APPROVED **[2020] IEHC 540**

THE HIGH COURT

2020 No. 262 MCA

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

AND IN THE MATTER OF AN APPLICATION

BETWEEN

WATERFORD CITY AND COUNTY COUNCIL

APPLICANT

AND

CENTZ RETAIL HOLDINGS LIMITED
CENTZ STORES 7 LIMITED
ICE COSEC SERVICE LIMITED
NAEEM MANIAR
CENTZ STORES 8 LIMITED

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered electronically on 27 November 2020

INTRODUCTION

1. This matter came before the court on 25 November 2020 by way of an application to set aside or vary orders which had been made on an *ex parte* basis the previous week (19 November 2020). The orders had been made pursuant to section 160 of the Planning and Development Act 2000 ("***the PDA 2000***"). The effect of the orders was to restrain the use of certain premises for retail purposes. The principal issue for determination on the "set aside" application concerned the circumstances in which it is appropriate to grant injunctive relief under section 160 on an *ex parte* basis.

2. At the conclusion of the hearing on 25 November 2020, I made an order setting aside the *ex parte* orders. I delivered an *ex tempore* ruling on that date outlining a summary of the reasons for my decision. The ruling had been delivered on an *ex tempore* basis because of the urgency of the matter from the parties' perspective. The parties were informed that a fuller statement of reasons would be provided subsequently in a written judgment.

PROCEDURAL HISTORY

3. Waterford City and County Council ("***the planning authority***") seeks to restrain what it alleges is the carrying out of unauthorised retail development at three premises within its functional area. The three premises are located at (i) a site outside Waterford city centre; (ii) Dungarvan; and (iii) Tramore, respectively. The planning authority also seeks the removal of what it alleges is unauthorised signage or advertisements.

4. The respondents operate retail stores under the style and title of "Homesavers". The gravamen of the planning authority's complaint is that the respondents are engaged in the sale of convenience goods, including food, household cleaning products and pet supplies; and non-bulky comparison goods, such as home accessories and toys. It is said that this represents an *unauthorised use* in that none of the three premises has the benefit of a planning permission which would allow for such a retail use. Whereas the premises outside Waterford city centre has planning permission for a form of retail use, i.e. retail warehousing, it is said that the permission does not allow for the sale of convenience or non-bulky goods. The premises at Dungarvan and Tramore are said not to have a retail planning permission of any sort.

5. An official of the planning authority inspected the premises outside Waterford city centre on 16 October 2020 and prepared a report on the same date. A statutory warning letter,

pursuant to section 152 of the PDA 2000, issued on 19 October 2020. This indicated that submissions could be made to the planning authority within a period of four weeks.

6. The two other premises were inspected on 4 November 2020, and, again, statutory warning letters were issued.

7. On 19 November 2020, the planning authority made an *ex parte* application to the High Court (Meenan J.) pursuant to section 160 of the PDA 2000. Orders were made on that date which, in brief, restrained the respondents from using the three premises other than in accordance with the terms and/or conditions of the relevant planning permissions relating to those premises.

8. The application had been grounded on an affidavit of an executive planner in the planning authority's enforcement unit. The asserted urgency for the application is summarised as follows at paragraph 24 of the affidavit.

> "24. One of the principal aims of the Retail Planning Guidelines 2005, which are specifically referred to under Condition 3 of the permissions (and also the Retail Planning Guidelines 2012) is to protect the vitality and viability of town centres. The Applicant, as a planning authority, was and is obliged to have regard to these statutory Guidelines. The operation, in breach of the planning laws, of the Homesavers' retail business at this location and at the other two locations mentioned below will undermine the vitality and viability of retail businesses in Waterford City centre, which are already suffering very significant adverse effects as a result of Covid restrictions on trade. The unauthorised retailing from these premises as the Christmas retailing period (*sic*) has the potential to have a detrimental impact on existing lawfully operated retail business in the city centre. […]"

9. The following day (20 November 2020), the respondents were granted liberty to apply, by way of motion on notice, for an order lifting or varying the injunctions. The respondents duly issued a motion seeking to set aside or vary the interim orders. That motion came on for hearing before me on 25 November 2020.

INTERIM RELIEF UNDER SECTION 160 OF THE PDA 2000

10. Section 160 of the PDA 2000 allows for wide ranging relief in the case of unauthorised development. The grant of relief under the section is often described as the grant of a "planning injunction". This shorthand is useful, but it should be noted that the jurisdiction conferred on the court is statutory rather than equitable in nature. (See *Mahon v. Butler* [1997] 3 I.R. 369).

11. The procedure for the making of an application for a planning injunction is prescribed as follows under subsections 160(3) and (4).

> (3) (a) An application to the High Court or the Circuit Court for an order under this section shall be by motion and the Court when considering the matter may make such interim or interlocutory order (if any) as it considers appropriate.
>
> (b) Subject to section 161, the order by which an application under this section is determined may contain such terms and conditions (if any) as to the payment of costs as the Court considers appropriate.
>
> (4) (a) Rules of court may provide for an order under this section to be made against a person whose identity is unknown.
>
> (b) Any relevant rules of Court made in respect of section 27 (inserted by section 19 of the Act of 1992) of the Act of 1976 shall apply to this section and shall be construed to that effect.

12. As appears, the legislation envisages that an application for relief will ordinarily be made on notice to the developer, i.e. the person who it is alleged is carrying out the unauthorised development. The proceedings are instituted by way of originating notice of motion. Relevantly, however, it is expressly provided that the court may make such interim order (if any) as it considers appropriate.

13. The test to be applied in deciding whether to make an interim order is prescribed under Order 103, rule 7 of the Rules of the Superior Courts as follows.

> 7. Pending the determination of an application under [Section 160]*, the Court on the application of the applicant or the respondent, by interlocutory order, (or if satisfied that delay might entail irreparable

> or serious mischief, by interim order on application *ex parte*) may make any order in the nature of an injunction; and for the detention, preservation or inspection of any property or thing; and for all or any of the purposes aforesaid may authorise any person to enter upon or into any land or building; and for all or any of the purposes aforesaid may authorise any sample to be taken or any observations to be made or experiment to be tried, which it may consider appropriate necessary or expedient.
>
> * As per subsection 160(4)(b) of the PDA 2000, the rule is to be construed as applying to section 160.

14. As appears, the test for the grant of an interim order on an *ex parte* application is that the court must be satisfied that delay might entail irreparable or serious mischief. This rule does not appear to have been brought to the High Court's attention on the *ex parte* application. I will return to consider the significance of this under the next heading below.

15. One issue which has not yet been fully explored in detail in the case law is whether it is appropriate to require a planning authority to give an undertaking as to damages as a *quid pro quo* for the grant of an interim or interlocutory injunction under section 160. (cf. *Donegal County Council v. P Bonar Plant Hire Ltd* [2020] IEHC 349 where an undertaking for damages was required of a planning authority).

16. The availability of an undertaking as to damages plays a significant role in the test governing the grant of interim and interlocutory injunctions in *private law* proceedings. The principles governing interlocutory injunctions have recently been restated by the Supreme Court in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Ltd* [2019] IESC 65 ("***Merck***"). Relevantly, the Supreme Court held that if there is a fair issue to be tried (and the case will probably proceed to trial), then the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice. The most

important element in that balance is, in most cases, the question of the adequacy of damages.

17. The Supreme Court emphasised, however, that any application for an interlocutory injunction should be approached with a recognition of the essential flexibility of the remedy and of the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined at trial.

18. Of course, the adequacy of damages will only ever be a relevant consideration in assessing the balance of justice where damages are capable of being recovered in the context of the proceedings, whether by the plaintiff as an award of compensatory damages or by the defendant pursuant to an undertaking as to damages. See paragraph 30 of the judgment in *Merck*, as follows.

> "[…] As to that the governing principle related to the adequacy of damages, this involved considering two hypotheses and balancing the outcome. If the plaintiff was refused an injunction but succeeded at the trial would he or she be adequately compensated by the award of damages at the trial? On the other hand, if the defendant was restrained by injunction, but nevertheless succeeded at the trial, would he or she be adequately compensated by the award of damages pursuant to the undertaking for damages which the plaintiff would have been required to give at the time of the grant of the injunction? In either case, it was also relevant to consider if the party was capable of meeting any award of damages if made."

19. The relevance, if any, of damages to an application for an interim or interlocutory injunction under section 160 is diminished by the fact that an applicant—whether a planning authority or any other person—cannot recover damages as a substantive or final relief in such proceedings. (See, by analogy, *Ellis v. Nolan*, unreported, High Court, McWilliams J., May 6, 1983). It would be anomalous were an applicant nevertheless to be entitled to recover damages referable to the period of time for which an interlocutory injunction had been sought and refused. It would be more consistent with the statutory scheme to say that an applicant cannot recover damages at any stage. On this analysis,

damages will simply not be a relevant consideration in assessing the balance of convenience from an applicant's perspective.

20. It must also be doubtful whether it would be consistent with the statutory scheme to require a planning authority to give an undertaking as to damages as a *quid pro quo* for the grant of interim or interlocutory relief. There is a strong public interest in ensuring that a planning authority is able to take urgent enforcement action where necessary. An obligation to provide an undertaking as to damages for any losses suffered by a developer who ultimately succeeds in defending the application might well have a deterrent effect on the planning authorities.

21. More generally, and in accordance with the tenor of the judgment in *Merck*, it seems that the matters to be considered in assessing the balance of justice will be wider in applications for interlocutory relief under section 160 than in private law proceedings. In particular, considerations such as the public interest in ensuring the maintenance of proper planning and development and the need to protect public amenities will come into play. See, for example, the following passage from the judgment in *Johnson & Staunton Ltd v. Esso Ireland Ltd* [1990] 1 I.R. 289 (at 294/95) cited by the planning authority in argument before me.

> "[…] The statutory power conferred by the Oireachtas on the courts by this section [the statutory precursor to section 160 of the PDA 2000] was given to ensure that, in the public interest, there would be compliance with the planning code generally and with conditions attached to planning permissions in particular. Here there is an admitted breach by the defendant of some of the conditions attached to the permission (namely those relating to the need to obtain pre-development approval for certain of the works to be carried out) which cannot be remedied. The extent and seriousness of this breach cannot be adequately assessed until the trial of the action. I think it is in the public interest (in the absence of special circumstances which do not here exist) that illegal developments should be halted until the court has had an opportunity to examine all the circumstances of the case to see whether there are any reasons why it should not permanently stop the development."

22. On the facts of *Johnson & Staunton Ltd*, the High Court (Costello J.) placed some reliance on the existence of an undertaking as to damages. The proceedings were, however, between two private parties and did not involve the local planning authority.

23. Finally, it should be emphasised that the procedure under section 160 is intended as a summary procedure. In the vast majority of cases, final orders will be made on the basis of affidavit evidence alone (*Meath County Council v. Murray* [2017] IESC 25; [2018] 1 I.R. 189, [34] to [43]), and thus such applications come on for full hearing much more rapidly than conventional plenary proceedings. On the facts of the present case, for example, the full hearing will take place on 7 December 2020, that is within three weeks of the proceedings having first been instituted. Such expedition will often obviate the need for interim or interlocutory orders in section 160 proceedings.

DISCUSSION

24. The default position under section 160 of the PDA 2000 is that the party against whom orders are sought must be put on notice of the making of an application to court. This reflects the principle of constitutional justice, *audi alterem partem*. The making of orders under section 160, even on a temporary basis, has the potential to adversely affect the rights of the owner and/or occupier of the lands. On the facts of the present case, for example, the legal effect of the interim orders was that the respondents had to cease trading and to put their staff of some 125 employees on protective notice. (See affidavit of Mr Maniar filed on 20 November 2020). It is entirely understandable, therefore, that the legislature envisaged that parties against whom orders are to be made should normally be put on notice and given an opportunity to respond. The planning legislation does, however, envisage that in some circumstances it will be appropriate to proceed on an *ex parte* basis.

25. It should be observed from the outset that an *ex parte* application involving the making of a substantive order is unusual. It is a basic tenet of our legal system that parties have a right to be heard and to respond before a substantive order adversely affecting their interests is made. This is, of course, subject to exceptions in urgent cases.

26. Where an order is made on an *ex parte* basis, the court has jurisdiction to set aside or vary that order on a subsequent *inter partes* hearing. If and insofar as authority is needed for this proposition, same is to be found in the judgment of the Supreme Court in *Adam v. Minister for Justice* [2001] IESC 38; [2001] 3 I.R. 53 as follows.

> "In my view, any order made *ex parte* must be regarded as an order of a provisional nature only. In certain types of proceedings, either the apparent requirements of justice or the requirements of its administration mean that a person will be affected in one way or another by an order made without notice to him and therefore without his having been heard. This state of affairs may, depending on the facts, constitute a grave injustice to the defendant or respondent. In the context of an injunction, only a very short time will normally elapse before the defendant has some opportunity of putting his side of the case. In judicial review proceedings the time before this can occur will normally be much longer. This clearly has the scope to work an injustice at least in some cases.
>
> Considerations such as those mentioned above led to the observations of McCracken J. in *Voluntary Purchasing v. Insurco Limited* [1995] 2 I.L.R.M. 145 at p. 147:-
>
> > '… Quite apart from the provisions of any rules or statute, there is an inherent jurisdiction of the courts in the absence of an express statutory provision to the contrary, to set aside an order made *ex parte* on the application of any party affected by that order. An *ex parte* order is made by a judge who has only heard one part to the proceedings. He may not have had the full facts before him or he may even have been misled, although I should make it clear that that is not suggested in the present case. However, in the interest of justice it is essential that an *ex parte* order may be reviewed and an opportunity given to the parties affected by it to present their side of the case or to correct errors in the original evidence or submissions before the court. It would be quite unjust that an order could be made against a party in its absence and without notice to it which could not be reviewed on the application of the party affected."

27. On the facts of the present case, the High Court (Meenan J.) had made a direction at the time of granting the *ex parte* orders allowing the respondents to apply to vary the order on 48 hours' notice to the planning authority.

28. An application to set aside an order granted *ex parte* does not proceed by way of an appeal of the original order but rather by way of review. The court must consider whether, had all the facts and legal authorities presented to the court on the set aside application been made known to the judge hearing the *ex parte* application, he or she might not have made the *ex parte* order. It seems to me that the critical factor in the present case is that Order 103, rule 7 of the Rules of the Superior Courts had not been opened to the court on the *ex parte* application.

29. The full text of the rule has been set out at paragraph 13 above. It is clear from the wording that the making of an application on an *ex parte* basis will only be justified where the "delay" might entail "irreparable or serious mischief". The "delay" referred to in the rule is that which would otherwise occur were it necessary to comply with the time-limits prescribed under Order 103 for the service of proceedings. The default position is that there must be at least *ten days* between the service of the notice of motion and the day named therein for the hearing of the motion.

30. To put the matter another way, the court hearing an *ex parte* application must be satisfied that, were the grant of relief to be delayed to allow time for the respondents to be served, this might entail irreparable or serious mischief. This might be the position in circumstances where, for example, it is alleged that the unauthorised development is causing ongoing environmental pollution. Another example is where the unauthorised development is alleged to entail damage to, or the destruction of, a protected structure or a national monument. Yet another example is where it is alleged that the unauthorised

development adversely affects a conservation site, such as a national heritage area or a special area of conservation for the purposes of the EU Habitats Directive.

31. No such considerations apply on the facts of the present case. The only matter relied upon in support of the argument that the application is *urgent* is the potential detrimental impact which the alleged unauthorised retail use will have on existing lawfully operated retail businesses during the Christmas retailing period. This falls well short of the legal test of "irreparable or serious mischief" as per Order 103, rule 7.

32. At the risk of belabouring the point, what must be examined is the effect of the delay inherent in serving the respondents and allowing them the minimum period of ten days' notice. It is difficult to understand how such a short period of delay could be said to entail "irreparable or serious mischief" in the context of a retail development. This is especially so in circumstances where the Level 5 restrictions introduced in response to the coronavirus pandemic continue in force until 1 December 2020. These restrictions affect all retail activity, and the commencement in earnest of the traditional seasonal shopping period has been postponed. Whereas the impact which out-of-centre retail development can have on the vitality and viability of a town centre can be a relevant planning consideration in the context of an application for planning permission, a transient impact lasting a matter of days during November can hardly be said to be irreparable.

33. It must also be borne in mind that there has been delay on the part of the planning authority in instituting these proceedings. In particular, the site inspection and report in respect of the premises outside Waterford city centre had been completed on 16 October 2020, that is some four weeks prior to the making of the *ex parte* application. Counsel for the planning authority very properly acknowledges that the application could have been made sooner in respect of those particular premises.

34. Had the planning authority moved more promptly, there would have been adequate time to issue a notice of motion returnable for mid-November, while still affording the respondents the requisite ten days' notice period.

35. (It should be emphasised that, in nearly any other case, a "delay" of a matter of weeks in instituting proceedings under section 160 would not be open to criticism. However, where the planning authority asserts urgency as a justification for making an *ex parte* application, the scale for measuring delay has to be recalibrated accordingly).

36. It is also relevant that the planning authority's initial approach to the alleged unauthorised development had been to issue statutory warning letters which allowed a period of four weeks for the developer to make submissions. The *ex parte* application was made before this four-week period had elapsed for at least two of the premises. Whereas it is, of course, correct to say that a planning authority is not obliged to serve a warning letter in advance of the institution of enforcement proceedings (section 153(5) of the PDA 2000), the very fact that the planning authority initially pursued this more leisurely route undermines the argument which is now made that the matter was so urgent as to justify the draconian step of an *ex parte* application. If rather than issuing warning letters, the planning authority had, instead, instituted these proceedings earlier, then it would have been possible to have brought an application on notice before the court by mid-November 2020.

37. Counsel on behalf of the planning authority submitted that the exchange of affidavits in enforcement proceedings can sometimes drag on for months, and that the making of the *ex parte* application has to be seen in this context. With respect, the appropriate response to such a concern would have been to apply to court for an expedited hearing rather than reaching for the nuclear option of an *ex parte* order shutting down the respondents' business. The Non-Jury List has been sitting consistently throughout the covid-related

restrictions and there is no difficulty in obtaining an early hearing date in urgent matters. The presiding judge (Meenan J.) has an active case management list, and the planning authority could have applied to have these proceedings admitted to that list. There was no need to pursue an *ex parte* application. As detailed under the next heading below, this case has now been assigned to me for case management, and the full hearing will take place on 7 December 2020.

38. Counsel for the planning authority further submits that there are substantial grounds for saying that the retail development is unauthorised, and that the strength of the case can, in principle, justify the making of orders on an *ex parte* basis. In particular, it is submitted that the planning permissions in respect of the premises at Tramore and Dungarvan do not authorise retail development of any type. The permitted user in respect of Tramore is said to be confined to use for "offices, warehouse and storage facilities for ceramic tiles and other goods", and in respect of Dungarvan confined to use for "wholesale/light industrial buildings".

39. In reply, counsel for the respondents suggests that the two premises may have an "established" retail use (by which it seems to be implied that such a use may be immune from enforcement action under the seven-year limitation period), and that a retail use would be consistent with the planning policy for the area. Counsel also submits that his clients have had difficulties in obtaining access to the full planning files (which had been archived). The content of the files is said to be potentially relevant to the interpretation of the permitted user.

40. I have given careful consideration as to whether the *ex parte* orders in respect of the premises at Tramore and Dungarvan should be allowed to stand, given the apparent strength of the planning authority's case. However, I have come to the conclusion that those orders should also be set aside. First, in the absence of urgency, a party is not

entitled to an *ex parte* order under section 160 solely on the basis that the case may appear to be a strong one. This is not the test prescribed under Order 103, rule 7. The general position is that a respondent must be afforded an opportunity to be heard. Of course, urgency coupled with an apparently strong case may well persuade a court to grant interim orders on an *ex parte* basis. For the reasons outlined earlier, none of the considerations which might justify a finding of "irreparable or serious mischief" arise in this case.

41. Secondly, and perhaps more importantly, the fact that the court is now in a position to give the parties an early hearing date removes any necessity for interim orders. It may well be that on 7 December 2020, counsel for the planning authority makes good his submission and I am persuaded—following a full hearing and an examination of all of the evidence—that the development is unauthorised. That is, however, a matter for another day. I cannot reach any conclusion on the substantive merits of the proceedings in the absence of the respondents having had a proper opportunity to put forward their case on affidavit and by way of legal submission.

42. My decision to set aside the *ex parte* orders is also informed, to a limited extent, by doubts as to the availability of an undertaking as to damages in enforcement proceedings taken by a planning authority. (See discussion at paragraphs 15 to 22 above). The risk that an undertaking as to damages might not be actionable suggests that caution should be exercised before making interim orders which may result in significant commercial losses.

CASE MANAGEMENT

43. Following the delivery of my *ex tempore* ruling on 25 November 2020, I gave detailed directions as to the exchange of affidavits and written legal submissions. I also made an

order allowing the inspection of the three premises by officials from the planning authority. On consent, a further respondent, Centz Stores 8 Ltd, was added to the proceedings.

44. The proceedings have since been assigned to me for hearing. The full hearing of the application under section 160 of the PDA 2000 will now take place on 7 December 2020 at 11.30 am.

SUMMARY OF CONCLUSIONS

45. The test to be applied in deciding whether to grant a so-called planning injunction on an *ex parte* basis is that prescribed under Order 103, rule 7 of the Rules of the Superior Courts. The court hearing an *ex parte* application must be satisfied that, were the grant of relief to be delayed to allow time for the respondents to be served, this "delay" might entail "irreparable or serious mischief". One example of a scenario which would fulfil this contingency is where it is alleged that the unauthorised development is causing ongoing environmental pollution. Another example is where the unauthorised development is alleged to entail damage to, or the destruction of, a protected structure or a national monument. Yet another example is where it is alleged that the unauthorised development adversely affects a conservation site, such as a national heritage area or a special area of conservation for the purposes of the EU Habitats Directive.

46. No such considerations apply on the facts of the present case. The only matter relied upon in support of the argument that the application is *urgent* is the potential detrimental impact which the alleged unauthorised retail use will have on existing lawfully operated retail businesses during the Christmas retailing period. This falls well short of the legal test of "irreparable or serious mischief" as per Order 103, rule 7. Whereas the impact which out-of-centre retail development can have on the vitality and viability of a town

centre can be a relevant planning consideration in the context of an application for planning permission, a transient impact lasting a matter of days during November can hardly be said to be irreparable. This is especially so in circumstances where the Level 5 restrictions introduced in response to the coronavirus pandemic continue in force until 1 December 2020. These restrictions affect all retail activity, and the commencement in earnest of the traditional seasonal shopping period has been postponed.

47. In accordance with the principles in *Adam v. Minister for Justice* [2001] IESC 38; [2001] 3 I.R. 53, the interim orders are set aside in circumstances where the provisions of Order 103, rule 7 had not been brought to the attention of the High Court on the *ex parte* application.

48. The costs of the "set aside" application have been reserved pending the outcome of the full hearing of the substantive application on 7 December 2020.