondent for a period not exceeding 5 October 2024, observing that it is a matter for the High Court to determine if a stay ought to be granted and the length of any stay. The respondent reserves the right to appeal the duration of the stay in the event that the court refuses to grant the stay for a period not exceeding the 5 October 2024."*

Thereafter, the terms provided *inter alia* for the forfeiture of the lease on the expiration of any stay or on 5 April 2024 if no stay is granted and for the execution of a deed of surrender to give effect to this.

**15.** Although the appellant filed a further affidavit which had been sworn by Mr. Brady on 5 October 2023, the matter did not proceed that day but was adjourned by Simons J. to allow the appellant to file additional affidavit evidence in support of its application for a stay. Mr. Brady's affidavit reiterated the importance of the appellant's business in regard to the provision of storage for shipping containers in Ireland and, by extension, its importance to the Irish transport logistics infrastructure. Having noted the outstanding appeal to An Bord Pleanála, Mr. Brady stated that the appellant was in the process of acquiring an alternative site to which it hoped to relocate its business. He expressly stated that: *"The respondent and its planners have had pre-planning discussions with FCC concerning the new site. I understand that the respondent's proposals have been received very positively by FCC."* As a result of this, he believed it unlikely that there would be any planning issues in respect of the new site. The purchase of the new site was subject to a special condition that the vendor would remain in occupation under a caretaker's agreement for ten months – i.e., up to the beginning of September 2024. Taken in conjunction with the time necessary to resurface the site and relocate the containers, this led to the date of 5 October 2024 being nominated as the date to which the appellant required the s.160 order to be stayed. Mr. Brady subsequently filed a further affidavit to clarify that the averment quoted above is incorrect. No discussions had been had between the appellant and planning officials within Fingal. The conversations referred to were those between the respondent and its own planning consultants, which, of course, casts a very different light on Mr. Brady's belief that there would be no planning issues with the new site.

**16.** The papers do not record all the dates on which the stay application was mentioned before Simons J., but it appears that there were a number of such occasions prior to it being listed for hearing on 6 November 2023. On 11 October 2023 the affidavit of an economics expert, Dr. Constantin Gurdgiev, was filed on behalf of the appellant. On 26 October 2023

affidavits of John Donegan (a chartered surveyor and expert in land development), Stephen Tracey (a management consultant), and Mark Whelan (a planning consultant) were filed. The affidavit of Mr. Tracey was filed in response to queries raised by the trial judge as to the instructions given to the economics expert and it exhibits the written briefing note provided to him as well as clarifying (or perhaps more accurately correcting) certain aspects of that note.

**17.** When adjourning the matter on 5 October 2023, Simons J. directed that the Attorney General and Fingal be put on notice of the appellant's invocation of the public interest in support of its application for a 12 month stay on the orders to which it had consented under s.160 and those parties be invited to make submissions. The Attorney General declined to avail of this invitation, but Fingal responded by letter from its law agent dated 13 October 2023. That letter made a number of points regarding the length of time the unauthorised development had been ongoing, the planning enforcement history preceding the issuing of the proceedings and the large, commercial scale of the development, citing resulting planning issues such as health and safety, impact on amenity and traffic considerations. Fingal submitted that any stay should be for the purpose of winding down the operations on the site rather than for seeking retention permission or continuing to make a profit from the unlawful operations for an additional 12 month period. The letter indicated that counsel would attend court on the next occasion, albeit noting that Fingal was not a notice party to the proceedings. An affidavit was subsequently sworn by a planner in Fingal exhibiting the planning file relating to the retention application and certain correspondence between the appellant and Fingal.

**18.** Shortly before the stay application was heard, an application for planning permission was submitted on behalf of the appellant in respect of the new site on 27 October 2023. That application was refused by Fingal on 7 December 2023. The appellant has submitted a

revised application on 8 February 2024, which it believes meets the concerns expressed in the reasons for refusal of the first application.

**19.** Having heard the application for a stay on 6 November 2023, the trial judge delivered judgment on 13 November 2023. I will look at various aspects of that judgment in more detail when addressing the appellant's grounds of appeal. In broad terms, it sets out the relevant chronology (in somewhat less detail than I have done here); it then identifies the factors relevant to the exercise of the court's discretion under s.160 as summarised in *Meath County Council v. Murray* and looks at the interaction between s.160 and the public interest. At para. 10 of the judgment Simons J. observes:

> *"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."*

**20.** Simons J. relied on *Leen v. Aer Rianta* [ 2003] 4 IR 394 as illustrating the requirement that there be factors in addition to the public interest which support the grant of a stay where it has otherwise been established that unauthorised development has taken place. He distinguishes the circumstances of this case from *Leen* on four grounds. The appellant takes issue with this and contends that it is an incorrect application of the principles in *Meath County Council v. Murray* ("*Murray*") to require that there be factors additional to the claimed public interests which support the granting of a stay. I will return to this issue.

**21.** Simons J. then proceeds to consider the purpose for which the stay was sought (to allow the appellant time to relocate the development to an alternative site) and whether it should be granted for that purpose. He expresses concern (at para. 19) that the imposition of a twelve month stay *"would be tantamount to the High Court setting itself up as a rival planning authority and licencing the unauthorised use on a temporary basis"*. He

characterises the order sought (at para. 22) as one which would provide "*the imprimatur of the High Court to the continuation of the unauthorised use of the lands for a period of twelve months*". He notes that the only discretionary factor which might potentially weigh in favour of the imposition of this stay is the *"supposed public interest in the continued provision of container storage facilities at the site"*. He then goes on to list four reasons why that factor cannot prevail against the countervailing public interest in upholding the integrity of the planning and development system. These include the fact that the development is wholly unauthorised in a sense of having no planning permission as opposed to being one which is unauthorised by reason of the breach of a condition contained in a planning permission. He reiterates that a public interest of the type asserted *"is only effective when combined with an additional discretionary factor"* and concludes that there are no such additional factors in this case. Other factors weighing against the imposition of a stay included the conduct of the appellant. A specific finding is made that the breach of planning control by the appellant could only have been conscious and deliberate.

**22.** Simons J. treated the attitude of the planning authority as being a factor relevant to the exercise of the court's discretion. He sets out the reasons that retention permission was refused for the development on this site, quoting from the planner's report regarding the potential impact of the development on Natura 2000 sites and the fact that the planning authority could not conclude that there was no likelihood of significant effects on those sites in the absence of an appropriate assessment (AA) screening report being submitted with the application. He also quotes from Fingal's letter of 13 October 2023 citing both the planning concerns expressed and the view of Fingal that any stay should be expressly and only for the purpose of winding down the unauthorised development on the site.

**23.** The judgment than treats of the evidence relied on by the respondent and, in particular, the expert evidence. He notes the decision of this court in *Duffy v. McGee* [2022] IECA 254

regarding the approach a court should take towards expert evidence including the fact that a court is not under an obligation to accept the evidence of any particular expert, even where that evidence is uncontradicted. He then proceeds to analyse the economist's report making a number of criticisms as he does so. As this forms a central argument in the appellant's appeal, I will return to it in more detail in due course.

**24.** Based on all of these consideration Simons J. concluded that he would make orders in the terms sought by Tesco in the originating notice of motion and that he would refuse the 12 months stay requested by the appellant. Instead, he allowed the period of six weeks for the removal of the shipping containers from the lands which reflects the length of time he was told would be required to effect the orderly winding down of operations on the site.

**Issues on appeal**

**25.** The issues raised by the appellant on this appeal can be broadly grouped under four headings. These are, firstly, whether Simons J. incorrectly applied the criteria in *Meath County Council v. Murray* by requiring there to be additional factors supporting the grant of a stay where the developer whose development is found to be unauthorised relies on public interest grounds; secondly, whether greater weight should have been attached to the uncontradicted expert testimony adduced by the applicant; thirdly, whether the court erred in the weight it attached, on the one hand, to the views expressed by Fingal as planning authority and, on the other, to the position of Tesco as the applicant in the s.160 proceedings and, finally, the extent to which the High Court should have taken into account the planning concerns relating to the development as expressed by Fingal.

**26.** In fairness to counsel for the appellant, he acknowledged that in seeking a lengthy stay on behalf of his client he was asking for the court's indulgence. He pointed out that if the site were required to close, it would be the shipping companies which owned the containers

rather than the appellant who would be forced to seek alternative storage for them. He emphasised the serious economic consequences likely to be caused by the lack of adequate storage for these containers and the extent to which the economic impacts are likely to be felt by those affected and not merely by the appellant.

**27.** The application for a stay was *de facto* opposed by Fingal which, despite not being a party to the proceedings, made submissions on Simons J.'s invitation and filed written submissions on the appeal. Counsel for Fingal was careful to acknowledge that the grant or refusal of the stay is ultimately a matter within the discretion of the court. In oral submissions, he emphasised the planning concerns raised by Fingal; he contended that the trial judge had not rejected the credibility of the appellant's expert witnesses but, for clearly stated reasons, had not attached significant weight to their evidence, a matter which was within the court's discretion. He also pointed to the lack of evidence from within the industry as to the availability of alternate storage capacity on existing sites or as the availability of suitable alternative sites for a development of this nature. He acknowledged that Fingal had not taken action on foot of the enforcement notice nor participated actively in the Tesco proceedings but pointed to the fact that it had served warning and enforcement notices and had responded in writing.

**Section 160 of the PDA**

**28.** There is no dispute as to the entitlement of Tesco to seek relief under s.160 nor as to the applicability of that section to the appellant's development. Instead, the issues raised by the appellant concern the extent to which, having made an order under s.160, a court has or should exercise a discretion to postpone the coming into effect of that order in a manner which would allow the development which has been found to be unauthorised to continue. The relevant parts of s.160 provide as follows:

"*160(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, 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;*

*(c) that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject.*

*(2) In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature."*

**29.** Under the precursor provision to s.160, s.27 of the Local Government (Planning and Development) Act 1963, as amended, applications for a statutory injunction were frequently adjourned while the respondent applied for retention permission for the offending development which adjournments continued as long as the retention application (and any appeal) was pending. To avoid an application for retention permission attracting an automatic adjournment of the injunction application, s.162(3) of the PDA expressly provides that no enforcement action (including applications under s.160) "*shall be stayed or withdrawn by reason of an application for retention permission*" nor indeed by reason of the grant of such permission.

**30.** Section 160(1)(c) is not relevant as there is no planning permission governing the appellant's development. Therefore, the primary purpose of making an order under s.160 in

this case was to ensure that the unauthorised development did not continue and, insofar as practicable, that the land would be restored to its condition prior to the commencement of the unauthorised development. The court is given wide power under sub-s. (2) to include in its order directions regarding the manner in which a development is to cease and the lands to be restored. The trial judge exercised those powers to impose conditions on the winding down of the appellant's operation within the six-week period that he allowed for the removal of all containers from the site. Notwithstanding this, he observed in his judgment, correctly in my view, that it is not the function of the High Court to act as a planning authority and to licence the unauthorised use of lands on a temporary basis.

**31.** The reasons for this are twofold. Firstly, the wide powers under sub-s. (2) to make orders akin to planning conditions involving the restoration, reconstruction, removal, demolition or alteration of a structure or other feature are exercisable only in conjunction with the making of an order under sub-s. (1). Therefore, any such *"conditions"* must facilitate the giving of effect to an order requiring an unauthorised development to cease or requiring the restoration of land to its condition prior to the commencement of such unauthorised development. Sub-section (2) is not intended to and does not confer upon the court a power to make planning conditions *simpliciter*.

**32.** The second reason why this should be follows from the fact that large parts of the planning code derive from EU law requirements which the State has implemented by imposing obligations on planning authorities and others to carry out environmental assessments as an integral part of the process leading to the making of a planning decision. Those assessments must be based on stipulated information to be provided by a developer and, crucially, must include an opportunity for the public to participate and to make submissions on the proposed development before any decision is reached. A court exercising jurisdiction under s.160 is simply not in a position to carry out such an assessment

or even to safely carry out a screening assessment in order to be satisfied that a full assessment is not required. Apart from lacking the necessary expertise, the essential element of public participation cannot be readily accommodated in litigation *inter partes*. In this case, one of the reasons for refusal of planning permission was Fingal's concern as to the potential impact the surface water run-off from the site might have on an adjacent river which is connected to a number of protected European sites and the lack of information provided by the appellant to enable it to screen out the risk of adverse effects on those sites. Whilst the appellant's planner is satisfied that this issue has now been adequately dealt with in the information submitted to An Bord Pleanála on appeal, it is not a matter on which a court could reasonably be expected to make a decision. To allow the development to continue, even on a temporary basis, in the absence of a concluded assessment which would legally enable it to be permitted, could itself be a breach of European law.

**Principles in *Meath County Council v. Murray***

**33.** Both the appellant and Fingal relied on the judgment of McKechnie J. in *Meath County Council v. Murray* as setting out the principles applicable to the exercise of the court's discretion regarding the grant or refusal of relief under s.160. At para. 92 of his judgment these are identified as follows:

> *"What, then, are the factors which play into the exercise of the Court's discretion? From a consideration of the case law, one can readily identify, inter alia, the following considerations:*
>
> *(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,*

**34.** It is important to note that McKechnie J. regarded these as *"factors to be considered"* rather than as a checklist of criteria which must be met in each case. In the immediately following paragraph he recognised that:

*"The weight to be attributed to each factor will be determined by the circumstances of a given case. Some, because of their importance, may influence whether an order is or is not in fact made: others, the scope, nature or effect of that order. This list is not in*

*any way intended to be exhaustive, and it may well be that other matters might require consideration in an appropriate case."*

**35.** It may also be useful to bear in mind that in *Murray* the appeal to the Supreme Court (by the owners of a dwelling house which had been built without planning permission and in the face of a refusal of permission for a smaller dwelling at the same location) was against the making of an order under s.160 by the High Court. The issue here is somewhat different. The court has decided to make an order under s.160, indeed the parties to the original proceedings consented to the making of that order. The issue therefore is the narrower one of the exercise of the court's discretion to stay an order which it has made requiring the unauthorised development to cease. Whilst it is probably reasonably safe to presume that similar factors fall to be considered regarding the exercise of the court's discretion at this point as to the making of the s.160 order in the first place, the weighting of those factors might well be altered by reason of the court's anterior conclusion that an order should be made requiring the development to cease. In other words, the factors identified in *Murray* have already been weighed and have been found to warrant the making of an order under s.160. Any re-consideration of those factors for the purposes of deciding whether a stay should be granted has to be carried out in a context which acknowledges not just the unauthorised nature of the development but that the court has already decided in principle that the unauthorised development should cease.

**Appellate Standard of Review**

**36.** The final issue to be considered at the outset is the scope of this court's appellate jurisdiction in an appeal against a discretionary order made by the High Court. The appellant relies on the decisions of the Supreme Court in *Vella v. Morelli* [ 1968] IR 11 and *Lismore Builders Ltd. v. Bank of Ireland Finance Ltd.* [2013] IESC 6 to contend that it is open to an

appellate court to substitute its own discretion for that of the trial court, albeit that *"great weight"* or *"great deference"* should be given to the views of the trial judge. In the former case Budd J. identified circumstances where the appellate court should be particularly slow to interfere such as where the trial judge was in a special position to form a particular view for example, based on an assessment of the credibility of witnesses giving oral evidence. In the latter case, MacMenamin J., in acknowledging that an appellate court *"retains the jurisdiction of exercising its discretion in a different manner in an appropriate case"*, went on to give the example of where there were errors detectable in the approach adopted by the High Court. This much is, I think, uncontestable. The difficulty lies in cases where the trial judge is not shown to have made an error *per se*. At what point does the deference to be shown to the High Court yield in circumstances where the appellate court does not agree with the outcome of the exercise of that discretion?

**37.** Fingal relies *inter alia* on the views expressed by Finlay Geoghegan J. in *McCoy v. Shillelagh Quarries Ltd.* [2017] IECA 185. That case has some similarities to this in that it was an appeal against a refusal of a stay following the making of orders under s.160. She observed at para. 12 of her decision:

> *"…in very broad terms this Court will be slow to intervene to allow an appeal against a discretionary order made by the High Court unless the appellant establishes either that there was an incorrect application of principles by a High Court judge or that the resultant decision is one which is unjust as between the parties having regard to the particular circumstances."*

**38.** The most recent authoritative consideration of these issues as regards this court is that of Collins J. in *Betty Martin Financial Services Ltd. v. ESB DAC* [2019] IECA 327 between paras. 35 and 41 inclusive. Summarising his conclusions, the position is as follows:

- Whilst the Court of Appeal will pay great weight to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any *a priori* rule that would restrict the scope of that appeal by permitting the appellate court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed (*per* Irvine J. in *Collins v. Minister for Justice* [2015] IECA 27 applying *Lismore Builders Ltd. v. Bank of Ireland Finance Limited* (above)). Consequently, the appellant is not required to establish an error of principle as a prerequisite to the Court of Appeal reaching a different conclusion to the High Court.
    - However, in order to displace the order of the High Court in a discretionary matter, the appellant should be in a position to establish that a real injustice will be done unless the High Court order is set aside. It is not sufficient for the appellant simply to establish that there was a better or more suitable order that might have been made (*per* Irvine J. in *Lawless v. Aer Lingus* [2016] IECA 235 and Finlay Geoghegan J. in *McCoy v. Shillelagh Quarries Ltd.* (above)).
    - Where the High Court does not explain its basis for taking a particular view on a contested issue or fails to engage appropriately with the arguments made, that will necessarily affect the weight to be attached to the trial judge's view on appeal (*per Doyle v Banville* [2018] 1 IR 505).
    - The potential for interfering with the exercise of a discretion by the High Court is significantly greater where the High Court does not give sufficient reasons for its decision such that the parties cannot understand the basis upon which the discretion has been exercised (*per Law Society v Callanan* [2018] 2 IR 195).

**39.** Consequently, in considering the issues raised by this appeal, I am satisfied that this court is not constrained by reason of the fact that the refusal of the requested stay was an

exercise of the High Court's discretion. As a general rule, this court should be slow to interfere with a discretionary decision of this nature unless it is satisfied that an error of principle has been made or that the outcome is unjust as between the parties, but it retains the jurisdiction to do so if the circumstances so warrant. Given the very detailed judgment delivered by the trial judge, no question arises of a failure to explain his decision or of a failure to engage appropriately with the arguments made to the court on behalf of the appellant.

**Application of *Murray* Principles**

**40.** To a certain extent all of the grounds of appeal raised by the appellant can be characterised as being based on the alleged incorrect application of the *Murray* principles by the trial judge. However, two of the four broad headings which I have set out earlier in this judgment (see paragraph 25) fall most obviously into this category, namely, his treatment of the public interest criteria and the weight afforded by him to the position of Tesco and Fingal respectively. I will deal with the latter issue below. Here, I will consider whether Simons J.'s treatment of the public interest arguments made by the appellant is consistent with *Meath County Council v. Murray*.

**41.** The argument made by the appellant is relatively net. It based its application for a stay on the grounds that, given the shortage of available storage for empty shipping containers transiting through Dublin Port, there was a public interest in maintaining the operation of its facility (which forms a significant component in Ireland's transport logistical infrastructure) at its current site until it can be relocated to an alternative site. It is contended that the trial judge did not consider this argument *simpliciter* to decide whether the public interest relied on by the appellant outweighed the accepted countervailing public interest in upholding the integrity of the planning system. Instead, he imposed an additional requirement on the

appellant of showing the existence of some other discretionary factor which, when combined with the claimed public interest, would justify the grant of a stay (see paras. 10 and 28 of his judgment). In this context, the reference to discretionary factors appears to be a reference to the matters identified by McKechnie J. in *Murray* as those expressly referenced by the trial judge are drawn from para. 92 of McKechnie J.'s judgment, namely the minor nature of the infringement (para (i)) and the *bona fides* of the developer (para (ii)). As no additional factors were found to be present, he refused the stay. The appellant argues that neither *Murray* itself nor any other authority makes the presence of additional discretionary factors mandatory before a discretion can be exercised in favour of the developer. Consequently, it is contended that the trial judge made an error of principle in exercising his discretion to refuse the stay.

**42.** In dealing with this argument, it is appropriate to note at the outset that McKechnie J. does not make the court's assessment of the public interest under para. (vi) of the *Murray* factors dependent on the existence of another discretionary factor operating in the developer's favour. However, it is also clear that the factors to be considered by a court in exercising its discretion under s.160 are not isolated or stand-alone factors but will inevitably interact with each other. As observed by McKechnie J. at para. 93 of *Murray*, the weight to be attributed to them will vary with the circumstances of the case. In my view, the circumstances of the case necessarily include the court's consideration of the other factors insofar as they are relevant to the facts at issue. It may be hypothetically possible to envisage a claim of public interest of such great weight and moment that it could, of itself, justify the exercise of discretion in favour of the developer of an unauthorised development even where all other considerations weigh against that developer. In reality, the circumstances in which this could arise will necessarily be so extremely rare that it is difficult to speculate as to what they might be.

**43.** It seems to me that Simons J.'s conclusion that an additional factor or factors is required is based on the fact that no decided authority was identified in which a claimed public interest weighed sufficiently heavily with the court so as to lead to the refusal of s.160 relief without there being at least one – and usually more – discretionary factors which also weighed in the developer's favour. As such, I think that whilst the proposition may go too far as a statement of legal principle, it is substantively correct as an analysis of the decided jurisprudence. Consequently, I think the approach taken by the trial judge was appropriate where the public interest claimed was by some margin below the degree of urgency and importance that would warrant, without more, overriding the public interest in the integrity of the planning system. The appellant does not contend, and indeed could not realistically contend, that there is any other factor which weighs in its favour.

**44.** The applicant relied on two cases, *Dublin Airport Authority plc v. JD Motorline Ltd.* [2013] IEHC 510 and *Leen v. Aer Rianta cpt* [2003] 4 IR 394, the latter of which is the leading authority on the balancing of competing public interest considerations in s.160 cases. In *JD Motorline*, the DAA sought two s.160 injunctions to restrain the operation of unauthorised commercial car parks facilitating customers of Dublin and Cork airports respectively. In each case the developers disputed whether the developments were unauthorised relying unsuccessfully on the previous use of the sites for broadly similar but not identical purposes. In one of the cases the developer also argued, again unsuccessfully, that the development was immune from enforcement by reason of the passage of time. Birmingham J. indicated that he was prepared to grant orders under s.160 but subject to a stay for a reasonable period to permit planning applications to be made and processed. He regarded the developments as giving rise to *"important planning questions with an economic and public interest dimension that arise and merit consideration"* (para. 17).

**45.** The judgment does not treat the argument made as primarily one based on a claimed public interest. Rather, there were a range of factors which Birmingham J. regarded as relevant to the exercise of his discretion in the circumstances. These included the fact that DAA was a commercial rival of the developers in that it operated car parks at its airports in competition with those which it sought to injunct. DAA was also in breach of the planning acts itself, albeit in a far more minor way than were the developers. The type of planning considerations that usually arise in a s.160 case had not featured so that it was not clear to the court that the existence of the car parks at those locations represented a *"planning mismatch"*. The evidence did not suggest that there were environmental or ecological considerations or that the amenities of the public were under threat. No mention is made of the attitude of the planning authorities to either case. They do not seem to have participated in the proceedings and there is no suggestion that they had embarked upon enforcement action separate to that taken by the DAA.

**46.** This decision offers some support to the appellant's case but there are significant differences. In particular, in *JD Motorline* Birmingham J. envisaged that planning applications would be made to the planning authority to have the suitability of the sites in question for development of that type determined. Here, although there is an appeal pending to An Bord Pleanála, the purpose of the stay is not to regularise the development at this site but to allow the appellant time to relocate its operations to a different site which is now the subject of a revised application for planning permission, the first application having been refused by Fingal. Given that planning permission for this development at the subject site has already been refused and express planning grounds have been identified as being of concern to the planning authority in the course of both the planning process and of these proceedings, the trial judge was not in an analogous position to that in which Birmingham J. found himself in *JD Motorline*.

**47.** The second case, *Leen v. Aer Rianta*, concerned proceedings taken on the grounds that Aer Rianta had failed to comply with conditions attaching to a grant of planning permission for the extension of Shannon Airport which required it to agree with the planning authority a suitable method and location for the treatment and disposal of the effluent to which the development was likely to give rise before the development was occupied. Aer Rianta had engaged with the planning authority on this issue and reached agreement as to what was required but, for reasons which were not the fault of Aer Rianta, that agreement had not been implemented before the building was occupied. McKechnie J. found this to be a breach of the planning permission and went on to consider whether, in the circumstances, an order under s.160 should be made. A number of different issues were raised. These included the fact that the applicant was not genuinely concerned with the planning issues central to his proceedings but wished to prevent the use of Shannon Airport for the transit of U.S. troops involved in the conflicts then underway in Iraq and in the Gulf. Aer Rianta contended that it had at all times acted reasonably and cooperated fully with the planning authority which was itself attempting to upgrade the local sewerage system to which the airport would ultimately be connected. Finally, it was contended that there was a public interest in the continued operation of the airport including for those directly or indirectly dependent on employment from the development and extending to commercial, business and economic considerations.

**48.** In the event, McKechnie J. did not grant the injunctive relief sought. He concluded that Aer Rianta had acted at all times in a *bona fide* manner and had actively sought a solution to the effluent disposal issue with the relevant authorities. He did not regard Aer Rianta as having any *mala fides* intention of flouting the planning laws for gain in business or commercial terms. He did not regard the consequences for Aer Rianta of an order requiring closure of the airport as determinative. However, the devasting affect which such closure

would have had on the multiplicity of other bodies, entities and persons who would most definitely suffer was an overriding concern. Notably, in reaching this conclusion McKechnie J. stated:

> *"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."*

**49.** He went on to say that had the behaviour of the respondent being akin to that identified in other cases – i.e. a deliberate disregard of the planning laws - he would have made an order under s.160 irrespective of the consequences. It seems to me likely that this is the passage which Simons J. had in mind when he suggested that the claimed public interest would have to be combined with an additional discretionary factor in order to justify the grant of a stay in this case.

**50.** The appellant argues that Simons J. incorrectly distinguished *Leen* from the circumstances of this case. I do not agree that this is so. Simons J. identifies four bases upon which this case is distinguishable from *Leen*. Two of these are entirely uncontroversial, namely that the public interest claimed in *Leen* (i.e. the continued operation of an international airport) was of a greater magnitude than that claimed in this case and that there was positive evidence adduced before the High Court in *Leen* in the form of a report from the Environmental Protection Agency that the receiving waters had not deteriorated due to non-compliance with the condition in question. The two points with which the appellant takes issue concern the purpose for which a stay is sought and the appellant's *bona fides*.

**51.** It is, I think, relevant to note that the judgment in *Leen* does not concern the granting of a stay but the refusal of relief under s.160. Insofar as the appellant wishes to draw an analogy, what is relevant is that prior to the institution of proceedings, the respondent in *Leen* had been actively pursuing a resolution to the effluent disposal issue with the relevant

authorities so as to comply with its planning permission and maintain the development at the location in question. Here, the appellant, who singularly failed to engage with the planning authority notwithstanding the service of a warning letter and of an enforcement notice, wishes the indulgence of the court to continue the unauthorised development for an extended period so as to facilitate a move of its business to alternative premises. This is, in my view, a very different thing.

**52.** Further, I cannot accede to the appellant's arguments that the trial judge erred in determining that it lacked *bona fides* or that he gave insufficient weight to the appellant's attempts to regularise its planning status which, it claimed, was frustrated by the delay on the part of An Bord Pleanála in dealing with its appeal. In this regard it is relevant to note that the appellant's application for retention permission in respect of this site was first made nearly two years after it had received a warning letter from Fingal; fifteen months after it had received an enforcement notice and four months after Tesco had served the s.160 proceedings. Notwithstanding that it has never disputed the unauthorised status of its development, it made no attempts to regularise the situation until it was forced to do so by reason of these proceedings. Even then, the initial affidavit sworn by Mr. Brady inaccurately suggested that a planning application had already been made or would be made the following day when, in fact, this step was not taken for another three weeks. By any standard the appellant's development is a large-scale commercial development which it entered into and continued to carry on without any planning permission whatsoever. The fact that its belated application for retention permission is now stalled in the appeals process does not take away from the correctness of the conclusion that the appellant did not act in a *bona fide* manner and engaged in a deliberate breach of planning legislation.

**53.** In these circumstances, I do not see any basis upon which the trial judge could be said to have incorrectly distinguished *Leen*. Insofar as it may be regarded as technically

inaccurate to say that a claim of public interest by a developer who is in breach of planning laws must be coupled with another discretionary factor which operates in his favour, *Leen* illustrates that even a very strong public interest (such as in the operation of an international airport) required the added weight of a number of other factors for the court to be satisfied to refuse relief under s.160.

**Treatment of expert testimony**

**54.** The next group of arguments made by the appellant is that the trial judge was wrong to reject the uncontradicted affidavit evidence of its experts and, in any event, did not afford the appellant a fair opportunity of dealing with his concerns regarding that evidence before rejecting it.

**55.** The evidence in issue is primarily that of the appellant's economic expert, Dr. Gurdgiev, although evidence was also adduced from a chartered surveyor regarding difficulties in locating a suitable alternative site and from the appellant's planning consultant. The trial judge did not take issue with the evidence of the surveyor but noted that even on its own terms that evidence did not suggest a shortage of suitable sites but rather that that appellant's bids on potentially suitable sites had not been accepted, presumably either because they did not match the vendor's expectations or because somebody else bid more.

**56.** The trial judge was clearly not impressed by the evidence of the appellant's planner. He pointed out that the suggestions that it is appropriate for developers not to cease unauthorised development in response to a warning letter and for a planning authority to hold off enforcement action until an application for retention permission has been applied for are both incorrect as a matter of law. I share his views of the planner's evidence. The suggestion that cessation of an unauthorised use would not typically be requested until it had been proven that the development was unauthorised "following confirmation of a decision"

by the planning authority or An Bord Pleanála and his assumption that Fingal were awaiting a decision of An Bord Pleanála is entirely self-serving in circumstances where the appellant had neither applied for planning permission nor made a reference under s.5 of the PDA or otherwise instituted any process through which such a decision might be made.

**57.** Counsel suggested that the court could have regard to the fact that the appellant, in responding to the warning letter and enforcement notice, was acting on professional advice. Certainly, this may be a relevant factor where there is a *bona fide* dispute as to whether a development is unauthorised. This could for example, take the form of an argument as to the scope or meaning of a planning permission or disagreement as to whether the development benefits from an exemption under the PDA. Where it is undisputed that a development is unauthorised and the professional advice seems to amount to no more than encouraging the client to continue to benefit from an unauthorised commercial development whilst waiting to see how long it will take a planning authority to jump through the enforcement hoops, then in my view, very little, if any, weight could be attached to this factor.

**58.** As regards Dr. Gurdgiev's expert economic evidence, the appellant's arguments were two-fold. Firstly, it is said that following the decision of the Supreme Court in *RAS Medical Ltd. v. College of Surgeons in Ireland* [2019] 1 IR 63 sworn affidavit evidence cannot be rejected without giving the deponent the opportunity to answer any questions as to why that evidence should not be regarded as credible or reliable. The onus in this regard lies on the opposing party to ask the court to take appropriate steps, such as permitting cross-examination on the affidavit, so that the reliability of the evidence can be determined. Secondly, the appellant complains that insofar as the trial judge sets out a list of concerns regarding the expert evidence between paras. 47 and 60 of his judgment, these were not brought to the appellant's attention prior to the judgment. Consequently, the appellant did

not have the opportunity to clarify issues of concern to the court or to supplement any evidence deemed insufficient.

**59.** It may be useful to bear in mind that *RAS Medical* deals with affidavit evidence in general as distinct from expert evidence. There is rarely an issue as to the credibility of an expert witness (although this does occasionally occur) but there may well be issues as to the appropriateness of the witness's expertise in light of the issues upon which they have been asked to report or as to the instructions given to the expert and upon which they have based their views. Dr. Gurdgiev is undoubtedly a very highly qualified and well-respected economist and there is no question at all as to his personal credibility. This was not the matter of concern to the trial judge. Instead, he appears to have been concerned as to the basis upon which the expert was instructed in circumstances where the appellant had not adduced any independent evidence of the claimed public interest prior to the date fixed for the hearing of the action and the expert's report was produced in less than six days.

**60.** It is evident from the report itself that the views expressed by the expert are based on underlying circumstances and data provided to him by the appellant. The phrases *"per company supplied information"*, *"company stated"*, *"based on company reports"*, *"based on previously cited company's results"* and *"per company"* appear frequently across the report. Whilst a number of internationally authored articles are referenced, these deal with container traffic in global trade. The only material referenced dealing specifically with Ireland is the Dublin Port Throughput Statistics for Quarter 4 of 2022. Interestingly, the report notes that according to the Dublin Port figures the appellant handles 14% of Dublin Port's container traffic whereas the company's own figures put its share at between 22% and 30% leading the expert to make a conservative estimate of 19%. In these circumstances it is perhaps unsurprising that the trial judge flagged his concerns by directing that an affidavit be sworn exhibiting the briefing material provided to Dr. Gurdgiev.

**61.** I do not propose to go through all of the issues taken by Simons J. with the evidence of this expert. Much of it concerns the lack of an explanation provided for the cost estimates applied to the use of alternative facilities at various distances from Dublin Port (a point the validity of which was accepted by counsel for the appellant) and the fact that the report does not examine whether alternative storage capacity could be provided by another operator either in an existing facility or in an alternate facility in a location equivalent to the appellant's development. Simons J. also notes discrepancies between the briefing note (which suggested that additional storage facilities were due to be provided at Dublin Port itself), the report and public statements published on the Dublin Port Company website accessible via a hyper-link in the report. For what it is worth, I do not accept the criticism that the trial judge engaged in independent research rather than addressing his concerns to the appellant. If material is hyper-linked in an expert's report, then it constitutes part of the reference material upon which the report is based and a court is, at very least, entitled (if not expected) to look at it where it has concerns regarding the content of the report itself. This is not *"independent research"* but rather an attempt to understand an expert report in its own terms. In any event, these discrepancies undermined the confidence which Simons J. felt he could place in the report.

**62.** I have already noted that there is a difference between evidence *simpliciter* and expert evidence. Expert witnesses are entitled to express opinions on matters of which they have no personal knowledge because of their specialist expertise in the subject matter with which the court is concerned. For a court to assess the appropriate weight to afford to an expert opinion, it is necessary to establish both the extent of the expert's expertise and the basis upon which they have been asked (usually by one of the parties to the case) to prepare their report. The former, as I have noted, does not arise in this case but the latter does.

**63.** Even where an appropriately qualified expert properly instructed gives evidence, a court is not obliged to accept that evidence. These matters were considered by this court in *Duffy v. McGee* [2022] IECA 254. At para. 78 of his judgment, Noonan J. stated as follows:

> *"78. Expert witnesses enjoy a special position in the law of evidence. Unlike non-experts, experts are not confined to giving purely factual evidence but may give opinion evidence where certain criteria are satisfied. The proliferation of the expert witness is an ever-present feature of almost all spheres of litigation, one such being personal injuries.*
>
> *79. Very frequently, the evidence of the expert will be decisive to the outcome, particularly where, as here, there are complex scientific or medical issues arising. Some of the most high-profile miscarriage of justice cases have arisen from serious failures on the part of experts. It is right therefore that the law expects and demands the highest standards of experts. This has found expression in many judgments and more recently, rules of court.*
>
> *80. The expert 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 - per Clarke J. in Donegal Investment Group plc v. Danbywiske [2017] IESC 14 at [7.1], [2019] 1 IR 150, at para 60."*

**64.** Noonan J. then went on to consider the duty of impartiality that an expert witness has and approved the classic statement of the duties of experts as set out in *National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd* (*The Ikarian Reefer*) [1993] 2 Lloyds Rep. 68 at 81-82. These include, at item 3, a requirement that an expert witness state the facts or assumptions upon which his opinion is based and should not omit to consider material facts which could detract from his concluded opinion. In this case, the expert took care to make it clear to the court that much, if not most, of the material upon which his report

was based had come directly from the appellant, implicitly recognising that this could have a bearing on the weight the court might attribute to his resulting views. Noonan J. goes on to consider the extent to which non-compliance with any of the *Ikarian Reefer* duties will affect the admissibility of the expert's evidence or merely the weight to be attached to it. It seems to me that these considerations are potentially relevant where there are concerns as to the robustness of the assumptions underlying an expert's report, even where these do not arise though any personal fault of the expert but because of the material with which and the circumstances in which he was instructed.

**65.** Collins J. delivered a concurring judgment in the same case, noting the differing approaches adopted in various jurisdictions as to whether the reliability of expert evidence should be treated as a threshold admissibility issue. At para. 17 he notes that there is no general requirement under Irish law that expert evidence must meet a specific threshold of reliability as a condition of admissibility although it is open to challenge the admissibility of expert evidence on the basis, *inter alia*, that it lacked a reliable methodological foundation. Crucially, he notes that *"even where admissible, issues of reliability may properly affect the weight to be given to expert evidence"*. He goes on to state:

> *"In civil proceedings, the weight to be given to evidence, including expert evidence, is always a matter for the court. Even if uncontradicted, a court is not obliged to accept the evidence of an expert witness any more than it is obliged to accept the uncontradicted evidence of a witness of fact."*

**66.** In light of these principles, the following observations can be made. The unauthorised nature of the development was conceded in an affidavit sworn on 3 November 2022 and retention planning permission was refused on 20 January 2023. The stay application was not heard for another ten months. Thus, the appellant had ample time within which to prepare its case that the public interest justified a lengthy stay on orders to be made under s.160 of

the PDA. This included ample time to instruct any expert necessary to support the case the appellant wished to make. For reasons which are not explained by the appellant, it did not introduce the potential public interest argument until an affidavit was sworn by Mr. Brady on 5 October 2023, i.e., the day the case was originally listed for hearing. It is evident from Mr. Treacy's affidavit that the expert was first contacted on that same day and formally instructed late the following day. He produced his report five days later and quite clearly did not purport to have done independent research within that time frame to confirm the underlying facts upon which he had been instructed. The appellant was afforded considerable latitude by the High Court and was permitted not only to file this affidavit but also to file an additional six affidavits after the originally scheduled hearing date dealing with its application for a stay. This latitude continued through the hearing of the appeal when the appellant was permitted to file a further affidavit dealing with the impact of current geo-political issues on container shipping traffic and how this might impact on the need for storage for shipping containers in Ireland.

**67.** Whilst the appellant was undoubtedly entitled to be heard and indeed was heard on the question of a stay, the application was not an iterative one in which the court was obliged to enter into an exchange with the appellant identifying weaknesses in the appellant's case and affording the appellant an unlimited opportunity to mend its hand. This is particularly pertinent in the context of a stay on a s.160 order where the starting point is that the development is unauthorised and an order requiring it to cease should be made. Any delay in dealing with the issue of a stay affords the developer the continued benefit of the unauthorised development without even satisfying the court that a stay should be granted.

**68.** In my view, in directing that an affidavit be sworn exhibiting the briefing note upon which the expert report was based, Simons J. clearly flagged that he had a concern on this issue which was not subsequently addressed by the appellant. Although the briefing note

was duly exhibited by the management consultant who had instructed the expert, the expert himself was not asked to address the obvious discrepancies between the briefing note and his report nor to explain gaps between the briefing note and the report such as where the figures used in his costs analysis had come from. Indeed, in his affidavit the management consultant identifies two errors in the briefing note which was provided to the expert. The expert was not asked to re-consider any aspect of his report in light of those admitted errors.

**69.** The suggestion that the expert evidence should automatically have been accepted because it was uncontradicted is not consistent with the statements of principle made by this court in *Duffy v. McGee*. In my view, the proposition that a court is not bound to accept even uncontradicted expert evidence has not changed in light of *RAS Medical*. Indeed, it is interesting to note that the judgment of the Supreme Court in *RAS Medical* was delivered by Clarke C.J. who two years earlier in *Donegal Investment Group plc v. Danbywiske* (above) had held that *"A trial judge is entitled to reach his or her own conclusion as to the proper approach even where it is different to the approach suggested in the expert evidence of either party"* and *"a trial judge is not bound necessarily to adopt the views of either expert"*. That case involved a situation where there were experts acting on behalf of opposing parties who took conflicting views as to the correct approach to the issue before the court.

**70.** Although the appellant sought to characterise this as an *inter partes* case in which the applicant had not opposed its expert evidence, it seems to me more correct to characterise the application for a stay as one made on an *ex parte* basis. The terms of the settlement agreement between Tesco and the appellant clearly provided that Tesco would consent to an application for a stay if it were moved by the appellant, albeit in doing so it observed *"that it is a matter for the High Court to determine if a stay ought to be granted and the length of any stay"*. Tesco did not participate in the stay application and in making the application,

the appellant knew that Tesco would not participate and certainly that Tesco would not oppose the application as that was part of the commercial agreement reached between them.

**71.** Finally, I think it important to emphasise that the analysis carried out by the trial judge between paras. 47 – 60 of his judgment did not lead him to treat the economist's expert report as inadmissible. Rather, the issues identified went to the weight of the evidence and led to the conclusion in para. 60 of the judgment that the appellant had failed to put before the court evidence which indicated, on the balance of probabilities, that the economic effects of the loss of the container storage capacity provided by the appellant were such that it would have been in the public interest to allow the unauthorised use to continue. This is not a conclusion that closure of the facility will have no impacts on transport logistical infrastructure in this jurisdiction nor that such impacts will not be felt more broadly by the public and ultimately by consumers. Rather it is a conclusion as to the robustness of the evidence offered, the extent to which it supported the claimed public interest and, to the extent that it did, that the public interest in question was not sufficient to allow the unauthorised use to continue.

**72.** I do not think that the appellant has established a basis upon which it can be said that there was an error of principle in the manner in which Simons J. reached this conclusion or that the conclusion is one which is inherently unjust. Given that there must be a margin of appreciation afforded to the trial judge in the manner in which he dealt with the evidence in a case, even where that evidence is on affidavit and can be reviewed by the appellate court, I do not see that there is any basis for interfering with the conclusions reached by Simons J. in this regard.

**Weight Attached to Evidence**

**73.** The third group of grounds of appeal raised by the appellant concerns the weight attached by the trial judge to the positions adopted by Tesco and by Fingal, complaining that

too little regard was had to the former and too much to the latter. There is no doubt that the position of Tesco as applicant in this s.160 application and of Fingal as the relevant planning authority are both factors which the trial judge may consider when exercising his discretion under s.160 appearing, as they do, at paras. (vii) and (iv) of the *Murray* principles.

**74.** Under para. (vii) of *Murray* the "*conduct and personal circumstances*" of the applicant for relief under s.160 may be a relevant consideration. Interestingly, para (iv) dealing with the planning authority, refers to its "*attitude*" suggesting that it may be appropriate for the trial court to treat the views of the planning authority and of the applicant for relief somewhat differently, assuming, of course, as was the case here, that the planning authority is not also the applicant. The appellant does not point to any aspect of the conduct or circumstances of Tesco but to its attitude towards the appellant's application for a stay which, in accordance with the terms of the settlement agreement, Tesco did not oppose. There is nothing in particular identified about the conduct or circumstances of Tesco which might have a bearing on the decision the court had to make.

**75.** Tesco is a large commercial entity and indeed profits, through the payment of rent, by the appellant's tenancy of its property. Although its deponents raised some planning issues (mainly to do with traffic, visual prominence and safety) it is clear that the main impetus behind Tesco's proceedings was the service of an enforcement notice by Fingal, the threat of criminal prosecution and the effect that these matters could have for Tesco in the context of its long-term relationship with the planning authority. There is, of course, nothing untoward in any of this but it is perhaps relevant when considering Tesco's attitude to the stay to understand its motives in bringing the proceedings. In fairness to Tesco, it engaged with Fingal from the point at which the warning notice was first served and made attempts to engage with the appellant with a view to resolving matters before the proceedings were commenced.

**76.** The appellant's reliance on Tesco's attitude in not opposing the stay is linked to its argument, dealt with in the previous section of this judgment, that the evidence of its experts was uncontradicted and therefore should have been accepted by the court. As noted, although the proceedings themselves are *inter partes* proceedings, given Tesco's agreement not to oppose the stay as part of the terms of settlement, by the time the court was dealing with the stay it was effectively an *ex parte* application. The court was not obliged to accept the appellant's evidence simply because it was uncontradicted.

**77.** Crucially, Tesco's agreement not to oppose the stay was expressly subject to the observation that it was a matter for the High Court whether or not a stay should be granted and for how long. I do not think Tesco's agreement to these terms can necessarily be read as supportive of the applicant's application for a stay. At best it is neutral. In his judgment the trial judge noted Tesco's position and the explanation offered by counsel for Tesco (which did not participate on this appeal). I do not think that Tesco's attitude to the stay, insofar as it is relevant, adds materially to the matters the High Court was obliged to consider and I find no fault with the way in which Simons J. addressed the matter.

**78.** The converse argument is made regarding the treatment of Fingal's position. Its views, as expressed in a letter dated 13 October 2023 (written when it was invited to make submissions on the stay application) and as contained in the reasons for refusal of retention permission are set out in some detail in the judgment. The appellant queries the role of Fingal in the litigation and the weight to be attached to its views in circumstances where it was not a party to the proceedings.

**79.** In my view, these concerns are misplaced. Although Fingal was not a party to the proceedings and, indeed, was not a party to the appeal, it availed of the opportunity afforded to it by the trial judge to be heard on the stay application. Subsequently, it acted, in effect, as the *legitimus contradictor* on this appeal. In my view, it was entirely appropriate for the

court to invite Fingal's participation and equally appropriate for Fingal to accept - especially in circumstances where, because of the agreement reached with Tesco, the appellant's application for a stay was otherwise unopposed.

**80.** However, even if Fingal had declined to actively participate in the application, its views would still be relevant under para. (iv) of the *Murray* principles and it would have been appropriate for the trial judge to consider them. A planning authority has both particular local knowledge of its functional area and a statutory obligation regarding the proper planning and sustainable development of that area such that its views are potentially relevant even where it chooses not to become involved in a s.160 application taken by a private party. Therefore, as a matter of principle, the trial judge did not err in considering Fingal's attitude. Further, in this particular case, Fingal's role went beyond responding to an invitation to make submissions on the application for a stay. It had commenced an enforcement process through the service of a warning letter in December 2020 and taken formal action through the enforcement notice served in August 2021. It was the service of these notices which prompted Tesco to institute these proceedings. Therefore, far from being a stranger to the proceedings, Fingal's actions were intimately connected with the proceedings from the outset.

**81.** The weight to be attached to the views of the planning authority on a s.160 application is essentially a matter for the trial judge subject to the proviso noted by McKechnie J. in *Murray* that the planning authority's attitude cannot be decisive. There is no suggestion in the judgment that the trial judge regarded Fingal's views as determinative of the issues before him. He clearly regarded these views as important, as he was entitled to, and afforded them considerable weight. In circumstances where the development was entirely unauthorised in a sense of not having any planning permission rather than being in breach of the terms of a planning permission and Fingal had commenced an enforcement process in

respect of it, I do not think that there is any basis within the scope of this court's appellate jurisdiction to interfere with the weight attached by the trial judge to the planning authority's views. I am, if anything, fortified in this view by the fact that the reasons for refusal of planning permission included a ground related to the possibility of the effluent run off from the development having an adverse effect on sites protected under European law for ecological reasons. I think that a trial court in a s.160 application is entitled to have particular regard to the views of the planning authority as to potential environmental and ecological concerns which are strictly regulated under European law.

**Should a Court consider Planning Issues?**

**82.** Counsel for the appellant raised an interesting issue as to the extent to which a court hearing a s.160 application should consider the planning merits of the development, particularly where there is an outstanding appeal before An Bord Pleanála. In the judgment under appeal, Simons J. is clearly of the view that a court should not be asked to sanction the continuance of an unauthorised use of the land as to do so would set itself up as *"a rival planning authority"*. He noted that the court was being invited to licence the unauthorised use of the lands on a temporary basis in circumstances where the planning authority had already refused retention permission. Given that it is not the function of a court to act as a planning authority, to what extent is it appropriate for the court to consider the planning merits of the development the subject of a s.160 application in exercising its discretion either to make the order or to grant (or refuse) a stay?

**83.** When pushed on the extent to which the court should ignore the serious planning issues raised by the planning authority, counsel conceded that the court could take account of the unauthorised nature of the development and the fact that it comprised a large scale commercial operation but submitted that the court should not consider the detail of the

matters relied on by the planning authority in refusing retention permission or even those raised by the appellant in its appeal to An Bord Pleanála. In making this submission counsel relied on the observations of McKechnie J. in *Meath County Council v. Murray* (above) at para. 126:

> *"It is not an easy task to try and articulate a visible boundary line beyond which a judge should not go when applying the proportionality test. Some engagement with the facts is obviously required. However, he is not permitted to reach his own independent view on the planning merits of a case. That is the function of the planning process. The courts must not act as a surrogate for the nominated bodies. They have no role in performing such function through some process of reviewing the merits of a decision reached by either of them within their remit. Still less, do they have the expertise to carry out such a function."*

**84.** McKechnie J. cited the views of Finlay P. in *Dublin Corporation v. Garland* [1982] ILRM 104 and of Kearns P. in *Wicklow County Council v. Kinsella* [2015] IEHC 299 before concluding *"I am satisfied that the court should not embark on what, in effect, would be a further review of matters the determination of which is committed by legislative policy and statutory provision to stipulated bodies."*

**85.** The difficulty with the appellant's submission, if correct, is it means that notwithstanding that s.160 provides for a statutory injunction as part of the planning code, a court is required to ignore the planning context in which any application for such an injunction is made. If the court is confined to considering only the fact that a development is unauthorised and perhaps the conduct of the developer in breaching the planning code, how is it to assess the appropriateness or otherwise of granting a stay? In my view there is nothing in s.160 or in *Murray* which requires a court to deliberately blind itself to the planning context within which a s.160 application is brought. Further, the relevant planning

context is not limited to the question of whether the development is authorised or not. Even within the *Murray* principles the very first factor – the nature of the breach from minor, technical and inconsequential up to material, significant and gross – requires some analysis of the planning context in order for the court to assess whether the breach is technical or material in nature. The materiality and significance of a breach of the planning code will necessarily be linked to the potentially adverse planning impacts the unauthorised development might have.

**86.** I fully accept that it is not the function of the court on a s.160 application to second guess decisions which have been or may be made by a planning authority. In *Murray* the issue arose in a context where the appellants were seeking to retain *in situ* an unauthorised dwelling house notwithstanding the decision of the planning authority (upheld on appeal) to refuse retention permission for it. A refusal of s.160 relief to the planning authority would have had the effect of reversing the planning decision that the dwelling should not be permitted at that location. Here, the position is slightly different in that a stay, even though it is for an extended period, is necessarily finite. If retention permission is ultimately refused on appeal, the development will have to cease on the expiration of the stay.

**87.** However, I do not think this means that the court must be blind to the serious planning issues regarding this development which were raised in the planning process. Without purporting to decide these issues, the court can take account of the fact that the reasons for the refusal of planning permission reflect serious planning concerns on the part of the planning authority. These include a contravention of the zoning for the area, visual and residential amenity, the potential for adverse ecological impacts on EU sites and potential transportation and traffic impacts. The appellant may well be correct in its belief that it has dealt satisfactorily with these issues in its appeal such that An Bord Pleanála might grant

permission. That remains to be determined and it is not the function of the court to attempt to predict what the outcome of the appeal might be.

**88.** What is clear is that the outcome of the appeal is unlikely to be binary – i.e., a simple grant or refusal of retention permission. If retention permission is granted it will almost certainly be subject to conditions as almost all planning permissions are. The very high likelihood is that these conditions will engage with the concerns raised in the planning authority's reasons for refusal and will impose controls regarding those aspects of the development. On the other hand, if the development is allowed to continue on foot of a stay, none of these issues will be subject to planning control. Consequently, in considering whether a stay should be granted to postpone the implementation of a s.160 order for a lengthy period, the court can and should have regard to the fact that serious planning issues have been raised which would remain both undetermined and unregulated during the period of any stay. In those circumstances, I do not think that the regard had by the trial judge to the planning issues raised by the planning authority crossed the boundary between the impermissible usurpation of the role of the planning authority and the permissible consideration by the court of factors relevant to the exercise of its discretion regarding the grant of a stay. Notably, Simons J. did not purport to determine these issues or to predict the view that might be taken of them by An Bord Pleanála. Instead, he had regard to the fact that the planning authority had *"raised significant concerns in respect of the unauthorised development"* and regarded that as a matter to which the court should afford weight (para. 39) and he viewed the planning authority's point that there were no controls in place as a valid concern (para. 41).

**Conclusions**

**89.** It will be evident from the analysis carried out above that I do not think the trial judge erred in principle in the manner in which he approached this s.160 application. The high point of the appellant's case is that there is no strict legal requirement that when a public interest claim is made in respect of an unauthorised development, it must be combined with another discretionary factor before the court can exercise its discretion in favour of a developer. However, even if that is not a strict legal rule, the operation of the principles in *Murray* clearly envisages that the various factors should be considered in tandem with one another. Therefore, it was not incorrect for the trial judge to have looked to see if there were other factors which supported the exercise of discretion in the appellant's favour. It is also undeniable that with the exception of the claimed public interest and, arguably at best, the attitude of Tesco, all factors weigh heavily against the grant of a stay.

**90.** The court was not obliged to accept the evidence adduced in favour of the claimed public interest merely because it was not contradicted by any party. The court was entitled to interrogate that evidence and did so by reference to the instructions which had been given to the expert witness and the material which the expert witness referenced and hyper- linked in his report. The trial judge's dissatisfaction with that evidence should not be read as an adverse finding as to the personal credibility of the witness. Rather, it flows from the manner in which the witness was instructed to provide an expert report within a very tight time frame concerning an issue which had been newly introduced into the proceedings only a number of days previously. Insofar as the trial judge had concerns about the expert report, these were flagged to the appellant when he directed that the instructions provided to the expert be put on affidavit. The court does not assume the role of *legitimus contradictor* where, because an original litigant agrees not to oppose an application, it proceeds on what is *de facto* an *ex parte* basis. The appellant was afforded extensive opportunities after the original

hearing date to put its case for a stay on affidavit. It is not a matter for the court to direct the appellant regarding the contents of those affidavits.

**91.** Simons J. properly considered both the position of Tesco and the attitude of the planning authority, both of which are identified as factors relevant to the exercise of the court's discretion under s.160 in *Meath County Council v. Murray*. The weight to be attached to the views expressed by each of those parties is primarily a matter for the trial court and there was no error of principle or obvious injustice in the manner in which the trial judge approached this evidence.

**92.** Finally, it was appropriate for the trial judge to have some regard to the serious planning issues arising in respect of this development without determining those issues or purporting to second guess what the decision of An Bord Pleanála might be.

**93.** In light of these conclusions, I refuse the appellant's appeal.

**94.** The stay granted by Simons J. to facilitate the bringing of this appeal and which was extended to the date of the hearing of the appeal (by order of Noonan J. of 8 December 2023) will now lapse. I am conscious that by virtue of seeking a stay and then bringing this appeal the appellant has already secured a *de facto* four month stay on the operation of the s.160 orders made on 16 November 2023. As the court understands it, the appellant has made no effort to wind down its commercial operations at the site or to prepare for the eventuality that a stay might not be granted to it. This leaves this court in the invidious position of having to extend to the appellant the same six-week period allowed to it by Simons J. within which all of the shipping containers must be removed from the lands. In that regard, I propose that the Order of this Court would be subject to the same terms as the order made by the High Court save that the period of six weeks will run from the date of this judgment (23 February 2024) rather than from 14 December 2023. The stay will expire on 5 April 2024 irrespective of the date of the perfection of the order of this Court.

**95.** In the course of the hearing of this appeal it was suggested (albeit by the appellant) that as Fingal County Council was not a party to the proceedings and has not been joined as a party for the purposes of the appeal, it is not in a position to seek an order for costs. In my view, that seems both legally and logically correct. However, if Fingal County Council wishes to make an application for costs it shall have liberty to do so and I propose directing that it notify the Office of the Court of Appeal as to whether it intends to make such an application within fourteen days of this judgment. If such an application is made, the Court will provide further directions as to the provision of written submissions and/or the listing of this matter for a costs hearing. The making of any application for costs shall have no bearing on the commencement of the six week period referred to in the preceding paragraph.

**96.** As this judgment is being delivered electronically, my colleagues, Costello and Noonan JJ, having read this judgment, have indicated that they agree with it and with the orders proposed.