

APPROVED

[2020] IEHC 634

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 on 16 December 2020

INTRODUCTION

1. This matter comes before the High Court by way of an application for relief pursuant to section 160 of the Planning and Development Act 2000 (“*the PDA 2000*”). 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 are unauthorised signage or advertisements (as defined).

2. 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.
3. The respondents now concede that, in respect of two of the three premises, there is no extant planning permission which would allow for retail use. It is accepted, therefore, that “unauthorised development” (as defined under the PDA 2000) has been carried out at these premises (Tramore and Dungarvan). The respondents have, belatedly, submitted applications for retention planning permission. These applications for retention planning permission were invalidated by the planning authority because the applications did not fully comply with certain requirements of the Planning and Development Regulations. A second round of applications were submitted this week.
4. The position in respect of the third of the premises is different. The respondents maintain that they are entitled under planning permission to carry out a range of retail activity at the Waterford premises, but accept that the sale of “convenience goods” is precluded. The respondents dispute the planning authority’s interpretation of the relevant planning permission, and, in particular, the attempt to preclude the sale of non-bulky goods.
5. The first issue to be addressed in this judgment is the correct interpretation of the planning permission in respect of the Waterford premises. The resolution of this issue

turns, largely, on whether it is legitimate to have regard to Ministerial guidelines on retail planning in interpreting the planning permission.

6. The second issue to be addressed is whether this court should refuse relief and/or place a stay on its orders in the exercise of its discretion. The respondents have sought to identify what they say are a series of factors which militate against the grant of immediate relief under section 160 of the PDA 2000.
7. For the sake of completeness, it should be noted that interim orders which had been obtained on an *ex parte* basis in these proceedings were discharged for the reasons set out in a written judgment of 27 November 2020, *Waterford County Council v. Centz Retail Holdings Ltd* [2020] IEHC 540.

WATERFORD PREMISES / PLANNING PERMISSION

8. The dispute between the parties in respect of the Waterford premises centres on the interpretation of a planning permission granted on 6 April 2000 (Reg. Ref. 99/515) (*“the 2000 planning permission”*). More specifically, the dispute centres on the meaning to be attributed to the term “retail warehousing” as employed under that planning permission. Before turning to discuss that issue, however, it is necessary first to explain that when the proceedings were initially instituted, the allegation was that the respondents were in breach of a *different* planning permission. Specifically, it was alleged that retail activity was being carried out in breach of a later planning permission (Reg. Ref. 11/531) (*“the 2011 planning permission”*). The nature of the retail use permitted under the 2011 planning permission had been restricted as follows by Condition No. 3 thereof.

- “3. The development permitted herein shall be used solely as a retail warehouse as defined in the Retail Planning Guidelines 2005.

Reason: In order to comply with the Waterford City Development Plan Retail Policy and having regards to the application site's high profile location, in the interest of proper planning and sustainable development of the area.”

9. It is now conceded by the planning authority that the 2011 planning permission had not actually been implemented. The above planning condition does not, therefore, bite. The 2011 planning permission has since expired in accordance with the provisions of section 40 of the PDA 2000.
10. The planning authority have applied to amend the originating notice of motion so as to refer to the correct planning permission, i.e. the 2000 planning permission. Whereas the respondents had, initially, indicated in their replying affidavits an intention to oppose this amendment, counsel confirmed at the hearing before me that there is now no objection to the amendment. Accordingly, I will make a formal order allowing the amendment to the originating notice of motion. The implications, if any, of this for legal costs may be addressed by the parties by way of written submission.
11. Returning to the wording of the 2000 planning permission, the permitted development is described as follows as *per* the grant issued by the planning authority on 6 April 2000.

“In pursuance of the powers conferred upon them by the above-mentioned Acts, Waterford Corporation have by order dated 06/04/2000 granted permission to the above-named, for the development of land, namely:

Alterations & change of use from bowling alley/Fun World centre to retail warehousing & extension to existing unit for retail warehousing with relevant site development works at Inner Ring Road, Cork Road, Waterford.

Subject to the 13 conditions set out in the schedule attached.”

12. Condition No. 1 of the planning permission reads as follows.
 1. “The use of the building for wholesale/retail warehousing shall be limited to use as “wholesale warehouse” as defined in Article 8 of the Local Government (Planning & Development) Regulations 1994 – 1999, and to use for retailing of non-convenience goods. In particular, the sale of food, clothing and footwear shall be excluded

from the permitted use, and no subdivision of the two permitted units shall take place without a prior and specific grant of permission.

Reason: It is considered that the control of intensification of use and on the type of goods which may be offered for sale is necessary (a) to ensure that the development will not affect significantly the role of the City Centre as the primary retailing area in accordance with the Waterford City Development Plan, and (b) to limit traffic generation.”

13. The term “wholesale warehouse” as defined in article 8 of the Local Government (Planning & Development) Regulations 1994 reads as follows.

“‘wholesale warehouse’ means a structure where business, principally of a wholesale nature, is transacted and goods are stored or displayed but only incidentally to the transaction of that business.”

14. The parties are in disagreement as to whether the term “retail warehousing” should be interpreted by reference to the definition of that term provided for under the Retail Planning Guidelines for Planning Authorities (December 2000). Those guidelines were issued by the Minister for the Environment and Local Government pursuant to section 28 of the PDA 2000. The term “retail warehouse” is defined under the guidelines as follows.

“Retail Warehouse – a large single-level store specialising in the sale of bulky household good such as carpets, furniture and electrical goods, and bulky DIY items, catering mainly for car-borne customers and often in out-of-centre locations.”

15. Counsel on behalf of the planning authority conceded that these guidelines had not been issued by the Minister until a number of months *after* the planning permission had been granted (The planning permission had been granted in April 2000, whereas the guidelines were not issued until December 2000). Counsel submits that it is nevertheless legitimate to have regard to the guidelines in circumstances where, or so it is said, a *draft* form of the guidelines had been in public circulation for several months prior to their having been formally issued by the Minister in December 2000. The implication being that the planners within the planning authority would have understood the term “retail warehousing” to be a term of art, bearing the meaning provided for under the then draft

guidelines. The planning authority were not, however, in a position to exhibit the draft guidelines. This is, perhaps, unsurprising given that twenty years has since elapsed.

16. Notwithstanding the careful submission of counsel, I do not think that the draft guidelines can be called in aid to interpret the 2000 planning permission. It will generally only be legitimate to rely upon extraneous material in the interpretation of a planning permission where (i) such material has been incorporated either expressly or by necessary implication, or (ii) forms part of the policy context referable to the determination of the planning application.
17. Had the planning permission not been granted until after December 2000, then it might reasonably have been inferred that the planning authority intended that any term of art employed in a planning permission should have the same meaning as in the statutory guidelines. This is because, on the version of section 28 of the PDA 2000 applicable as of December 2000, local planning authorities were obliged to “have regard to” Ministerial guidelines in the performance of their functions. Such guidelines would thus form part of the overall policy context in which the planning permission had been granted, and can fairly inform the interpretation of the permission.
18. The same rationale does not, however, apply to *draft* guidelines. The chronology of events leading up to the grant of the 2000 planning permission in April 2000 is such that reliance cannot be placed on the Ministerial guidelines issued more than six months later. This is especially so where the provisions of section 28 of the PDA 2000 were not commenced until November 2000.
19. The meaning of a planning permission cannot change as the result of guidelines issued subsequently. The general obligation on a planning authority to “have regard to” Ministerial guidelines cannot be relied upon so as to read into an *earlier* planning permission the requirements of the guidelines for the time being in force. See *Ogalas*

Ltd v. An Bord Pleanála [2014] IEHC 487 (“express language of the condition could [not] be displaced or replaced by a later administrative act of the Minister in issuing new Guidelines”).

20. The 2000 planning permission must, therefore, be interpreted by reference to its own terms. There is nothing on the face of the planning permission which draws the distinction between bulky and non-bulky goods now sought to be relied upon by the planning authority. The only category of goods actually excluded by Condition No. 1 are “convenience goods”. It is necessary to give some meaning to this phrase in order to give effect to the planning condition. The concept of “convenience goods” (and of a “convenience store”) are not confined to the planning field but are of more general application. The concept of “convenience goods” is well established, for example, in economics. The hypothetical intelligent reader of the planning permission would understand that term as referring to the type of goods found in a convenience store, i.e. food and non-durable household goods. It is not necessary to have recourse to the Ministerial guidelines to interpret these terms.
21. As it happens, the condition appears to apply an extended meaning to this category so as to capture not only food and other convenience goods (such as non-durable household goods) but also shoes and clothing. (The latter items are categorised as “comparison goods” under the December 2000 guidelines). On its correct interpretation, therefore, the planning permission excludes what would now be regarded as a hybrid category, including both convenience and comparison goods. It precludes the sale of non-durable household goods, food, clothing and footwear. The evidence before the court establishes that the respondents breached this aspect of the condition.
22. Had the planning authority intended to further restrict the nature of the goods to be sold by reference to the (then) draft guidelines so as to preclude the sale of non-bulky goods,

then this should have been set out in clear terms in the 2000 planning permission itself. It would, for example, have been open to the planning authority to incorporate the draft guidelines by reference, or to have simply replicated the wording of the draft guidelines as part of the planning permission. This did not happen, and the planning permission must be given its ordinary and natural meaning as it would be understood by members of the public.

23. For the sake of completeness, it should be noted that neither side has sought to rely on the content of the planning application in support of its interpretation of the planning permission. This is so notwithstanding that the case law confirms that a planning permission may be interpreted 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 (*Lanigan v. Barry* [2016] IESC 46; [2016] 1 I.R. 656). It is perhaps surprising that the respondents made no effort to exhibit the planning application given that strenuous objection had been taken on their behalf at an earlier stage of the proceedings that they had not been afforded sufficient time to take up the planning application file from the planning authority's archives. Having then been afforded ample time to review the files, nothing appears to have been done with the archived files. This is so notwithstanding that the respondents have not been shy about showering the court with documents: their exhibits run to hundreds of pages of largely irrelevant documents.
24. It is not entirely clear from the planning authority's own exhibits whether the full of the planning application file has been laid before the court. At all events, the only internal report exhibited is in the following terse terms.

“Permission is sought to alter, extend and change the use of the bowling alley/Fun World at the Inner Ring Road, Cork Road to use for retail warehousing. The site layout and scale of the units comply in general with the requirements of the City Development Plan (1998 variation) on retail warehousing.

An objection from An Taisce refers to the loss of recreational facilities. The site is zoned for general business use and there is an existing retail warehousing use on the site. There is no requirement in the development plan to retain recreational use on the site and a refusal of the application on that basis would not be warranted.

Permission is recommended.”

25. Neither party has exhibited the relevant extract from the City Development Plan (1998 variation).
26. In summary, I have concluded, on the basis of the evidence before the court, that the 2000 planning permission is not confined to the sale of bulky goods. The only category of goods which are excluded are convenience goods, and clothes and footwear. The term “convenience goods” includes non-durable household goods. The evidence establishes that, at an earlier stage, the respondents were clearly in breach of this requirement of the planning permission in that when the premises was inspected by Ms. O’Sullivan and Mr McGree, it was selling household groceries, food and clothes.

ONUS OF PROOF

27. There was a very brief discussion at the hearing before me as to which side bears the onus of proof in respect of planning permission. However, counsel on behalf of the planning authority was prepared to concede, for the purpose of these proceedings only, that, as moving party, the planning authority bears the onus of proof of establishing that the development is unauthorised. This, it has been accepted, includes an obligation to address the relevant planning permissions.
28. I am not entirely convinced that this is correct: it seems anomalous that an applicant should have to prove a negative, i.e. that there is no extant planning permission which authorises the development complained of. Approaching the matter from first principles, it is at least arguable that once an applicant in proceedings under section 160 of the PDA

2000 has established that development is being carried out, the onus then shifts to a respondent to establish that such development comes within the terms of any planning permission relied upon. Certainly, this is the position in respect of “exempted development” (*South Dublin County Council v. Fallowvale Ltd* [2005] IEHC 408).

29. It is not, however, necessary for me to rule on this issue for the purposes of resolving the within proceedings. Irrespective of which side formally bears the onus of proof, I am satisfied—for the reasons explained under the previous heading—that the 2000 planning permission allows for the sale of non-bulky comparison goods (bar footwear and clothing).
30. The resolution of the question of which party bears the onus of proof under section 160 insofar as the existence of a planning permission is concerned falls to be addressed in other proceedings where it is necessary to the outcome of the proceedings and where it has been more fully argued.

DISCRETION

31. The principles governing the exercise of a court’s discretion in enforcement proceedings under section 160 of the PDA 2000 are well established. The Supreme Court has recently delivered a number of authoritative judgments on the issue as follows: *Meath County Council v. Murray* [2017] IESC 25, [2018] 1 I.R. 189; *An Taisce v. McTigue Quarries Ltd* [2018] IESC 54; [2019] 1 I.L.R.M. 118; and *Krikke v. Braddanfaddock Sustainability Electricity* [2020] IESC 42. (The last of these judgments is in relation to the principles governing the grant of a stay pending an appeal to the Court of Appeal).
32. The discretionary factors relied upon by the respondents in this case can conveniently be addressed under the following broad headings.

(i) Allegation that development is permitted in principle

33. Much time and energy was expended—both in the affidavits and at the hearing on 14 December 2020—in an attempt to persuade the court that retail development is, in principle, acceptable in the relevant locales. Reference was made, for example, to the nature of the existing uses within the general area of the premises at Dungarvan and Tramore. Reference was also made to the planning policy documents applicable. It is submitted that in the case of Dungarvan, for instance, retail warehousing is “permitted in principle” under the relevant zoning objective, whilst retail discount store and retail comparison goods are “open for consideration”. The implication being that there is a good prospect that the two retention planning permissions currently pending before the planning authority are “credible”.
34. With respect, such submissions cut across the entire tenor of the case law in respect of section 160 of the PDA 2000, and its statutory precursor, section 27 of the Local Government (Planning & Development) Act 1976. It has never been the function of the court to anticipate whether a grant of retention planning permission might be forthcoming. The court does not act as a surrogate planning authority.
35. It is no answer to an application for relief under section 160 of the PDA 2000 for a developer to say, in effect, that his failure to comply with the legal obligation to obtain planning permission in advance of the commencement of development should be overlooked if the court is satisfied that there is a “credible” prospect of obtaining retention planning permission. A developer is obliged to apply for and obtain planning permission in advance of the commencement of development. If he fails to do so, then he is in breach of planning control and is liable to enforcement action. The fact, if fact it be, that there is a likelihood of obtaining retention planning permission does not absolve the developer from the necessity of applying for planning permission prior to the commencement of development.

36. The default position under the PDA 2000 is that the existence of a pending application for retention planning permission is irrelevant. Section 162(3) expressly addresses the contingency of a retention planning application as follows.

(3) No enforcement action under this Part (including an application under section 160) shall be stayed or withdrawn by reason of an application for permission for retention of unauthorised development under section 34(12C) or the grant of that permission.

37. As appears, enforcement proceedings are not to be stayed even where retention planning permission has been granted.

38. Notwithstanding these statutory provisions, a court may, in the exercise of its discretion, defer orders pending the outcome of a retention application. This will normally only ever be done where there is some discretionary factor—over and above the fact that a retention application has been made—in favour of withholding relief. For example, if as on the facts of *Krikke*, the court finds that a developer had acted *bona fide* and there is an arguable case that the alleged breach actually comes within the envelope of an existing planning permission, then a court may modify its order. The High Court in *Krikke* made an immediate order requiring cessation of activity, but envisaged that this might be modified if leave to apply for substitute consent were to be granted. As explained presently, there is no discretionary factor in favour of the respondents in the present case.

39. The respondents seek to draw out an entirely different proposition from the judgment of the Supreme Court in *Krikke*. Much reliance is placed in the written legal submissions on behalf of the respondents on the following passage from the judgment of O’Donnell J. (at paragraph 2).

“Applications pursuant to s. 160 of the Planning and Development Act 2000 (‘the 2000 Act’) present some particular problems of analysis. Section 160 and its statutory predecessor, s. 27 of the Local Government (Planning and Development) Act 1976, created what is described colloquially as the planning injunction. For the first time, it allowed members of the public – and not merely planning authorities – to bring applications to enforce compliance with

planning law. That was a statutory recognition of the fact that there is a public interest, and members of the public have an interest in the proper enforcement of planning law. The enforcement of planning law is something of benefit to those immediately affected by a development, but is also of benefit to the wider community. This, if anything, has become more apparent since the implementation in Irish law of the Environmental Impact Directive 85/337/EEC and its successors. The courts, in applying the law, must seek to find a balance between restraining unauthorised development which might be harmful to the built and natural environment and to the legitimate interests of people affected, and permitting protracted litigation to obstruct and perhaps preclude development where the breach, if one exists, may be minor and where the development is clearly permissible in principle and of benefit to the community and the wider economy.”

40. An attempt is made in the written submissions to draw a parallel between the phrase “permissible in principle” as employed in the judgment, and the terms of art “generally permissible” and “open for consideration” as employed in statutory development plans. To elaborate: most development plans will contain what is described as a “land use matrix” to assist readers in understanding the zoning objectives under the plan. The matrix sets out in tabular form a long list of uses, e.g. agricultural, residential, industrial; and then indicates by reference to each zoning objective whether a particular use is “generally permissible”, “open for consideration” or “not permitted”. For example, under an open space zoning objective, agricultural use might be “open for consideration” but industrial use will be “not permitted”. Crucially, these terms refer to the likely outcome of an application for planning permission made in respect of any particular zoning objective. The fact that a particular use may be “generally permissible” does not mean that planning permission will inevitably be granted, still less does it obviate the need to make a planning application. Zoning objectives are not self-executing, but rather guide the determination of planning applications.
41. It is perfectly obvious that the reference in the judgment in *Krikke* to a development being “permissible in principle” was directed to the question of whether there is an extant

planning permission which authorises the development project in principle. On the facts, the developer had the benefit of a planning permission which authorised the erection of a wind farm consisting of a number of individual turbines. The dispute centred on whether the planning permission, on its correct interpretation, authorised the erection of wind turbines of a particular dimension. Specifically, the controversy in the proceedings centred on whether an aspect of the project (namely, the length of the rotor blades) was consistent with the planning permission. The alleged breach had to be seen in the context of the extant planning permission.

42. This is put beyond all doubt by paragraph 19 of the judgment as follows.

“I do not think the High Court judge would have made the order he did if it was to amount to a permanent restraint on the operation of the development, and if such an order had been granted, I would have granted a stay, perhaps upon terms. Such an order would appear disproportionate to the fact that permission had been granted for a windfarm development, and there was little clear-cut evidence that the development in operation was any more intrusive or offensive than the development for which permission had been granted: the fact that the developers had acted in good faith, and had immediately applied for substitute consent: and the fact that the application had not already been determined by the time of the High Court hearing was through no fault of the developer, but rather because the Board had initially concluded that the deviation was so limited in its effect that it fell to be dealt with by retention application rather than substitute consent.”

43. A further complicating factor is that the planning authority had, on one view at least, purported to authorise the changed dimensions of the rotor blades.
44. The reference to the development being permissible in principle has to be seen in this context, and is referable to the development being in broad terms consistent with an underlying planning permission. By contrast, in respect of the premises at Tramore and Dungarvan, there is no planning permission in existence which authorises any type of retail use.

45. The judgment in *Krikke* is certainly not authority for the proposition that a court, in enforcement proceedings, should consider whether an unauthorised development, without the benefit of a relevant planning permission, is of a type which is “generally permissible” under the zoning objectives of the relevant development plan.

(ii) Gravity of the breach

46. On occasion, it may be appropriate for the courts to consider the separate and distinct issue of the gravity of the breach of planning control. If a breach is technical or minor, then this is a factor which may well inform the court in exercising its discretion. The gravity of the breach is assessed by reference to the extent to which the unauthorised development diverges from the permitted development. It is not measured by reference to the prospect of obtaining retention planning permission. In the case of the premises at Dungarvan and Tramore, there is no permission for retail use of any type. The permitted user in respect of Tramore is 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”.
47. In effect, the respondents are carrying out development without the benefit of any relevant planning permission. This represents a significant and material breach of planning control.

(iii) Bona fides of respondents

48. The respondents have sought, in their written legal submissions, to attribute their conduct in carrying out unauthorised development to “naivety” on their part. It is also suggested that it was reasonable for the respondents to consider that retail development would be appropriate having regard to the established use of the two sites.

49. These arguments are not, however, borne out or supported by the affidavit evidence. Regrettably, the affidavits sworn by the general director of the respondent companies, Mr Naeem Maniar, can only be described as evasive and self-serving. Despite having sworn no less than seven affidavits, no explanation has ever been provided of the steps taken to investigate the planning status of the lands *prior to* the entry into of three leases (each of which is said to be for a term of twenty years). The leases have not been exhibited, and the court does not, therefore, know whether the obligation to comply with planning was attributed to the lessor or the lessee. It strains credulity that a well-resourced company, which on its own admission operates in excess of 30 retail stores, would not have taken legal and planning advice prior to executing such lengthy leases.
50. If a respondent to proceedings under section 160 of the PDA 2000 wishes to resist an immediate order on the basis of their *bona fides*, it is essential that they make full and frank disclosure to the court of all relevant facts. This was not done in this case.
51. The alleged *bona fides* of the respondents is further undermined by the fact that in the case of each of Dungarvan and Tramore, a statutory warning letter had been received from the planning authority in advance of the first opening of the stores. Notwithstanding this, the respondents proceeded to commence the unauthorised retail activity regardless. It also seems that no urgent effort was made to take up the relevant planning files.

(iv) Conduct of the Planning Authority

52. The respondents are sharply critical of what they allege represents the “improper manner” in which the planning authority has pursued the enforcement proceedings. The approach of the planning authority is described as “heavy handed” and as demonstrating a “motivation to attack the Homesavers’ operation in all three stores with blunt force”. Much emphasis is placed in the affidavits on what is alleged to be a change in position by the planning authority from an initial reliance on the warning letter procedure to the

institution of these proceedings. It is suggested that this change was brought about as the result of submissions made by competitors in relation to the respondents' retail activity.

53. The respondents' criticisms of the planning authority are untenable. It is simply incorrect to suggest that a local planning authority must satisfy an objective threshold of *urgency* before it is entitled to institute proceedings under section 160 of the PDA 2000. As explained by the Supreme Court in *Meath County Council v. Murray*, the only precondition to the institution of proceedings is that the local planning authority must have formed a *bona fide* opinion that unauthorised development is, has been or will be carried out. There is no requirement for a secondary decision, whereby the local planning authority must engage in a proportionality test. This is because the institution of proceedings does not *per se* determine any rights or liabilities. The proceedings are simply a vehicle to bring a complaint before the court. The ultimate decision to grant or refuse relief is a judicial function, and issues such as proportionality and urgency can be addressed by the court.
54. See paragraphs 63 and 64 of the judgment in *Murray* as follows.

“In my view, this submission is to over-characterise what the institution of these proceedings actually means, what the step entails and what relationship that has with the principles of constitutional justice. Save for the obvious consequences of putting in train a course of action which might possibly lead to a court hearing, such a move, of itself, does not impact on any of the rights of the individuals concerned. Such rights remain entirely intact and no decision with any legal consequences has been taken in that regard. It is but the commencement of a process which itself might never go much further. In this case the application was left standing, as it happened, until the Council and An Bord Pleanála between them had made a number of decisions to refuse permission, none of which were legally challenged. Even then the order which has consequences for the respondents was not one made by the local authority, but rather by the court itself.

Further, to impose a requirement such as that agitated for would create major problems if one was to analyse the practical difficulties which would inevitably arise. Would a moving party be obliged to search and seek out the intended respondent and afford him or her an

opportunity to make what would in effect be submissions? Would there be a right to make an oral presentation, even to give evidence? Would there have to be some form of appeal mechanism? These are but some of the obvious difficulties which it might be said could debilitate the system, at least in its current structure. I therefore reject this submission.”

55. For that reason, the Supreme Court held that it was not necessary that there be some sort of hearing or advanced notice given to the respondent of an intention to issue proceedings. This rationale applies with equal force to the argument advanced by the respondents in this case to the effect “*there must be an objective basis for switching to section 160*”.
56. The fallacy underlying this argument is that a planning authority must meet a certain minimum threshold before it is entitled to institute proceedings under section 160 of the PDA 2000, and, further, that a court in entertaining such proceedings should have regard to and inquire into the approach of the planning authority. Neither of these propositions is correct. Once the matter is before the court, a party, such as the respondents in this case, are afforded full fair procedures. They are entitled to invoke the court’s discretion by reference to factors such as the alleged immateriality of the breach or a lack of urgency justifying immediate orders. Indeed, this court has already sought to vindicate the procedural rights of the respondents by setting aside earlier orders which had been made on an *ex parte* basis, i.e. without the respondents having had an opportunity to be heard. The respondents were allowed to continue their retail activity for a period of some two weeks thereafter as the case was readied for hearing. An initial hearing date of 7 December 2020 had to be put back by one week in order to allow further time to the parties to prepare fully. Against this background, the suggestion that the court should now embark on a detailed assessment of whether the planning authority reached some objective threshold of urgency is simply nonsensical.

(v). **Public Interest**

57. The respondents have sought to call in aid the public interest. It is suggested, in particular, that the making of orders in relation to the premises at Dungarvan and Tramore would result in the loss of a large number of jobs. It is also pointed out, correctly insofar as it goes, that certain retail activity had been treated as an essential activity for the purposes of the COVID-19 regulations. There is no suggestion, however, that there is a shortage of retail units at either location or that the respondents are meeting a demand which would otherwise remain unmet. Indeed, as discussed earlier, a large plank of the respondents' case is that these locales are already served by retail development.
58. The respondents' submissions overlook the more obvious public interest, namely, the public interest in ensuring compliance with the planning legislation. As explained by the Supreme Court in *Meath County Council v. Murray*, the public interest in ensuring compliance with planning control will be ever present in enforcement proceedings. See paragraphs 90 and 91 of the judgment as follows.

“In the first instance, the principal starting point on planning control is that no development can lawfully be commenced without the cover of an appropriate permission; this subject to certain specific exemptions which are not to the fore of this discussion. Failure to apply, even where an application might be favourably looked upon, is in itself a serious breach where works are carried out or uses made of the subject lands. The legislative view is to criminalise such unauthorised conduct, with both terms of imprisonment and fines on indictment up to over €12m. This is a significant expression of the high level of public concern there is in regulating orderly and sustainable development. The fact that one can apply for retention permission impacts very little, if at all, on this point: such an application would not of itself prevent the bringing of a criminal prosecution, nor should any enforcement proceedings, including a s. 160 order, normally be stayed simply because of such a step (s. 162(3)). Consequently, this demonstration of intent must always be given its justifiable position in the court's evaluation of the s. 160 exercise.

In addition, it must be borne in mind that a breach of planning law will previously have been established and that the defaulter is seeking the indulgence of the court as to what resulting consequences he should face. As such, it must be that the interests of the public will

be ever present on the enforcing side. Whilst the importance of that interest and the weight which it must be given, having regard to what is previously stated, will vary on a vertical scale by reference to a number of influencing factors, nonetheless it will always exist and most likely will stand first in the queue for consideration. Such was expressly acknowledged in the passage above quoted from *Morris v. Garvey* [1983] I.R. 319, as is evidenced by the lead-in requirement that any excusing factors must be found within “exceptional circumstances”. Equally so with *Wicklow Co. Co. v. Forest Fencing* [2007] IEHC 242, [2008] 1 I.L.R.M. 357. Such is and has been recognised as an important factor.”

59. It is blithely submitted on behalf of the respondents in the present case that there is “no concern about the integrity of the planning system” in circumstances where they have made applications for retention planning permission (written submissions, §41).
60. With respect, it would be destructive of the integrity of the planning system were this court to condone the very serious and significant breaches of the planning legislation engaged in by the respondents, by postponing the making of orders pending the determination of the applications for retention planning permission. The only reasonable inference to be drawn from the failure of the respondents to disclose on affidavit what steps they took to inquire into the planning status of the three premises prior to entering into lengthy leases is that the respondents failed to carry out proper inquiries. The respondents have shown a reckless disregard for the requirements of the planning legislation. The respondents, in the teeth of warning letters, commenced unauthorised retail activity at Dungarvan and Tramore in the run-up to Christmas without any planning permission to do so.
61. The case law establishes that the courts will not indulge commercial entities who seek to carry on unauthorised development with a view to making a profit. See, in particular, the judgment of the High Court (Clarke J.) in *Cork County Council v. Slattery Pre-Cast Concrete Ltd* [2008] IEHC 291 (at paragraph 12).

CONCLUSION AND FORM OF ORDERS

62. For the reasons set out above, there is no defence to the proceedings in respect of the premises at Tramore and Dungarvan. Moreover, the court declines in the exercise of its discretion to stay the granting of relief pending the determination of the two applications for retention planning permission. It would be contrary to the public interest in ensuring compliance with the planning legislation to allow a commercial entity, who has shown a reckless disregard for the statutory requirement to obtain planning permission prior to the commencement of development, to continue to trade and profit in the interim.
63. Accordingly, in respect of those two premises, orders will be made restraining the respondents, their servants or agents or any person having notice of the making of the order, from carrying out any retail use at the two identified sites. These orders will have immediate effect from midnight tonight. All unauthorised signage and/or advertisement structures are to be removed within 72 hours of today's date.
64. The position in relation to the third premises (Waterford) is more complicated. There is a limited form of retail use allowed, but this excludes the use for the sale of convenience goods (including non-durable household goods and food), clothing and footwear. The evidence establishes that this limitation had been breached. An order will be made restraining the use of the premises for the sale of those goods. All unauthorised signage and/or advertisement structures are to be removed within 72 hours of today's date.
65. Insofar as costs are concerned, and given that this judgment has been delivered electronically, the attention of the parties is drawn to the notice published on 24 March 2020 in respect of such judgments, as follows.

“The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other

direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.”

66. The parties are requested to correspond with each other in relation to the appropriate costs order. The correspondence should also address the question of the costs of the application to set aside the interim orders made. In default of agreement, the parties are to file written submissions in relation to costs in the following sequence. The applicant is to file its submissions by 18 January 2021, and the respondents are to file their submissions two weeks later. The court will then issue a written ruling on the question of costs.

Appearances

Eamon Galligan, SC and David Bulbulia for the applicant instructed by Nolan Farrell & Goff Solicitors

Martin Hayden, SC and Niall Handy for the respondents instructed by Nicola Walsh Solicitor

Approved
Gemma S. Mans