



THE COURT OF APPEAL

CIVIL

High Court Record Number: 2018/308MCA

Court of Appeal Record Number: 2021/315

**Costello J.
Collins J.
Allen J.**

Neutral Citation Number [2022] IECA 223

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING
AND DEVELOPMENT ACT, 2000 (AS AMENDED)**

BETWEEN

**ELAINE KELLY DUNNE, NOEL MOORE, ANN FLYNN, DAVID KELLY, ANNETTE MCGRATH,
LOUISE O’SULLIVAN, CLAIRE MOORE, MATT KELLY AND MICHAEL KELLY**

APPLICANTS/RESPONDENTS

- AND -

GUESSFORD LIMITED TRADING AS OXIGEN ENVIRONMENTAL

RESPONDENT/APPELLANT

JUDGMENT of Ms. Justice Costello delivered on the 12th day of October 2022

Introduction

1. What does planning permission No. PL2/09/439 authorise? This is the principal issue in this appeal from the judgement of Simons J. [2021] IEHC 583. The proceedings are enforcement proceedings brought by a number of individuals (*"the respondents"*) pursuant to s. 160 of the Planning and Development Act, 2000 (as amended) (*"The PDA 2000"*) who allege that a waste facility operated by Guessford Limited (*"the appellant"*) has been operated in breach of the terms of the planning permission. In particular, they assert that the authorised use is confined to the recycling of construction and demolition waste and does not permit the acceptance and treatment of non-inert, commercial or municipal waste. The High Court agreed with the respondents and held that the authorised use of the waste facility is confined to the recycling of construction and demolition waste; that this term would be understood by the hypothetical ordinary and reasonably informed reader of the planning permission as referring to waste material

generated by activities involving the construction and demolition of buildings; and that the treatment of timber by shredding was not authorised by the planning permission. The High Court ordered that the appellant be prohibited from accepting any waste at the facility other than construction and demolition waste and made other ancillary orders.

2. The appellant has appealed the judgment and orders of the High Court.

Background

3. In 2006 Kevin and Michelle Daly were the owners of lands located at Barnan, Rhode, County Offaly approximately two miles from Daingean, off the main Daingean to Tyrrellspass road. The lands had been previously used for agriculture but Mr. and Mrs. Daly decided to develop a recycling facility on the lands. On 2 February 2007 Mr. and Mrs. Daly's company, Concrete Recycling Specialists Limited, was granted a waste permit – WP 138-06 – pursuant to the Waste Management (Permit) Regulations, 1998 for the processing of 23 types of waste as described in Appendix A of the permit, by reference to the relevant European Waste Catalogue Code. Of the 23 types of waste, sixteen were in the category of "*Construction and demolition wastes (including excavated soils from contaminated sites)*" one in the category of "*Wastes from waste management facilities, off-site waste water treatment plants and the preparation of water intended for human consumption and water for industrial use*", and the remaining six in the category of "*Municipal wastes (household waste and similar commercial, industrial and institutional wastes) including separately collected fractions*". On the 15th December, 2010 the Local Authority granted to Complete Recycling Services Limited¹ a waste facility permit – 2007 WFP-10-OY-0183-01 – pursuant to the Waste Management (Facility Permit and Registration) Regulations, 2007 (as amended). The classes of waste permitted to be accepted and recycled on the site were extended to include inter alia waste plastics, waste from forestry, waste metal and waste packaging from a variety of materials including paper, cardboard, plastic, wood, metal, glass textile and mixed and composite packaging as well as mixed municipal waste comprising of commercial dry recyclables and bulky waste, clothes and textiles. This waste facility permit was transferred to the appellant on 28th March 2011 and had an expiry date of the 14th December, 2015. Prior to the expiry of the permit, the appellant applied to renew the permit. After certain litigation, the local authority decided not to renew the permit and that it warranted an application for a new waste facility permit. The appellant appealed that decision to the District Court where it has been adjourned on a number of occasions.
4. Mr. and Mrs. Daly had not applied for planning permission in respect of the development which consisted of the making of a material change in the use of the lands and the erection of certain structures to enable them to operate the waste recycling facility on the site. As no planning permission had been obtained prior to the commencement of the development, the change of use and the development works constituted "*unauthorised development*".

¹This is a different company, but neither party has explained its role or suggested that anything turns on this fact.

5. Mr. and Mrs. Daly took steps to regularise the planning position by seeking retention planning permission in 2009. The application for retention planning permission submitted to Offaly County Council was dated the 20th October, 2009. It was thus submitted when WP 138-06 applied to the site and before WPF-10-0183-01 issued. As the scope of the grant of planning permission is at the heart of these proceedings, it is necessary to set out in some detail the contents of the relevant documents.

6. On the 8th October 2009 a site notice was erected which identified that the application was for permission and retention permission for development consisting of:-

“... retention permission of recycling facility for construction and demolition materials incorporating storage buildings, bunkers, offices and weigh bridge, and plant and material storage yard, effluent treatment system and all ancillary services and permission to construct 1st aid fire firefighting water tank.”

A notice in identical terms had been advertised in the Offaly Express on the 7th October 2009. There was no reference to commercial or industrial waste being recycled at the facility.

7. The application submitted to Offaly County Council indicated that it was for permission for retention. The applicants were Kevin and Michelle Daly. Specifically, the applicant was not their company, Concrete Recycling Specialists Limited.

8. Part 9 of the application form required the applicants to provide a *"Brief description of the nature and extent of the development"*. This was completed as follows:-

“Recycling facility for construction & demolition materials incorporating storage buildings, bunkers, offices, weigh bridge, plant & machinery storage yard, effluent treatment system and all ancillary services and permission to construct 1st aid fire-fighting water tank.”

9. Part 15 of the form required the applicants to indicate whether the application related to a *"material change of use of any land or structure or the retention of such a material change of use"*. The answer was *"n/a"*. This would appear to be an error as the application plainly was for the retention of a material change of use as well as for permission for development. The previous use of the lands was stated to be *"Pig fattening unit – previous use"*. The use proposed or proposed to be retained was stated to be *"Recycling facility for construction and demolition materials and all ancillary services"*. Finally, opposite the box marked *"Nature and extent of any such proposed use (or use it is proposed to retain)"* (emphasis added) the applicants replied *"Recycling facility for construction and demolition materials and all ancillary services"*.

10. Somewhat surprisingly, in Part 17, they answered the question *"Does the application relate to a development which comprises or is for the purposes of an activity requiring a waste licence?"* in the negative. In Part 19 it was indicated that there had been three

different pre-application consultations between the applicants' representatives and identified officials of Offaly County Council.

11. The application was accompanied by a Supplementary Application Form No. 2 – Industrial/Commercial. In response to question No. 1 "*Specify **precisely** the nature of the proposed development*" (emphasis added) the answer was "*Recycling of construction & demolition of building materials*". The raw material involved in the process was identified on the form as "*construction and demolition waste*". The method of disposal of waste product was identified as landfill for non-recoverable wastes.
12. The planning application was accompanied by a report entitled "*Environmental report in support of planning application by Mr. Kevin Daly in respect of site*" compiled by RME Environmental dated 19th October, 2009 ("the RME Report"). The table of contents of the report listed six chapters: – (1) Introduction, (2) The need for the development, (3) Scoping (4) Alternatives addressed (5) Environmental impacts and (6) Conclusions. The schedule of drawings listed the seven drawings submitted as part of the application for planning permission and comprised a location map, a layout map, plans of the storage building and office, details of prefab offices and proposed water tank, plans elevation and sections of recycling stores 1 and 2 and traffic movement and landscape plans. The report appears to be focused upon the environmental impact of the works and material changes in use in respect of which retention planning permission was sought rather than on defining the scope of the user in respect of which planning permission was sought.
13. The introduction was divided into three sections. Section 1.1 set out the background to the development, 1.2, the proposed development, and 1.3 the description of the current site operations. As reliance was placed upon the entire contents of these sections by the appellant, it is appropriate to set these out in full.

"Introduction 1.0

1.1 Background to the development

CRS Ltd, Barnan, Rhode, County Offaly owned by Mr. Kevin Daly has developed on the site since 2006. The Company were granted a waste facility permit on the site in February 2006. The primary focus of the Company is to collect construction and demolition waste and commercial and industrial waste types in the Midland region and also the greater Dublin and Kildare regions. The Company has established a very broad and loyal client base and has provided to date a very vital role regionally in the segregation and recycling of wastes generated in the region.

Mr. Kevin Daly is now applying to the local authority for planning permission to stabilise the planned environment at the facility. This will be used as a solid base for the expansion and diversification of the business via the mechanism of the waste permit review, which will take place in the coming months. Since 2006 the company has addressed its environmental obligations through the modicum (sic.) of the Company Environmental Management Programme and has received

satisfactory commentary from the local authority inspectorate on a number of site reviews. The Company proprietary waste traceability system affords a full verification of the materials handled on-site and the Company again view these systems as solid baselines for the continuation of the business and the regularisation of the planning status of the site.

1.2 Proposed Development

The development proposed here is for the retention of structures as described in the planning permission application form. It is designed to ensure that the planned (sic) status for the site is regulated. The site history is commercial where a pig farming enterprise was planned on the site prior to the current activity being established.

1.3 Description of current on-site operations

The site is located at Barnan, Rhode, Co. Offaly. It is located approximately 2 miles from Daingean, Co. Offaly of (sic) the main Daingean to Tyrrellspass road. The road servicing the site is a secondary national road. The site location can be seen as per the attached map below.

Concrete Recycling Specialists Ltd. operating under Waste Facility Permit WP138-06 is operated as a transfer station for waste materials specifically derived from the Construction industry and the Commercial and Industrial sectors. The facility does not accept household waste of any kind. The proposed volume of waste to be brought onto the site is targeted at 23000 T per annum. Based on a proposed 6-day working week this equates to 73.71 Tonnes per day. Over a 10-hour day this represents 7.37 t per hour and this may equate to 1-3 loads per hour based on receptacle size. Waste is estimated to be on site for a period of no longer than 3 days in normal operation. The waste type is solely mixed commercial and construction and demolition waste. The significance of the site is that it employs 12 people onsite and 4 additional drivers and services specific waste customers in the Midland Region predominantly. The site aims to service the C&D market specifically and the residential market for C&D which is currently on the increase. The site is also significant in that it will provide access to third party waste collection operators who do not have access to economical transfer routes at present thus enabling sustainable waste collection on a region wide basis."

14. Paragraph 1.3 continues by describing the facility and the main waste handling areas. It describes the site weighbridge and administrative office and the waste intake area. It then continues:-

"Bulk Material Segregation: After being transferred to the waste intake areas the loads are manually and mechanically sorted to remove bulky materials and quarantine items as required. The bulky materials are predominantly timbers and

metal and they are removed outside to dedicated holding skips for transfer to relevant facilities.

Quarantine material is segregated and stored in dedicated skips for removal to authorised disposal facilities. The main items segregated at this facility are:

Household rubbish bags: Segregated to Landfill

Batteries: Segregated for specialist disposal

WEEE: Segregated for specialist disposal

Paint/Solvent tins: Segregated for specialist disposal”

The report then describes how the material is loaded onto the processing line by a waste grab and the waste is screened by a 30mm sieve size. It then continues:-

“The materials greater than 30mm in size is then transferred to the picking line where there are 6 take off points:

Paper/Cardboard

Timber

Rubbish/Waste for landfill

Plastics

Stone

Non-ferrous materials. [which are subject to manual take offs]

Other metals are removed by an inline magnet

Paper fragments are removed by the inline windshifter

Heavy stone is conveyed to the end of the line.”

The report then describes what occurs in respect of each of these six separate items and then this section concludes:-

“Hard plastics and waste timber are stored in the waste storage areas at the periphery of the site. Trigger levels for storage are reached via on-site environmental management procedures.

Waste rubber is also stored in the external areas and removed to for suitable re-use”

15. In chapter 3 of the report the author notes that the requirements of the planning permission were discussed with the Planning Department prior to making the submission.

At the conclusion of chapter 4, under the heading “*Alternatives addressed*” the author states:-

“Alternative processes are continually being addressed on the site and existing processes are continually being upgraded. The core elements of the process however and the core waste stream received on the site is essentially the same. The Company intends through the available channels in the waste facility permit to modify existing processes at a later stage however no additional structural changes are anticipated.”

In para. 5.6 it is specifically stated that the facility did not accept any organic waste.

16. On 10th December, 2009 the planning authority sought further information from the applicants for planning permission. Questions 13,14 and 16 were as follows:-

“13. Please submit a noise assessment report which should indicate noise measurement data at the proposed site boundary and the nearest noise sensitive locations i.e. neighbouring dwellings. The assessment should include noise data from all plant used on the site.

14. It is noted on page four of the supporting environmental report that household waste is not accepted at the facility however page five of the report indicated that household rubbish bags are segregated to landfill. The applicant is requested to explain the discrepancy.

16. Please indicate the source points for refuse entering the site and the destination points for the sites end products.”

17. In answer to question 13, the planning authority was referred to the RME Report, and in answer to question 14 it was stated that:-

“The discrepancy in the original report by Raphael McEvoy has been rectified and is included in the new report submitted herewith. Household waste is not accepted at this facility.”

The final query, number 16, was answered as follows:-

“The source point for refuse entering the site is from building demolition and the destination points for the sites end products are as follows:

- *MSM recycling* *WP79/1*
- *Advanced Environmental Services* *WP104/1*
- *Greyhound Waste & Recycling* *WO95/2*
- *KMK Recycling* *WP113/02*

- *Offaly County Council* *WP0029/02*
- *Hegarty Metals* *WP05/04*
- *WF Recycling* *WP01/09*
- *Enrich Recycling* *WFP/MH/08/0001/01*

The reply was accompanied by a letter from Mr. Raphael McEvoy of RME Environmental also dated 31st March 2010. On page 2 of that letter he addressed the request for further information number 14 – concerning household rubbish bags – as follows:-

“One of the primary activities of the facility is the collection of construction and demolition waste in skips placed around the company’s operational area. Invariably in the provision of this service despite notice to the contrary customers or third parties will place black bags of household rubbish into the skips. Whilst CRS Limited drivers have been instructed to inform the clients of this and remove the bags, there are occasions where the drivers do not see the material in the skips.

When tipped, the inspection process by the yard operational team will identify the household waste and put it into a quarantine area/skip. When the skip is full this material will be removed with other material for appropriate disposal.”

18. The reply to the request for additional information included an environmental noise survey report dated 11th January 2010 prepared by Fitzsimons Walsh Environmental Limited. The report identified the source of noises on site as coming from a small trommel and a large trommel, a front-end loader, a wind shifter and a tracked excavator. In para. 6.0 it was stated:

“It is anticipated that there will be no additional noise emissions associated with proposed developments to the site. The plant listed in table 2.0 above will remain the main noise sources.”

The report does not list a shredder as a noise source.

19. On 18th June 2010, the planning authority granted Kevin and Michelle Daly retention planning permission for the development of the land in accordance with the documents lodged namely:-

“Recycling facility for construction and demolition materials incorporating storage buildings, bunkers, offices and weigh bridge, and plant & machinery storage yard, effluent treatment system and all ancillary services and also permission to construct 1st aid fire firefighting water tank at Barnan, Daingean, Co. Offaly.”

Condition 1 in the Second Schedule of the grant of planning permission stipulated that:-

“The development shall be in accordance with plans and particulars submitted on 20/10/2009 and amended by revised particulars submitted on 1/4/2010 except where conditions hereunder specify otherwise.”

20. Sometime between 2010 and 2011, Mr. and Mrs. Daly disposed of their interests in the facility and the appellant became the owner and operator of the facility. On 10th February 2011, the appellant applied for a second planning permission in respect of the facility to include within the current recycling facility the handling and transfer of municipal solid waste (household waste) and the operation of associated static and mobile plant and machinery to sort out the waste prior to transporting the residue waste to a landfill site. This second planning application was ultimately refused on traffic safety grounds.
21. The respondents allege that the appellant expanded the activities at the site and breached the terms of its planning permission. The planning authority was of the view that the activities were authorised by permission No. PL02/09/439 and declined to take the matter further. The respondents were dissatisfied and so they initiated the enforcement proceedings themselves on 31st July 2019.

The proceedings

22. The respondents sought an order pursuant to s. 160(1) of the PDA 2000 restraining the appellant from carrying out unauthorised development at the site; a declaration that works carried out by the appellant, its servants or agents at the site comprising the acceptance and processing of unauthorised wastes, expanded office capacity, increased customer traffic, increased waste traffic and increased emissions constituted unauthorised development comprising unauthorised material change of use and unauthorised works which had been carried out either without planning permission and/or in non-compliance with the planning permission granted on 18th June 2010 and conditions 1, 2, 3 and 4 thereof. They also sought an order directing that any development that is or may be carried out at the site is to be carried out in conformity with the said planning permission and every condition to which the said planning permission is subject. An order was sought, if necessary, requiring the appellant to do or not to do or to cease to do anything that the court considered necessary to ensure that the unauthorised development was removed and, if necessary, that the lands were restored to their condition prior to the commencement of the unauthorised development. Finally, the respondents sought an order that the protective costs provisions under Part 2 of the Environment (Miscellaneous Provisions) Act, 2011 are applicable to the proceedings.
23. While the parties exchanged a total of eight affidavits, ultimately this appeal narrowed to the issue of whether the activities actually carried on by the appellant on the site were authorised by the planning permission and so many of the disputed issues raised in the affidavits do not fall for resolution in this appeal. As the trial judge pointed out, there was very little evidence as to the use being made of the lands, but the parties agreed that the exhibited documents were to be treated as admissible evidence and the court was invited to treat the documents as evidence of the truth of their contents. Thus, as the trial judge pointed out in para. 121 of his judgment, there was no factual dispute as to the nature

and extent of the waste being received and treated at the site: rather, the issue was whether the appellant was authorised to do so.

24. Mr. Brian Moylan, the Head of Planning and Compliance with the appellant, swore two affidavits on its behalf. He accepted that waste which was not construction and demolition waste was received and processed at the site. In his first affidavit he averred that the waste accepted at the facility was "*limited to commercial waste and to construction and demolition waste*". In his second affidavit sworn on 7th December 2020 at para. 26 he said:-

"All other waste types accepted to site as source segregated waste types or waste that formed part of bulky waste type loads e.g. Fridge, WEEE / Tyres – all types of waste contained in general skips accepted to site,(sic.) all these waste types formed part of the waste activity since 2006 ... These waste types are specifically in reference to the planning permission applied for and granted retention for the existing waste activities that has been in place on the site since 2006."(sic.)

At para. 33 he confirmed that the waste types brought onto the site were derived from both commercial, industrial and construction and demolition materials, and at para. 38 he averred:

"All other waste type collection categorised, such as commercial/industrial waste collections are permitted and were included as part of the context of the planning permission as envisaged by previous operators, CRS, when applying to retain their existing facility to cater for their existing operations. CRS ran a skip & commercial collection business when applying for the retention planning permission for the subject waste facility."

The dispute between the parties was whether it was authorised by the planning permission to do so.

The decision of the High Court

25. The High Court judge set out the planning history of the site and of the waste facility permits and of the opposing positions of the parties. Simons J. then addressed the principles governing the interpretation of planning permissions. He cited the decision of the Supreme Court in *Readymix (Eire) Limited v. Dublin County Council* (Unreported, Supreme Court, 30 July 1974), and *Lanigan v. Barry* [2016] IESC 46. These authorities were not in dispute and will be discussed more fully below. Applying the principles as set out in these authorities, the trial judge then assessed the scope of the permitted use. He held that the content of the notification of a decision on a planning application is as prescribed by the Planning and Development Regulations, 2001. Those regulations state that notification of the decision shall specify "*the development to which the decision relates*". Section 7 of the PDA 2000 requires each planning authority to maintain a statutory register. The complete decision of the planning authority in respect of a planning application, including any conditions imposed, must be entered in the register. While the content of the underlying planning application itself is not entered in the

register, the documentation is available separately for public inspection. At para. 87 of his judgment, the judge held that it would be inconsistent with the regulatory requirement to specify the "*development to which the decision relates*" were the description in the grant of planning permission to be contradicted by something in the planning application documentation. Thus, if and insofar as there is any inconsistency between the planning permission and the planning application documentation, he held that the former must prevail. At paras. 88 and 89 he held:-

"88. None of this is to say that the detail of the permitted development cannot be restricted by reference to the planning application documentation. Provided that the content of the planning permission and the planning application complement each other, it is entirely proper to rely on the latter in interpreting the extent of the permitted development. The planning application might, as in the present proceedings, restrict permitted use by specifying a threshold for the volume of waste which may be received annually. It is only in the case of a **conflict** between the planning permission and the planning application that legal certainty dictates that priority is given to the actual wording of the planning permission.

89. Put shortly, the content of the planning application documentation cannot be relied upon to **override** the fundamental nature of the permitted development as stated in the planning permission. Were it otherwise, this would create legal uncertainty. Any person reading a planning permission is entitled to assume that the description of the permitted development accurately records the fundamental nature of the development." (Emphasis in the original)

26. In considering the meaning of the planning permission in this case, the High Court judge held that the term "*construction and demolition*" is self-explanatory and would be understood by the hypothetical "*ordinary and reasonably informed*" reader as referring to waste material generated by activities involving the construction and demolition of buildings. Such waste material would be understood as including for example stone and soil from excavations, brick, rubble and concrete. The waste material would be sourced from the site at which the construction or demolition activity was being carried out. At para. 94 of his judgment, he held that it was the qualifying words "*construction and demolition*" which introduced the restriction on the use of the lands. "*It is these words that preclude the acceptance of other categories of waste, such as commercial, industrial, municipal or household waste.*"
27. The judge then considered whether the "*headline*" development as specified in the planning permission was modified by the conditions imposed. The first condition provides that the "*development*" shall be in accordance with the plans and particulars submitted, as amended by the revised particulars submitted. The reference to "*development*" in this first condition, he held, could only be understood as referring to the development identified earlier in the planning permission, namely a recycling facility for construction and demolition materials. He pointed out that the use to be retained was clearly and consistently identified throughout the planning application as involving the recycling of

construction and demolition waste and that there was nothing in the planning application documentation which purported to expand the use to be retained beyond the recycling of construction and demolition waste. (Para. 98).

28. At para. 100 of his judgment he held:-

“The respondent's contention that the planning permission authorises the reception of categories of waste **other than** construction and demolition waste is incorrect. The permission does not extend to commercial or industrial waste, nor to skips collected from households. The four or five sentences from the environmental report which are relied upon by the respondent do not bear out its contention. These sentences refer primarily to the range of activities carried on by the **company** in general, rather than to the use sought to be retained on the application site. These sentences are found in that part of the report which describes the waste facility permit. One of the curiosities of this case is that the local authority had been prepared to grant a waste facility permit in 2007 notwithstanding the absence of any planning permission for the use of the site as a waste facility. There continues to be a disconnect between the activities supposedly authorised by the last iteration of the waste facility permit (December 2016) and the planning permission.” (emphasis in the original)

29. The High Court judge held that the references to commercial or industrial waste in the EMR Report, which he described as “*vague*”, could not be understood as intended to change the fundamental nature of the permitted use as this would mean that the planning application had been self-contradictory. It would be contrary to legal certainty and undermine the regulatory requirement that an applicant for planning permission must specify the nature and extent of the use proposed to be retained, to expand the permitted use by such a side wind. (Para. 102). He therefore concluded that the planning permission does not authorise the reception and treatment of waste from sources other than construction and demolition. He expressly held that it did not extend to mixed dry recyclables, household or commercial skips, nor to segregated materials transferred from civic amenity sites.

30. The judge then considered the nature and the extent of the waste being received at the facility. He noted that there was no factual dispute on this point as the parties were agreed that it was correctly identified in the annual environmental reports submitted by the appellant to the local authority pursuant to the waste facility permit. He also noted that the respondent had conceded on affidavit that the waste types are all commercially collected waste streams as classified under each European Waste Catalogue code. He accepted that the European Waste Catalogue and Hazardous Waste List are used for the classification of all wastes and hazardous wastes and are designed to form a consistent waste classification system across the E.U. They form the basis for all national and international waste reporting obligations.

31. The Catalogue consists of twenty chapters. Chapter 17 applies to “*Construction and demolition wastes (including excavated soil from contaminated sites)*”. Chapter 20 applies

to "Municipal wastes (household waste and similar commercial, industrial and institutional wastes) including separately collected fractions". Each chapter is broken down into sub-categories, each with its own code. Thus, construction and demolition waste has individual codes for concrete, bricks, tile, ceramics, wood, glass, plastics, metals, soil and stone and dredging spoil.

32. The respondents exhibited the annual environmental reports submitted by the appellant for the Barnan waste facility for the years 2016 and 2017. The vast majority of the waste received at the facility was identified by the appellant as falling within Category 20 of the European Waste Catalogue. The High Court judge, at para. 127 of his judgment, observed that:-

"127. The categories of waste accepted at the facility during the year 2016 are summarised as follows at §3.1 of the annual environmental report:

MATERIAL	EWG Code	
CARDBOARD PACKAGING	150101	4,700
CLEAN CONCRETE	170101	129,240
CND WASTE	170914	770,346
CNI BULKY WASTE	200307	3,062,336
CRUSHED RUBBLE	191209	28,840
DMR	200301	104,540
END OF LIFE TYRES	160103	9,460
GLASS PACKAGING	150107	13,520
GREEN BIODEGRADABLE WASTE	200201	1,059,740
GYPSUM	170802	7,520
METAL	200140	505,220
METALIC PACKAGING	150104	520
MIXED PAPER	200101	2,020
PLASTIC PACKAGING	150102	1,220
PLASTICS — MIXED	170203	420
SOIL & STONES	170504	81,520
STREET SWEEPINGS	200303	8,040
TETRAPAK	150105	60
WEEE MIXED	200136	1,960
WOOD — NON PACKAGING	200138	4,328,810
WOOD — PACKAGING	150103	15,400

<i>Grand Total</i>		<i>10,135,432</i>
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33. Simons J. concluded that the appellant itself had identified that most of the waste received at the Barnan facility comes from sources other than construction and demolition. He held:-
- “129. ...This fact is indisputable given the agreement between the parties that the exhibited annual environmental reports are admissible as evidence of the truth of their contents.”
34. The judge found that for the purposes of the planning permission, what was relevant was the source of the waste and he held that the vast majority of the waste received did not represent construction and demolition waste. At para. 132 of the judgment he held:-
- “132. The concept of ‘municipal waste’ is defined, under the Waste Management Act 1996 (as amended), as excluding, inter alia, ‘construction and demolition waste’. The [appellant] has identified the vast bulk of its waste as ‘municipal waste’. It cannot now turn around and say that this waste should be regarded as construction and demolition waste.”
35. The trial judge also considered the 2017 annual environmental report and concluded:-
- “134. ...It is immediately apparent that the range of waste types accepted at the Barnan facility greatly exceed that for which planning permission has been granted.”
36. He held that the appellant “... *has no **factual answer** to the complaint that the vast bulk of the waste received is from sources other than construction and demolition.*” (Emphasis in the original.)
37. At paras. 137-143 the trial judge considered the amount of timber received at the waste facility and subject to shredding. He referred to the evidence of consistent stockpiling of timber on the site since 2012 through to January 2019. He noted that the appellant characterised the source of the timber as municipal waste, not construction and demolition waste. He did not accept that the assertion that timber which was deposited in a skip at a civic amenity area “*will almost inevitably arise from a construction operation*” rebutted the evidence of the appellant’s own documents, which characterised the vast majority of the timber material as municipal waste. He pointed out that the concepts of construction and demolition waste and municipal waste are mutually exclusive. At para. 143 he held that the planning permission does not allow for timber from civic amenity areas to be accepted and treated at the facility and it does not authorise the treatment by shredding of any timber on the lands.
38. Separately he held that the agreed evidence established that a significant number of mattresses were received at the waste facility; that mattresses do not represent

construction and demolition waste; and thus the planning permission does not allow for the acceptance and treatment of mattresses at the site.

39. Accordingly, he found that the development was being carried out in breach of the planning permission.
40. The judge then considered whether in the exercise of his discretion under s.160 he should refuse to grant the relief sought. The appellant had sought to rely on the view of the local authority which had not taken enforcement action. Simons J. held that on the facts of the present case, it would be inappropriate to attach any weight to the views of the local authority. He cited with approval the observations of Hogan J. in *Bailey v. Kilvinane Windfarm Limited* [2016] IECA 92 at para. 68 to the effect that:-

“...in the generality of cases, the inaction of the planning authority is largely a neutral factor and it is certainly not one which could deprive an otherwise meritorious applicant of his or her entitlement to obtain s. 160 relief where the unauthorised status of a particular development had been clearly established.”
41. He also held that the decision of the High Court in *Kelly Dunne v. Offaly County Council* [2019] IEHC 328 – a judgment in judicial review proceedings relating to the review of the waste permit for the facility by Offaly County Council – did not implicitly determine the planning status of the lands and thus could not be relied upon by the appellant. He held that the planning status of the lands only arose tangentially in those proceedings as they were concerned with article 18(4)(D) of the Waste Management (Facility Permit and Registration) Regulations, 2007. The High Court concluded that there had been insufficient evidence before the court in the judicial review proceedings to discharge the onus upon the applicant in those proceedings to demonstrate that the local authority had breached the requirement of the permit regulations to be satisfied that the facility was compliant with planning or was exempt from planning permission.
42. The appellant also argued that no order should be made on the basis that it was carrying out an important public service activity which the State had asked the private sector to provide on a commercial basis. The trial judge pointed out that there is a countervailing public interest in ensuring that waste management is carried out in compliance with the requirements of domestic and E.U. legislation.
43. Finally, the appellant argued that it was not appropriate to have regard to any alleged non-compliance with E.U. environmental legislation. Simons J. referred to the decision of Baker J. in the High Court in *McCoy v. Shillelagh Quarries Limited* [2015] IEHC 838 where she held that the exercise of the court’s discretion under s.160 of the PDA 2000 should be informed by reference to E.U. environmental law. Simons J. held that the unauthorised development being carried out at the Barnan Waste facility was of a category or class subject to the Environmental Impact Assessment Directive and that this was a relevant consideration. Simons J. expressed grave doubt as to whether the regulatory requirements of E.U. environmental legislation had been complied with by the local authority when granting retention planning permission in respect of the facility. He

accepted that no judicial review proceedings had been taken at the time and that the validity of the planning permission cannot now be questioned. However, at para. 163 of his judgment he held:-

“Nevertheless, this seeming breach of E.U. law is a factor which can be taken into account in the exercise of the court's discretion under section 160 of the PDA 2000. The fact that the time-limit for challenging a development consent has expired does not deem the project to have been lawfully authorised as regards the obligation to assess its effects on the environment (Case C-348/15, Stadt Wiener).”

44. Secondly, the judge observed that the appellant continues to operate the waste facility in purported reliance on a waste facility permit which expired on 14th December 2015. Simons J. said that it was inconsistent with the requirements of E.U. environmental law that a large-scale waste facility continued to operate on such an ad hoc basis, especially given its close proximity to the Raheenmore Bog Special Area of conservation. He concluded that having found that the development was carried out in breach of planning permission and having regard “to the E.U. law issues” identified, it would not be a proper exercise of the court’s discretion to refuse relief. At para. 172 he concluded:-

“172. Accordingly, an order will be made prohibiting the respondent, its servants and agents, from accepting any waste at the Barnan waste facility other than construction and demolition waste. For the avoidance of any doubt, the order will expressly prohibit the acceptance of mixed dry recyclables, waste from household or commercial skips, or waste from civic amenity sites. The planning permission does not authorise the treatment, by shredding, of any timber at the facility. Accordingly, an order will be made prohibiting the respondent from carrying on such activities. An order will also be made prohibiting the respondent from accepting any fridges, waste electrical and electronic equipment, beds, mattresses, sofas or tyres.”

The appeal

45. The Notice of Appeal filed on 13th December 2021 contained sixteen grounds of appeal. In essence, the appellant alleged that the trial judge erred in law in the manner in which the documentation lodged as part of the planning application process was considered, which documentation was said to have identified the nature and extent of the activities carried out and which, it was said, was the subject matter of the retention application. The appellant expressly appealed the finding that the receipt, recycling and/or processing of timber was not authorised by Planning Permission PL2/09/439. There was no appeal that the trial judge erred in the exercise of his discretion under s. 160 of the PDA 2000.

The appellant’s written submissions

46. The written submissions largely focussed on the scope of the planning permission. The appellant submits that the proceedings brought under s. 160 are concerned solely with the domestic law issue of whether an activity amounts to unauthorised development as defined in s. 2 of the PDA 2000. It submits that it was not appropriate to raise issues in respect of the validity of the permission granted by reference to E.U. law in circumstances

where the grant of planning permission was made twelve years previously and had never been the subject of any challenge. The appellant also submits that the status of the development "*relative to the Waste Management Acts*" is not an appropriate consideration in an application brought pursuant to section 160.

47. While the Notice of Appeal did not address the exercise by the trial judge of his discretion, in the written submission the appellant argues that this court ought to overturn his exercise of his discretion in the event its appeal in relation to the scope of the planning permission is rejected. The appellant relies upon the decision in *Morris v. Garvey* [1983] I.R. 319 where the Supreme Court held that it required exceptional circumstances such as mistake, acquiescence over a long period, trivial infraction or gross disproportionate hardship before a court would refrain from making an order under the equivalent section to section 160. The appellant argues that any unauthorised development found by the court would amount either to a genuine mistake or a technical infraction on its part. This, it is said, is because it purchased the lands with the benefit of the planning permission and operated the facility without objection pursuant to the planning permission and that "*it could not have anticipated that the permission would have been interpreted to deem a use which it believed was being carried out in accordance with the permission to be unauthorised.*" It therefore submits that any unauthorised development amounted to a genuine mistake. Secondly, the appellant submits that it was not disputed that there was no material change made in the nature of the activity and there was no objection made and therefore there was acquiescence over a long period of time as referred to in *Morris v. Garvey*. Thirdly, it submits that it would sustain a gross and disproportionate hardship were the relief to be granted in circumstances where there was a grant of planning permission which appeared on its face to authorise a range of activities had been carried out without objection or complaint and that the limitation would, in effect, "*extinguish the use of the facility*". This, it asserts, would create enormous difficulties for the entire waste collection and recycling facilities in the Midlands region, as there is no other facility within the region that can accommodate the material being collected at Barnan.
48. The appellant submits that the trial judge erred in having regard to any issues of European law in the exercise of his discretion under section 160. It asserts that it would be unfair and inappropriate to seek to address deficiencies in the planning application process by an authority which was not before the court in respect of which no issue was raised in the substantive proceedings. The s. 160 procedure, it submits, does not permit of an appropriate analysis of the issue of compliance with E.U. law, the relevant public authorities are not before the court and, having regard to these issues, the making of the orders sought would amount to an attack on the validity of the grant of planning permission years after the eight week period provided for by statute had elapsed. Accordingly, it submits, the court erred in having regard to any E.U. law issues in the exercise of its discretion.

The appellant's oral submissions

49. The appellant submitted that s. 160 of the PDA 2000 is a bespoke provision and the court is limited to considering planning issues when determining applications brought pursuant

to the section. Specifically, it is said, the court cannot have regard to, or pronounce decisions upon the validity or otherwise of, waste facility permits or waste management enforcement generally. Secondly, it is not open to a party to question the validity of a grant of planning permission in s. 160 proceedings where one exists. The issue for the court is whether the development complies with the grant of planning permission. Thirdly, it is said, issues of E.U. law are only relevant if the court concludes that there has been a breach of s.160 *i.e.* that there is unauthorised development. It is then relevant to the exercise of the court's discretion, but the court cannot make a finding that either a grant of planning permission or a waste facility permit was made in breach of any requirement of EU law. Finally, it is said, where there are disputes of fact on affidavit and there is no cross examination of deponents, the court cannot resolve these conflicts of fact within the scope of the section 160 proceedings.

50. The core issue on which the trial judge is said to have erred is the proper construction of the grant of planning permission and his conclusion as to what is permitted at the facility by that grant of planning permission. It was submitted that the outline description in the application for planning permission and the planning notice cannot be treated as a summary of what was applied for. Rather, it is said, this must be seen in light of the plans and drawings submitted and conditioned. Sometimes, it is submitted, the full extent of a planning application can only be understood by reference to the accompanying documents and the "*one line descriptor*" in the application for planning permission cannot be treated as a summary of the permission sought.
51. Secondly, it is said, the grant of planning permission on its face, specifically in Condition 1, refers to other documents and therefore the grant cannot properly be construed on its own; it must be construed in the light *inter alia* of the content of the RME Report. It was submitted that the trial judge erred in concluding that there was a conflict between the planning application and supporting documentation. The appellant submitted that there is no such conflict and there was no inconsistency as the documents supporting the application "*flesh out*" the application and therefore the application must be read "*in sympathy*" with the supporting documents.
52. It was submitted that the planning application was to retain the use/activity that was being carried on under the waste permit. This, it was said, included the shredding of timber and the failure expressly to refer to this activity did not mean that it was not recycling within the meaning of the application for planning permission and therefore permitted. It was submitted that a permission to operate a recycling facility permits any form of recycling, whatever the process. The appellant said that the grant of planning permission was for the uses described in para. 1.3 of the RME Report.

The scope of the appeal

53. The scope of the appeal was confined to essentially one issue and a number of other issues addressed by the High Court simply do not arise on this appeal. Specifically, in these s. 160 proceedings, the court is not concerned with whether the grant of planning permission was made in breach of any E.U. law. Likewise, the court is not concerned with whether the operation of the facility infringes any other code, specifically the waste

management code. The court is concerned solely with whether the respondents have established that "*unauthorised development*" within the meaning of PDA 2000 has or is occurring at the waste facility at Barnan and, if this is established, what order, if any, ought to be made in the circumstances.

The relevant legislation

54. Section 160(1) of PDA 2000 provides:-

"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."*

55. An unauthorised use of land as defined in s. 2 of the PDA in 2000 as:

"...use commenced on or after 1 October 1964, being a use which is a material change in use of any structure or other land and being development other than—

- (a) *exempted development...., or*
- (b) *development which is the subject of a permission... and which is carried out in compliance with that permission or any condition to which that permission is subject."*

56. Unauthorised development is defined in s. 2 of the PDA 2000 as:

"... *in relation to land ... the making of any unauthorised use"*

57. Thus, for any particular user of land to be unauthorised development, it must be use which is not either exempted development or a material change of use which is not carried out in compliance with the grant of permission or any condition to which a grant of permission is subject. There must be a change in use and the change must be material for planning purposes.

58. "*Development*" is defined in s. 3(1) of PDA 2000 as meaning:

“... except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.”

59. The PDA 2000 does not define waste or particular types of waste. These are defined in the Waste Management Act, 1996 (as amended). The practice has been to rely upon the definitions in the Act of 1996 when issues of waste arise in the context of the planning code.

60. Section 4 of the Waste Management Act, 1996 (as amended) defines waste as:-

“Waste means any substance or object which the holder discards or intends or is required to discard.”

Section 5 of the Act of 1996 defines a number of categories of waste.

Construction and demolition waste is defined as meaning:-

“Waste generated by construction and demolition activities”.

Household waste is:-

“Waste produced within the curtilage of a building or self-contained part of a building used for the purposes of living accommodation.”

Commercial waste is defined as meaning:-

“Waste from premises used wholly or mainly for the purposes of a trade or business or for the purposes of sport, recreation, education or entertainment but does not include household, agriculture or industrial waste.”

Municipal waste means:

“Household waste as well as commercial and other waste which, because of its nature or composition, is similar to household waste.”

The definition of municipal waste has been amended with effect from 27th August 2020 and the revised definition does not apply to these proceedings.

Facts not in dispute

61. Prior to 2006 the lands had been used for agriculture (a disused pig farm). Mr. and Mrs. Daly, through their company, then commenced to operate a waste recycling facility. This was a change of use of the lands within the meaning of the PDA 2000 and it was a material change of use in planning terms. It was not exempted development and was clearly post-1964. Accordingly, it required planning permission. If the use of the lands as a recycling facility was not authorised by a valid grant of planning permission, that use was an unauthorised development.

62. There was ample clear evidence before the High Court, and it was accepted by the appellant, that it was receiving and recycling waste which was commercial and industrial and not simply construction and demolition waste. If this was not authorised by the planning permission, then it follows that the use of the land for receiving and recycling such waste amounted to unauthorised development. This question in turn depends on the scope of the use of the lands authorised by the planning permission.

The principles for the construction of grants of planning permission

63. There was no dispute between the parties as to the principles governing the interpretation of planning permissions or of the relevant authorities. The starting point is the decision of the Supreme Court in *Readymix (Eire) Limited v. Dublin County Council* (Unreported, Supreme Court, 30th July, 1974). Henchy J., in a passage which has been repeatedly followed ever since, set out the principles in the following terms:-

"When a permission issues in a case such as this, it enures for the benefit not alone of the person to whom it issues but also for the benefit of anyone who acquires an interest in the property: s. 28(5). A proper record of the permission is therefore necessary. This is provided for by s. 8, which prescribes that a planning authority shall keep a register of all land in their area affected by the Act. This register is the statutorily designated source of authoritative information as to what is covered by a permission. The Act does not in terms make the register the conclusive or exclusive record of the nature and extent of a permission, but the scheme of the Act indicates that anybody who acts on the basis of the correctness of the particulars in the register is entitled to do so. Where the permission recorded in the register is self-contained, it will not be permissible to go outside it in construing it. But where the permission incorporates other documents, it is the combined effect of the permission and such documents that must be looked at in determining the proper scope of the permission. Thus, because in the present case the permission incorporated by reference the application for permission together with the plans lodged with it, it is agreed that the decision so notified must be construed by reference not only to its direct contents but also to the application and the plans lodged.

Since the permission notified to an applicant and entered in the Register is a public document, it must be construed objectively as such, and not in the light of subjective considerations special to the applicant or to those responsible for the grant of the permission. Because the permission is an appendage to the title to the property, it may possibly not arise for interpretation until the property has passed into the hands of those who have no knowledge of any special circumstances in which it was granted. Since s. 24(4) of the Act allows the production by a defendant of the permission to be a good defence in a prosecution for carrying out without permission development for which permission is required, it would be contrary to the fundamentals of justice as well as the canons of statutory interpretation to hold that a permission could have variable meanings, depending

on whether special circumstances known only to certain persons are brought to light or not."

64. Thus, the grant of planning permission must be construed objectively. Where, as here, the grant incorporates by reference the plans and particulars lodged with it, then the grant of planning permission must be construed by reference not only to the contents of the grant of planning permission but also to the application and the plans lodged. In determining the proper scope of the permission, it is the combined effect of the permission and the documents incorporated by reference which must be looked at.

65. In *In re X.J.S. Investments Ltd.* [1986] I.R. 750 McCarthy J. stated that planning documents:-

"... are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning."

66. He expressly stated that the accepted canons of construction of Acts of the Oireachtas or subordinate legislation do not apply.

67. More recently the Supreme Court considered the interpretation of planning permissions in *Lanigan v. Barry* [2016] IESC 46; [2016] 1 I.R. 656. Clarke J. (as he then was) gave the unanimous decision of the Court. He held that the starting point has to be a consideration of the grant of planning permission itself. Condition 1 of the planning permission in *Lanigan's* case was in what Clarke J. described as the usual form "*requiring that the development be carried out in accordance with the applicant's submitted drawings and outline specifications*", unless modified by other conditions...". In construing this standard condition Clarke J. held:-

"[26] In the context of that issue it is important, in my view, to distinguish between a general description of the scale of operation of a facility which might be anticipated, on the one hand, and a specific condition limiting the maximum scale of the operation concerned, on the other. The distinction may be easy to define in some cases but there may well be grey areas in other cases. For example, a retail unit might be described as being likely to attract a certain level of footfall. That description might, indeed, be relevant for planning purposes for it would undoubtedly affect traffic and potentially the amenity of other property occupiers in the vicinity. But such a description would be unlikely to be taken as imposing an absolute limit on the amount of customers which the retail unit would be permitted to entertain on any given day. Likewise, the documents filed in respect of a planning application might suggest that a retail unit was designed for daytime use. That might indicate the sort of use which might implicitly be approved by the granting of planning permission for the unit concerned. It is well settled that, in considering the use which may be regarded as being permitted, it is possible to look

at the development for which permission has been granted together with any documents submitted in the context of the relevant planning application.

....

[29] The distinction is between a specific requirement which must be obeyed more or less to the letter, on the one hand, and a general indication which may inform the baseline use by reference to which the materiality of an intensification of use may be judged. An assessment as to which of those two categories any particular description may fall into is one involving the proper construction of the planning permission as a whole including how that planning permission should be construed in the light of the documents filed by the applicant insofar as it can be said that those documents have been incorporated by reference into the permission itself."

68. It is thus clear that where, as in this case, a condition of a grant of planning permission incorporates documents by express reference, the principles of construction applicable to planning permissions require that the grant of planning permission be construed in light of the documents filed by the applicant for planning permission "*insofar as it can be said that those documents have been incorporated by reference into the permission itself.*" It is clear from the decision in *Derrybrien Co Operative Society Limited v. Saorgus Energy Limited* [2005] IEHC 485 that it is possible to have regard to the entirety of an Environmental Impact Statement furnished as part of the planning application in determining the proper scope of the permission granted on foot of that application.
69. It is always important to bear in mind the importance of public participation in environmental matters, including applications for planning permission, and to ensure that the right of the public to participate in environmental decision making is secured and facilitated by requiring both the applicant for planning permission and the planning authority comply with the provisions of the planning code which facilitate this. Of particular relevance to this case are the obligations to fairly put the public on notice of the application in respect of which permission is sought and in particular the scope and nature of the activity.

Discussion

70. The starting point is the grant of planning permission itself. Mr. and Mrs. Daly were granted retention permission for the development of land in accordance with the documents lodged, namely a recycling facility for construction and demolition materials incorporating storage buildings, bunkers, offices and weighbridge, and plant and machinery storage yard, effluent treatment system and all ancillary services and also permission to construct a first aid fire-fighting water tank. The grant was subject to five conditions set out in the Second Schedule. Condition 1 is repeated here for convenience:-

"The development shall be in accordance with plans and particulars submitted on 20/10/2009 and amended by revised particulars submitted on 1/4/2010 except where conditions hereunder specify otherwise."

71. The plans and particulars submitted on 20th October, 2009 and 1st April, 2010 are incorporated expressly into the grant of planning permission. As is set out in paras. 6 to 17 above, the statutory notices and the application forms all indicated that the application was for the retention of a recycling facility for construction and demolition materials. The application was not for retention of a recycling facility for commercial and industrial and construction and demolition materials. Neither was it for the recycling of dry inert municipal waste. The application did not mirror the terms of the waste facility permit or the activities carried on at the facility pursuant to that permit. As the trial judge said, there was a disconnect between the waste facility permit and the application for retention permission.
72. The appellant contends that the outline description in the application form and the planning notice cannot be treated as a summary of the development authorised by the grant. It says that it is necessary to look at the plans, drawings and specifications, and in this case, to the plans and particulars specified in Condition 1, in order to ascertain the scope of the permission applied for (and granted). The appellant submits that Condition 1 must be given a meaning and the trial judge effectively failed to do so in his construction of the planning permission. It submits that condition 1 means the uses referred to in the documents cited in Condition 1, and specifically the RME Report, were uses in respect of which retention planning permission was (a) sought and (b) granted. The appellant submits that the report makes it clear that both the application for planning permission and the permission granted on foot of the application, were for the retention of a recycling facility for commercial and industrial as well as construction and demolition materials. In my opinion, this is to misread the report and thus to misconstrue the planning permission.
73. The documents are to be construed objectively as a hypothetical, well informed reader would understand them. Section 1.1 of the introduction of the report sets out the **background** to the development. It does not purport to set out the use in respect of which retention planning permission is sought. In the background section the author states "*The primary focus of the company is to collect construction and demolition waste and commercial and industrial waste types...*". The hypothetical reader of the report would not construe this as anything other than background information, especially as the following section sets out the proposed development the subject of the application for permission. Section 1.2 is headed "*Proposed Development*". It clearly expressly states:-

"The development proposed here is for the retention of structures as described in the planning permission application form."

It thus refers the reader back to the planning permission application form. It does not refer to the collection (or recycling) of commercial and industrial waste types. If the reader then turned back to the application form as directed by section 1.2, the reader would see that the application was for a recycling facility for construction and demolition materials. Thus, the hypothetical reader would understand this to be the user in respect of which retention planning permission was applied for and granted.

74. Section 1.3 describes the current on-site operations. It does not purport to describe the proposed development. The author says that the site operates as a transfer station for waste materials specifically derived from the construction industry and the commercial and industrial sectors. It states that the waste type accepted is solely mixed commercial and construction and demolition waste i.e. not just commercial and demolition waste. The description of the facility and the main waste handling areas indicates that materials which are not construction and demolition materials are received and processed at the facility i.e. household rubbish bags, batteries, WEEE, paint/solvent tins, paper/cardboard, plastics and rubber. The report says that the facility does not accept household waste of any kind nor any organic waste. This is reiterated in the additional material furnished on 1st April 2010.
75. Undoubtedly the description of the activities on the site in the RME Report involve activities other than the recycling of construction and demolition materials. The report describes the acceptance and segregation of commercial and industrial waste. The issue is: does this mean that properly construed the grant of retention planning permission authorised the recycling of commercial and industrial waste as well as the recycling of construction and demolition waste?
76. The appellant submitted that the retention application was to retain the use that was been carried out at the facility under the waste permit. I do not accept that this is correct. The court must determine objectively what the applicants applied for; it is not a subjective test. Therefore, whatever Mr. and Mrs. Daly intended to apply for is irrelevant. The question is, what did they apply for. The wording of the application nowhere refers to the recycling of dry recyclable municipal waste.
77. Secondly, the statutory notices, whose purpose is to inform the public of the nature and extent of the development in respect of which planning permission is sought, likewise do not refer to anything other than recycling of construction and demolition waste. Members of the public are entitled to rely on the description of the proposed development in the site notices and public advertisements. It is essential that they do not mislead the reader as to the scope of the intended development. It is accepted that of necessity the notices present a brief description of the proposed development, and an interested member of the public would be expected to consult the planning application in the case of complex applications in order to ascertain a clearer picture of what was proposed. But that does not arise in this case. It has never been suggested, much less established, that it would not have been possible for Mr and Mrs Daly to have applied for retention planning permission comprising the recycling of commercial and industrial and construction and demolition waste had they wished, and to state this in the statutory notices. The statutory obligation is to describe the development in respect of which planning permission was sought and the members of the public are entitled to rely on the scope of the development set out in the statutory notices and act on the basis that the application is not in fact for a development which exceeds that set out in the notices.

78. Thirdly, one cannot look at the waste permit either to construe the grant of planning permission or to ascertain what was applied for. Both the application and the grant must be construed objectively through the eyes of the hypothetical well informed reader. In this case, this involved construing the grant of planning permission and the documents referred to in Condition 1 and nothing more.
79. It is the fact that in 2006 Mr. and Mrs. Daly applied for a waste facility permit to process a range of types of waste in addition to construction and demolition waste. But, in 2009 when they applied for retention planning permission of the facility, they did not apply for permission to recycle these other categories of waste or indeed anything other than construction and demolition waste. It is not permissible to construe the application for planning permission by reference to the waste facility permit. The relevance in the distinction lies in the fact that Mr and Mrs Daly applied for retention planning permission and, for whatever reason, did not apply for retention permission for a user of the same scope as the existing waste permit. The planning permission applied for on its face was more limited in scope than the existing waste permit granted for the facility.
80. None of the application documents seek permission to recycle commercial and industrial waste. The Supplemental Application Form No. 2 expressly excludes this from the scope of the application. It states it is only for commercial and demolition waste. This is confirmed in the reply to Question No. 16 in the Request for Further Information given on 1st April 2010. The RME Report does not state that the proposed development is for recycling of commercial and industrial waste (section 1.2). Section 1.3 of the Report specifically describes the current on-site operations. It was accepted by counsel for the appellants – correctly in my view – that it is possible to apply for retention permission for some but not all uses of lands. Therefore, the fact that certain activities were engaged in does not mean that permission to retain all such activities was sought or granted.
81. The appellant argues that the application for planning permission must be read in sympathy with section 1.3 of the report and this means that the true scope of the grant of planning permission is to authorise the retention of all the activities referred to as occurring on the site. This submission is based, it is said, on the decisions in *Readymix* and *Lanigan*. It is misconceived in my judgment. Neither case involved an argument that the permitted scope of development authorised by a planning permission could be expanded by reference to the materials submitted to the planning authority in support of the application. On the contrary, in each case the court was asked to limit the scope of the authorised development by reference to the materials submitted, in the case of *Readymix* to the type of concrete produced and in the case of *Lanigan* to the hours of operation of the facility. No authority for the proposition advanced was opened to the court and thus it is an issue which must be considered from first principles.
82. The grant of planning permission authorised the applicant to retain development of a recycling facility. It was authorised to carry out the development in accordance with the plans and particulars submitted. The function of the conditions in the Second Schedule is to condition the development for which permission is granted. It is not intended to, and

does not, expand the scope of the grant of planning permission. The conditions in a grant of planning permission may limit the scope of the planning permission but there is no authority for the proposition that a condition may expand it beyond the actual scope of the permitted development. The issue of whether there could ever be circumstances in which it is permissible to give an expansive reading to a grant of planning permission by reference to the material submitted support of the application is one which it is unnecessary to decide in this case because, on any view, the threshold for so doing must be a high one and the appellant in this case comes nowhere close to that threshold. For this reason, I refrain from further discussion of the issue.

83. I agree with the trial judge that it is not permissible for the description in the grant of planning permission to be contradicted by something in the planning application documentation. I also agree that the significance of Condition 1 is that it gives legal effect to (1) the restrictions on the use of the facility, and (2) the mitigation measures which had been specified in the plans and particulars submitted as part of the planning application documentation. It is, therefore, in my judgment, incorrect to say that the trial judge's construction of the planning permission fails to give any meaning to Condition 1.
84. For all of these reasons I agree with the conclusion of the trial judge that the planning permission in respect of the Barnan recycling site authorised the recycling on construction and demolition waste only.
85. I also agree that the planning permission did not authorise the shredding of timber on the site. The additional information submitted on 1st April, 2010 also included an Environmental Noise Survey dated 11th January, 2010 which identified the sources of noise on the site. It stated that the plant listed in Table 2.01 of the report would remain the main noise sources from the facility. The report did not list a shredder as a noise source. Neither of the RME reports referred to the shredding of timber when describing the current on-site operations.
86. No documents submitted by the applicants for planning permission referred to shredding timber on-site. The noise report shows – or at least states – that it was not taking place when the applicants applied for retention planning permission. Construed objectively therefore, the grant of planning permission and the documents referred to in Condition 1 do not authorise the shredding of timber on the site.
87. It is no answer to this conclusion to say that the grant is for a recycling facility and that shredding is a form of recycling and that all forms of recycling are permitted by the grant of planning permission. Shredding of timber is not referred to in the application. The description of the ongoing operations indicates that timber is sorted and segregated but not shredded. Timber is stated to be held in "*dedicated holding skips for transfer to relevant facilities*". The noise report, which the applicants were requested to provide by way of further information and which purports to list all relevant plant, does not list a shredder. Shredding timber gives rise to specific potential risks and nuisances which must be assessed in planning terms before planning permission for such a use may be granted. If planning permission had been granted for shredding of timber, one would

have expected conditions designed to mitigate these well-known environmental risks and nuisances associated with the shredding of timber to have been imposed. There are none relevant to the shredding of timber in the grant of planning permission. I am satisfied that properly construed the grant of planning permission does not authorise the shredding of timber at the facility.

88. For all of these reasons, I would reject the appeal in relation to the scope of the authorised use at the facility.

Was there unauthorised development?

89. The planning permission does not authorise the recycling of waste other than construction and demolition materials or waste. There was ample evidence that the vast majority of the waste accepted at the facility by the appellant was not construction and demolition waste. The annual environmental reports prepared by the appellant for the years 2016 and 2017 illustrate this. The appellant was required to identify the waste accepted at the facility by reference to the source generating the waste when filing the reports. Wastes which are classified as coming under Chapter 20 of the European Waste Catalogue and Hazardous Waste List are municipal wastes (household waste and similar commercial, industrial and institutional waste) including separately collected fractions. Commercial and demolition wastes (including excavated soil from contaminated sites) are dealt with under Chapter 17 of the catalogue. The reports prepared and submitted by the appellant to the Environmental Protection Agency classified the vast majority of the waste accepted at the facility under Chapter 20 and not under Chapter 17. As noted by the trial judge, the appellant agreed to admit the reports into evidence and invited the court to accept the truth of their content. Secondly, Mr. Moylan confirmed in his affidavits that the appellant accepted commercial and industrial waste at the facility. In my judgment this was not permitted by the planning permission. It amounts to a change in use from the previous use (agriculture) and it is a change which is material in planning terms. It follows that the use of the facility by the appellant amounted to unauthorised development with the meaning of s. 160 of the PDA 2000.

The High Court's exercise of its discretion

90. Section 160 of the PDA 2000 confers a very wide discretion on the trial judge whether to make an order under the section and, if so, in what terms. Henchy J., speaking for the Supreme Court, in *Morris v. Garvey* [1983] I.R. 319 considered the scope of the precursor to s. 160 at p. 324 of the report:-

*"When sub-s. 2 of s. 27 is invoked, the High Court becomes the guardian and supervisor of the carrying out of the permitted development according to its limitations. In carrying out that function the court must balance the duty and benefit of the developer under the permission, as granted, against the environmental and ecological rights and amenities of the public, present and future, particularly those closely or immediately affected by the contravention of the permission. **It would require exceptional circumstances** (such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship, or suchlike extenuating or excusing*

factors) **before the Court should refrain from making whatever order (including an order of attachment for contempt in default of compliance) as is 'necessary to ensure that the development is carried out in conformity with the permission'.** (Emphasis added.)

91. As previously stated, the appellant has not appealed the exercise of the trial judge's discretion. Though the issue is canvassed in the written submissions filed on its behalf, this does not make the argument an issue in the appeal. Furthermore, those submissions attempted to raise points which were not argued at first instance and thus in respect of which the trial judge has made no findings. There is no evidence in the affidavits even to support some of the assertions now advanced. In my judgment it is not open to the appellant to raise these issues at this stage in the proceedings in the manner it has purported to do. For this reason, I would not entertain any appeal against the exercise by the trial judge of his discretion.
92. The trial judge considered the arguments advanced by the appellant that he should refrain from granting relief if, contrary to its submission, he held that the planning permission did not authorise the acceptance and recycling of commercial and industrial waste. The trial judge was not persuaded that he ought to attach any weight to the views of the planning authority or to the public interest in private sector waste management. He rejected the argument that the planning status had been determined by the High Court in the previous judicial review proceedings between the parties in relation to the review of the waste permit for the facility. He was entitled in the exercise of his discretion to conclude that these arguments did not justify refraining from granting the relief and he exercised his discretion to make an order, the effect of which was to end the unauthorised development occurring on the lands.
93. The appellant submits that the trial judge erred in the exercise of his discretion because, when deciding whether or not to grant the respondents the relief sought in the proceedings, he weighed the question of whether the grant of planning permission may have been made in breach of the requirements of E.U. law, notwithstanding the fact that the grant of planning permission issued in 2010 and the proceedings were issued many years outside of the time limit to challenge the decision by way of judicial review. The appellant also argued that it was not open to the High Court to make any determination as to the validity of either the grant of planning permission or the waste permit in the context of s. 160 proceedings. This, it is said, the trial judge purported to do and amounts to an error in the exercise of his discretion and that in so doing, he exceeded his jurisdiction.
94. The trial judge held that the fact that the time limit for challenging a development consent has expired does not deem the project to have been lawfully authorised as regards the obligation to assess its effects on the environment (Case C-348/15, *Stadt Weiner*). He also felt that it would be inconsistent with the requirements of E.U. environmental law that a large scale waste facility should continue to operate on what he described as an *ad hoc* basis (in reference to the appellant's waste permit which had

neither been reviewed nor a new permit granted since December 2014). He then held in para.165

"At all events, this court having found that the development is being carried out in breach of the planning permission, and having regard to the E.U. law issues identified above, it would not be a proper exercise of the court's discretion to refuse relief"

95. The judge held in effect that, unauthorised development having been established, the appellant had not advanced any reasons which persuaded him that he should refrain from granting relief sought by the respondents. This conclusion was reinforced by his belief that there were serious issues of failure to comply with E.U. environmental law in respect of the facility. But the decision to grant relief – or not to refrain from granting relief – was not based upon considerations of E.U. law. As is clear from *Morris*, once unauthorised development has been established it would require exceptional circumstances before the court would refrain from making an order under the section. The onus rests on the offending party to establish those circumstances to the satisfaction of the court and the appellant failed in this regard. That being so, it was no appropriate not to grant relief. Whether this conclusion was reinforced by considerations of E.U. law does not detract from this position. Even if the trial judge ought not to have reached any conclusions (assuming for the purposes of the argument that he did) as to compliance with E.U. environmental law, any such error could not thereby make it appropriate to withhold relief which otherwise ought to be granted as a matter of national law.
96. In my judgment the trial judge acted within his jurisdiction when he refused the appellant's plea, exceptionally, to withhold relief notwithstanding the finding that development was being carried out in breach of the planning permission, *a fortiori* given the scale and duration of the breach. Even if the issue of the exercise of his discretion were properly part of the appeal, I would not interfere with his order.

Conclusion

97. The grant of planning permission in respect of the waste facility at Barnan, Co. Offaly, properly construed, having regard to the application for planning permission and the documents incorporated into the grant of planning permission by Condition 1, read objectively by the hypothetically well-informed reader, authorises the retention of a recycling facility for construction and demolition waste, only. It does not authorise the recycling of commercial and industrial waste and it does not authorise the shredding of timber.
98. The activities of the appellant in accepting and processing waste other than construction and demolition waste at the facility, including the shredding of timber, constituted unauthorised use of the lands and thus unauthorised development.
99. The trial judge did not err in the exercise of his discretion in making orders pursuant to s. 160 of PDA 2000 with a view to bringing to an end the unauthorised development which had been shown to be occurring at the facility.

100. For all of these reasons I would reject the appeal.
101. Provisionally, it seems to me that the respondents have been entirely successful on the appeal and are accordingly entitled to their costs of the appeal. If any party wishes to contend for any other order as to costs, they may apply within ten days from the date of the electronic delivery of this judgment to the Office of the Court of Appeal, on notice to the solicitors for the other side, for a short hearing in relation to costs. The party should be aware that in the event that a costs hearing takes place which does not result in any change to the indicative order, that they may incur a further costs liability.
102. Collins and Allen JJ. have read this judgment in draft and have authorised me to indicate their agreement with same.