Neutral Citation Number: [2006] IEHC 85

THE HIGH COURT
IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT, 2000
AND
IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT, 2000
AND
IN THE MATTER OF THE LOCAL GOVERNMENT (WATER POLLUTION) ACT, 1977 - 1990
AND
IN THE MATTER OF THE WASTE MANAGEMENT ACT 1996 - 2003

BETWEEN

PETER SWEETMAN

APPLICANT

AND

SHELL E&P IRELAND LIMITED AND LENNON QUARRIES LIMITED AND T.J. LENNON

RESPONDENTS

Approved Judgment delivered by Mr. Justice T.C. Smyth on Tuesday, 14th Day of March 2006

1. These proceedings relate to a development by the first Respondent ("Shell) of a gas terminal near Bellanaboy Bridge in County Mayo for the reception and separation of gas from the Corrib Gas Field and a peat deposition site. Development was sanctioned on foot of a planning permission granted by An Bord Pleanala ("the Board") on 22nd October 2004 under register reference 03/3343 which is subject to 42 conditions (the "Planning Permission"). I was informed by counsel at the hearing of the action that no work or development has taken place on the site since approximately July 2005.

2. The applicant is a photographer and resides at 73, Grosvenor Road, Dublin. He avers he has a keen interest in the environment and in protecting the Irish countryside, he says that on most week-ends over the course of the period March 2001-2005, he stayed within sight of Shell's site the subject matter of these proceedings. Further he states that he has devoted a lot of his time to protecting the environment and in particular, areas of special amenity rich in wild life and plant life. He is a member of An Taisce and of the Irish Heritage Trust.

3. The Applicant instituted Judicial Review proceedings (Record No. 1165JR/2004) to which Shell with others was a co-respondent. Judicial review proceedings were also issued by a Martin Harrington against Shell and others (Record No. 1164/2004 JR) the general purpose of which was to quash the decision of the Board granting the planning permission. Both proceedings aforesaid were the subject of a judgment of Mrs. Justice Macken on 13th April, 2005. Both sets of proceedings were with the agreement of the parties dismissed.

4. On or about the 15th January 2005 the Applicant's Chartered Civil Engineer Mr. Ron Bergin received instructions from the Applicant's solicitors advising him (Mr. Bergin) that certain works were being carried out on lands near Bellinaboy Bridge, County Mayo the subject matter of the permission. Both the Applicant and Mr. Bergin swore affidavits in these proceedings on 9th March 2005 and on the following day Quirke, J. enlarged the time to issue and serve the Notice of Motion (in these proceedings) and fixed a return date of 16th March 2005. On that date, Quirke, J. ordered that Mr. Bergin on 24 hours notice to the 2nd and 3rd defendants be at liberty to inspect the quarry lands of the 2nd and 3rd Respondents situate at Glencastle, Bunnahowen, Belmullet, County Mayo, it was further ordered that Mr. Bergin on:

1) the completion of a Health and Safety course of Shell

2) 48 hours notice to Shell

3) Under the supervision of Shell be at liberty to inspect the development being carried out by Shell of the gas terminal site on the lands situate at Ballagelly South, Bellanaboy Bridge, Co. Mayo.

5. The order fixed the time for filing affidavits to 31st March 2005 with the entitlement to the Applicant to serve any replying affidavit before 4th April 2005.

6. On the matter being referred to me in mid-February, 2006, the Applicant through junior counsel sought to file a further affidavit. In the light of the Order of Quirke, J. the respondent opposed the application and as the matter was twice listed for hearing but not reached in the Court lists. Having ascertained that the purpose of the replying affidavit was to exhibit a new draft Development Plant of Mayo County Council (the "Planning Authority") I determined that the Applicant not be disadvantaged and that as this was a document in the public domain and prepared under statutory authority that the parties be entitled to refer to it at the hearing, notwithstanding the late application for its admission. On the hearing no such document was produced or considered.

7. The reliefs sought by the Applicant may be broadly described as:-

I A declaration that all of the works carried out by Shell on its site at Bellyagelly South, Bellinaboy Bridge, Co. Mayo are unauthorised, unlawful and in breach of the planning permission.

II A range of inhibiting injunctions against Shell prohibiting:

(a) the carrying out any works on lands other than lands within the red line of the planning application map.

(b) the implementation of any part of development authorised by the planning permission.

(c) the discharge of polluting matter into waters and/or storing excavated material in such quantities, in such a manner at such locations as the run-off must inevitably discharge such materials into adjoining water sources.

(d) the excavation of and/or removal of and/or dealing in any materials whatsoever from the quarry facility of the 2nd and 3rd Respondent situate at Bunnahowen, Glencastle, Belmullet, Co. Mayo unless and until the 2nd and 3rd Respondent and/or the 3rd Respondent is in receipt of a full and valid grant of planning permission.

(e) Respondents to cease all works on the lands situate at Bellyagelly South, Ballanaboy Bridge, Co. Mayo.

III A range of mandatory injunctions require:

(a) the restoration of lands upon which it is alleged unauthorised development has been carried out to its original condition as existed prior to the carrying out of the alleged unauthorised development.

(b) Shell to cease all works of opening entrances from the public road onto lands at Rossport South, Ballina, Co. Mayo unless and until it has obtained a valid grant of planning permission in respect of such developments.

(c) Shell to cease all works establishing a works compound and storage compound for materials on lands situate at Rossport South 'unless and until it has obtained a valid grant of planning permission in respect of such developments'.

(d) Each of the Respondents 'to obtain all necessary consents pursuant to the Waste Management Acts 1996-2003 for the storage and/or disposal of waste arising from the development'.

(e) the 2nd and 3rd Respondent to apply for planning permission for 'the restoration of the illegal quarry lands and prohibiting works and/or use being carried out thereon pending the determination of such planning applications'.

(f) Shell to return the fencing posts and other materials imported by it onto lands situate at Rossport South on 1st March 2005 to 'the unauthorised timber processing facility of T&J Standish Limited at Leap Castle, Rosscrea, County Offaly, whence they came, which timber facility is unauthorised and operates without the benefit of (any) planning permission whatsoever and is currently the subject matter of High Court proceedings pursuant to the provisions of Section 160 of the Planning and Development Act, 2000'. [The court records indicate that legal proceedings to which the aforesaid company was a party were before Abbot, J. on a number of occasions and adjourned generally by him in December, 2005.]

(g) Shell 'to restore the lands upon which the unauthorised development currently being carried out at Rossport South, on (i) opening entrances from the public road and (ii) establishing a works compound to their original condition as existed prior to the carrying out of the alleged unauthorised works.

IV Orders entitling the Applicant to inspect:

(i) the works carried out and being carried out at the sites of Shell at Bellyagelly South, Bellanaboy Bridge, Co. Mayo.

(ii) the works carried out and being carried out on the sites of the 2nd and 3rd Respondent at Bunnahowen, Glencastle, Belmullet, Co. Mayo.

8. The Applicant's affidavit and that of his adviser Mr. Bergin, grounding the application allege, assert or suggest widespread non-compliance by Shell with a number of conditions of the planning permission and further that Shell has engaged in unauthorised development. The Order of Quirke, J. of 16th March 2005 permitted inspection of the terminal site to ascertain whether unauthorised works were being carried out thereon. Notwithstanding this facility and the Applicant's liberty to file any replying affidavit(s) to those filed on behalf of Shell so as to put before the Court any real firm evidence of non-compliance or the carrying out of any alleged unauthorised development no such affidavit evidence has been put before the Court. This is a notable feature of this case as the affidavits filed on behalf of Shell identify many inaccuracies in the Applicant's assertions.

9. Three minor points require mention (for completion):-

1) Between March 2005 and the hearing of this application, the Applicant conceded that the reliefs under (a) the Local Government (Water Pollution) Acts, 1977-1990 and (b) the Waste Management Acts 1996-2003 were not properly sought in these proceedings

2) The 2nd and 3rd Respondent were subsequent to March 2005 granted retention permission in respect of the quarry by An Bord Pleanala. The Applicant was an appellant to the Board against the earlier decision of Mayo County Council to grant retention permission. Nowhere is this disclosed in the Applicant's affidavits. [It was admitted to on the hearing of this Application on the matter being raised by Mr. Maurice Collins, SC, for Shell. The matter coming on for hearing before me it was agreed between the applicant and the 2nd and 3rd Respondent, that the proceedings against those Respondents be struck out.

3) Although it is asserted by the Applicant and on his behalf that relief can be granted against Shell on the basis of alleged unauthorised developments elsewhere carried out by other Respondents or T&J Standish Limited no authority was offered in support of this proposition and the matter was not pursued in the hearing. It was submitted on behalf of Shell that there was no legal basis for saying that a developer carries out unauthorised development by using, in the course of development works, materials supplied by a person who is engaged in unauthorised developments. Furthermore there is no legal basis for the contention of the Applicant that works carried out in advance of obtaining an IPC license for the developments are unauthorised.

Onus of Proof

10. It is settled law that the onus of proof is on the Applicant to make out his case and satisfy the Court that an order under Section 160 should be made. In Dublin Corporation -v- Sullivan (unreported, High Court 21st December, 1984) Finlay, P. considering Section 27 of the Local Government (Planning and Development) Act 1996 (the former equivalent to Section 160 of the Act of 2000) stated:-

"I am satisfied, since the Applicants come seeking relief which would affect the ordinary property rights of the Defendant and which potentially could cause him loss that in the absence of some express provision to the contrary that does not exist either in Section 27 of the 1976 Act or otherwise in the planning code that the general position must be that it is upon the Applicants there rests the onus of proving the case which they are making."

11. A like approach was taken by Gannon, J. in *Furlong -v- AF&GW McDonnell Ltd* [1990] ILRM 48 and Keane, J. (as he then was) in *Dublin Corporation -v- McGowan* [1993] 1 I.R. 405. Both decisions of Finlay, P. and Keane, J. are authority for the proposition that, where (as in the instant case) permanent orders are sought pursuant to Section 160, the Applicant cannot properly adduce or rely on hearsay evidence. Accordingly, the onus is on the Applicant to satisfy the court that there has been unauthorised development and also that the Court should exercise its discretion to make an order.

The Interpretation of the Planning Permission
12. The principles of interpretation are well established in *Readymix (Eire) Ltd -v- Dublin County Council and another* (Supreme Court, 30th July 1974) it was determined that a permission should be interpreted objectively and not in the light of subjective considerations on the part of either the applicant or the decision maker. The principle so established was approved in *Jack Barrett (Builders) Ltd -v- Dublin County Council* (Unreported, Supreme Court, 28th July 1983). Furthermore the manner in which planning permissions were to be construed was stated in *XJS Investments Ltd -v- Dun Laoghaire Corporation* [1987] ILRM 659 by McCarthy, J. Delivering the judgement of the Court, at p663:-

> *"Certain principles may be stated in relation to the true construction of planning documents:*
>
> > *(a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material.*
> >
> > *(b) They 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."*

13. These principles have been approved and applied subsequently in a number of cases including *Kenny -v- An Bord Pleanala* [2001] 1 I.R. 565 and *Westport U.D.C. -v- Golden* [2002] 1 ILRM 439.

The Applicants case
14. Notwithstanding that the case as originally formulated, sought relief under 21 heads, four only of which could be considered as formal in nature, only two issues were pursued at the hearing, of which limitation, notice to Senior Counsel for Shell was given only on the eve of the hearing. The issues were the alleged non-compliance with Conditions 1 and 37 of the planning permission.

Condition 1
15. This provides that the development shall be carried out in accordance with specific plans and particulars-

> *"Save as may be amended by the following conditions."*

16. Thirty-eight conditions follow upon Condition 1 in respect of a large and complex development. It is clear from the document as a whole that it envisages much interaction as between the Applicant (Shell) and the Planning Authority during the course of giving effect to the permission.

17. The proposed development consists of two sites located approximately eleven kilometres apart; the first of which is identified as a site for the reception and refining of gas of the Corrib Gas Field. This proposed development will require the excavation and removal of a large quantity of peat for the gas terminal site, and it is proposed to dispose of this peat to the other site located at Shramore and Attavilly, Co. Mayo.

18. The Applicant submitted that in the case of a Section 160 application it was unnecessary to prove that any planning harm resulted from a non-compliance, that mere compliance is all that need be proved. Furthermore it was contended that an applicant need not prove that he/she has suffered any detriment as a result of the alleged non-compliance, because the entitlement to take such proceedings was not dependent on any personal circumstances of the Applicant. While these general propositions may be uncontroversial, to seek to move the Court to grant injunctive relief in permanent form in their absence "lacks the urgency of reality" to adopt an expression of Henchy, J. in another context. [*Cahill -v- Sutton* [1980] I.R. 249 at 283.]

19. The Applicant alleges that there had been a failure in compliance because a large quantity of waste material of a peaty nature has been deposited on adjoining lands owned by Coillte Teoranta, which do not form part of the application site; furthermore, that there has been a failure to comply with the requirements in relation to the storage of peat. There is some controversy on the affidavits as to 'run off' from this material and whether such was deleterious or otherwise. The issue having been expressly averred to in the negative in the replying affidavits without contest, Dr. Forde, SC, rightly did not pursue this facet of the deposition. However, it was contended that the deposition was not *de minimis* and was of such an amount and extent as to attract the sanction of the Court.

20. Before referring to the factual issues, it is of importance to refer to two specific conditions in the planning permission appearing under the heading "Roads, Transportation and Traffic Management".

> *"6. Prior to the commencement of peat haulage operations from the terminal site, the main entrance and adjoining carriageway of R314 shall be realigned in accordance with Mayo County council Drawing Number 3225/04/02 to the satisfaction of the planning authority. 8. The Roadside boundary on the R314 shall be set back in accordance with Mayo County Council Drawing Number 3225/04/02, and the set back area shall be made level with the adjoining carriageway; these works shall be completed to the satisfaction of the planning authority at the same time as the creation of the proposed access to the settlement ponds."*

21. The issue of the excavated material was approached by the Applicant admitting that he took no exception to the deposition of the material on the Applicants own land within the red line of the planning application, but did complain of material deposited on the Coillte lands immediately adjoining. Mr. Bergin's affidavit paragraphs (11) and (12) estimate the quantity of material and the area(s) of the deposition. Mr. Gavin Lawlor's affidavit (sworn on the 31st March, 2005) filed on behalf of Shell is a detailed response to Mr. Bergin's position. I am satisfied and find as a fact that both the main entrance to the terminal site and the adjoining carriageway of the R314 that were the subject of the realignment works fall within the planning application boundary for the development of the terminal site, and this area includes the road shoulder on both sides of the R314. It is not disputed that the map in Exhibit "GL2" was part of the lodged documentation available for public inspection at the offices of the Planning Authority.

22. Insofar as works are alleged to have taken place in realigning the road, Mr. Lawlor avers at paragraph 10 of this affidavit sworn on 31st March, 2005, *inter alia* as follows:

"I say that any such works were required by the Planning Permission were authorised by and carried out on behalf of Mayo County Council. On 16th December, 2004, I wrote to Mayo County Council enclosing the proposed work method statement for the realignment works. On 23rd March, 2004 Mayo County Council confirmed by letter that the work method statement for the realignment works was in order. Exhibits GL3 and GL4 verify the averments made in the affidavit."

23. I am satisfied and find as a fact on the affidavit evidence that the realignment works were completed on 18th February, 2005. The Planning Authority by confirmatory letter of 21st February, 2005, bears out the averment of Mr. Lawlor. The response to Mr. Lawlor's averments by Mr. Bergin is quite detailed and is to the following effect:-

"12.

13. The realignment works required excavation material, predominantly peat, to be carried out. All material that was excavated came from within the planning application boundary identified in the map exhibit GL2. Condition 7(a) of the planning permission prohibits haulage of peat until, "such time as the proposed improvements of the Haul Route and the return route are completed."

24. To comply with this condition, Shell is temporarily storing the material excavated pursuant to the realignment works until such time as the road improvements have been completed.

"14. Some of the excavated materials are to be used in final landscaping works within the terminal site, primarily along the southern side of the R314. These landscaping works have not yet been commenced, and will be undertaken in suitable seasonal and weather conditions. Once the landscaping works are complete, Shell intends to remove any surplus excavated material off site to the peat deposition site at Shramore, Bangor Erris, Ballina, County Mayo. The peat deposition site is licenced pursuant to Waste Management Acts, 1996-2003 to accept this material."

25. [I am satisfied that the waste licence exists and is referred to as exhibit "GL6".]

26. Mr. Lawlor avers that approximately 10,000 cubic metres of the excavated material is temporarily stored on Shell land holding, within the planning application boundary on the shoulder of the R314. He further avers Mr. Bergin's estimate in paragraph 11 of his affidavit of the volume of excavated material being stored temporarily on Coillte Teoranta land holding, is grossly inflated and accepts that approximately 1,000 cubic metres of excavated material is being stored temporarily on Coillte Teoranta land holding, (which is subject to a private contractual arrangement between Shell and Coillte Teoranta).

27. Having considered the evidence as a whole and re-reading the papers I am satisfied that there is deposition of peaty material to the extent of approximately a half metre over part of the lands of Coillte representing 9% of the totality of the excavated material.

28. Exhibit "GL7" contains a copy of volume 1 of the EIS prepared in respect of the proposed development of the terminal site. Planning permission did not set out the areas where the excavated material for the re-alignment works were to be deposited. While undoubtedly paragraphs 3.3 and 3.4 of volume 1 of the EIS prepared in connection with the proposed developments identified the realignment works would be carried out, the final construction methodologies of the realignment works remained subject to agreement between Shell and Mayo County Council.

29. Mr. Lawlor in his affidavit avers as follows (and it is uncontradicted):-

"Arising out of discussions between Shell and Mayo County Council to reach agreement on the construction methodologies for the realignment works, Mayo County Council required deeper excavation of the road area than was initially envisaged. In this context, the construction methodologies were agreed between Shell and Mayo County Council as set out in paragraph 10 of my affidavit above. There is nothing in either the planning permission documents or the construction methodologies restricting the areas to be used for the temporary storage of the excavated material from the realigned works."

30. In law context is all.

31. I am satisfied that the planning permission must be read as a whole and the use of the word "amended" rather than "required" in the final sentence of condition 1 is not in any way significant. Condition 1 has to be read in conjunction with condition 6 which expressly required realignment. With regard to the storage of peat, the position is that the material excavated as part of the realignment works was predominantly peat and in accordance with condition 7(a) of the permission, could not be transported along the Haul Route to the deposition site until the road alignment works were completed.

32. The temporary storage of part of the excavated material on the Coillte site is by agreement with that party and it falls within the spirit of the condition imposed by the Board.

33. Besides contending that the storage of peat pro tem was agreed to by the Planning Authority and as a necessary incident to the planning permission, the Respondent relied on the provisions of the exempted Developments provided in Class 16 of Part 1 of Schedule 2 to the Planning and Development Regulations 2001. This class covers:-

"The erection, construction or placing on land, on, in, over or under which, or on land adjoining which, development consisting of works (other than mining) is being or is about to be, carried out pursuant to a permission under the Act or is exempt of development, of structures, works, plant or machinery needed temporarily in connection with that development during the period in which is it being carried out."

34. The class involves four separate elements:-

1. Placing on land

2. Land adjoining

3. Development consisting of works

4. Needed temporarily in connection with development

35. Section 2 of the Planning and Development Act, 2000, defines works as follows:

> *"Works" includes any act or operation of construction, excavation, demolition, extension, alternation, repair or renewal..."*

36. The conditions and limitations on the exemption provided for in the regulations (SI600 of 2001) is expressed as follows:

> *"Such structures works plant or machinery shall be removed at the expiration of the period and the land shall be reinstated save to such extents as may be authorised or acquired by a permission under the Act."*

37. The period here is the period during which development is being carried out. It was objected that while the material placed on the Coillte lands may have been placed there intended to be of a temporary character, that it is there for a period of months as at the date of the hearing. However, that is largely attributable to the fact that the other conditions in the planning permission are not capable of being operated and all works ceased on-site pending final resolution of a range of litigious and other matters. I am satisfied that notwithstanding that there is deposition of some material on lands adjoining such it is incidental in all the circumstances to the carrying out the permission and in any event materials on lands adjoining such is exempted development under Class 16. I take this view on the basis that the material which is being generated by excavation is properly described as works within the meaning of Class 16, which is a class of exempted development which is clearly aimed at facilitating construction work by permitting temporary use of adjoining lands for, inter alia, the placing or storage of structures, works, plant or machinery.

38. In the construction of the regulations, the Supreme Court in *Alf-a-Bet Promotions Ltd -v- Monaghan UDC* [1980] ILRM 64 per Henchy J. at 69, it is stated:

> *"...what the Legislature has, either immediately in the Act or mediately in the regulations, nominated as being obligatory may not be depreciated to the level of a mere direction except on the application of the de minimis rule. In other words, what the Legislature has prescribed, or allowed to be prescribed, in such circumstances as necessary should be treated as nothing short of necessary, and any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters the prescribed obligation has been substantially, and therefore adequately, complied with.*
>
> *While that decision expressly related to Articles 14, 15 and 17 of the regulations of 1977, the reasoning is by analogy applicable to class 16 part 1 of Schedule 2 of the Regulations of 2001. I am satisfied and find as a fact that there has been substantial compliance with the exempted development regulations invoked by Shell.*

39. On basis of the averment in Mr. Lawlor's affidavit, it is arguable that in carrying works of excavation, additional to those expressly mandated or incidental to the carrying out of the permission, such (works) development was "carried out on behalf of Mayo County Council" which resulted as a matter of probability in an increase of excavated material - that such was exempted development under S4(1)(f) of the Act of the 2000.

> *"The following shall be exempted developments for the purposes of this Act- development carried out on behalf of, ... a local authority that is a planning authority pursuant to a contract entered into by the local authority concerned, whether in its capacity as a planning authority or in any other capacity."*

40. Even if there is no written contract available the works carried out by agreement on behalf of the Planning Authority have not been gainsaid by it. I do not rest any part of this judgment on this point, although it was open to the Respondent.

Condition 37

> *"Prior to commencement of development, the developer shall lodge with Mayo County Council a cash deposit, a bond of an insurance company or other security to secure the satisfactory reinstatement of the site upon the cessation of activity at the terminal, coupled with an agreement empowering Mayo County Council to apply such security or part thereof to the satisfactory reinstatement of the site, the form and amount of the security shall be agreed between Mayo County Council and the developer or, in default of agreement, shall be determined by An Bord Pleanála. Reason: To ensure the satisfactory reinstatement of the site."*

42. It is common case that the documentation that exists in relation to this condition is that contained in Exhibit "A" in the affidavit of the applicant and Exhibit "AMcL2" in the affidavit of Agnes McLaverty sworn on 31st March 2005. The sequence of events is that consequent upon the planning permission dated 22nd October 2004, TPA, Town Planning Consultants by letter dated 19th November 2004 informed the Secretary of Mayo County Council that it was the intention of Shell to forward submissions, on inter alia, Condition 37 in the immediate future. Between that date and 10th December there was a discussion or there were a number of discussions in relation to Condition 37. A draft of an unsigned letter dated 10th December 2004 was prepared by Shell setting out its proposals for compliance which were (inter alia) stated to be-

> *"Subject to internal Shell Group approval we intend to put in place the following arrangements..."*

43. The draft concludes:

> *"We undertake that we shall promptly progress the putting into place the arrangements referred to above in consultation with, and to the satisfaction of the Council, with the aim of finalising the arrangements within four months from the date of this letter."*

44. This draft (in my opinion more in the nature of a document for discussion) was referred to a Mr. Ian Douglas, Senior Planner, and Mr. Peter Hynes, Director of Services both at Mayo County Council, who by memo of 10th December 2004 made certain recommendations to the Manager of the County Council. It would appear that further discussions took place on the same date (10th December 2004) and a revised submission (though not so expressly designated in the text) was made by Shell on official notepaper of Shell E & P Ireland Limited and, *inter alia*, stated:

> *"We ... confirm that we intend to put in place the following arrangements in order to secure the satisfactory reinstatement of the gas terminal site:*

(1) The provision of a parent company guarantee from the parent company of Shell E & P Ireland Limited (SEPIL), Shell Oversees Holdings Limited (SOHL) ("SOH") or its successors and assigns to secure the satisfactory reinstatement of the gas terminal site on cessation of activity at the terminal. The final guarantee will require formal board approval in due course.

SOH is a company registered in England and Wales and has substantial assets. As of the date of its last audited accounts, namely for the calendar year 2002, SOH reported total assets less current liabilities of £17,625.4 million. SOH would provide the Council with a copy of its audited accounts on an annual basis. SOH would also provide the Council with an independent credit assessment report in respect of SOH

The guarantee would be for a sum equal to €20 million, the current estimated cost of reinstating the gas terminal. This sum would be escalated throughout the life of the guarantee in accordance with the relevant consumer price index (building cost index). The guarantee would be put in place for a period so as to cover the time when decommissioning of the gas terminal site will occur. There shall be five yearly reviews of these arrangements by both parties to assess the adequacy of the financial provisions; and

(2) An agreement empowering the Council to apply the parent company guarantee, or part of it, to the satisfactory reinstatement of the gas terminal site. The guarantee would be able to be activated by the Council in the event of SEPIL failing to reinstate the site to the satisfaction of the Council following cessation of operations. Any disagreement between the Council and SEPIL, in this regard would be referred to the determination of An Bord Pleanála, or any successor of the Board.

We undertake that we shall promptly progress the putting in place of the arrangements referred to above in consultation with, and to the satisfaction of, the Council, within six months from the date of this letter. If at the expiry of a five-month period the agreement is not in place, SEPIL must enter into discussions with the Council and the Council may extend the period at its discretion or, alternatively, take whatever action the Council deems appropriate."

45. By letter dated 10th December 2004 Mayo County Council wrote to Shell acknowledging receipt of the submissions lodged with it on 22nd December 2004, 8th December 2004 and 10th December 2004 regarding compliance with the conditions set out by An Bord Pleanála which required the agreement of the Planning Authority prior to the commencement of development. In reference to Condition 37 it is stated as follows:

> *"Mayo County Council agrees to the terms set out in your letter of undertaking submitted Friday, 10th December 2004 as security to secure the satisfactory reinstatement of the site following cessation of activity at the terminal."*

46. The applicant submitted that in the absence of the lodgment of cash or a bond of an insurance company the words "other security" in the condition must be read in para materia with those of a cash deposit or insurance bond. Further that the obligation to "lodge" has a bearing on the concept of security, and that even if such was equated with a guarantee, it had not been lodged in this case.

47. On Thursday, 16th December 2004, the judicial review proceedings commenced by the applicant (in this case) and by Mr. Harrington, earlier referred to in this judgment, were issued. As those proceedings (which sought to query and quash the decision of An Bord Pleanála) did not terminate until mid 2005, not surprisingly many of the matters that required attention and in particular Condition 37 were quite clearly put "on hold".

48. While it is true, as Dr. Forde remarked, that no explanation has been given as to why the matter was not progressed, it seems to me no sensible or reasonable business person would make business commitments in the absence of legal certainty as to whether the planning permission would become fully implementable.

49. What is required by the condition is that an agreement is made between Shell and Mayo County Council prior to development for the purpose of ensuring the restoration of the site when activity ceases. The form and amount of the security to be given is to be determined by the Planning Authority. There is no obligation requiring delivery of any specific amount by Shell or any other person. Neither is a form of the documentation laid down in the condition.

50. Notwithstanding that terms of the letter of 10th December 2004 might be accepted by one planning authority and perhaps not by another; merely emphasises the margin of discretion that is left to the Planning Authority in determining the form and amount. The mere fact that "other security" does not measure up to requirements in other branches of the law does not mean that there has been any failure on the part of Shell to offer a security which has been found acceptable to the Planning Authority.

51. Dr. Forde contended that what was on offer in the letter of 10th December 2004 was not "security" that the condition does not permit Mayo County Council to accept what is not a "security" because it is not at large when a condition such as Condition 37 has been imposed by the board. In this regard he relied on *Kenny -v- Dublin County Council and Another* (unreported the High Court 8th December 2004, Murphy J.) adopting *O'Connor -v- Dublin Corporation* (unreported the High Court, O'Neill J., 3rd October 2002) which held that what is required in a compliance procedure is no more than a faithful implementation of a decision of An Bord Pleanála. In short, they must ascertain the true or correct meaning of the condition attached to the planning permission and confine themselves and the notice parties for such proposals as are in compliance with the condition. In the instant case the purpose of the security in Condition 37 is to secure the performance of an obligation viz to ensure the satisfactory reinstatement of the site. The obligation arises upon the cessation of activity at the terminal. The condition does not seek to dictate to the parties the form of the security or its amount. The security does not necessarily involve any third party to give an indemnity or guarantee. It is clear, however, that whatever security is agreed upon, there must be coupled with it an agreement empowering the County Council to apply such security or part thereof to the reinstatement of the site.

52. When the condition left the form and amount of the security to be agreed - this was the prerogative not of Shell but by of the Planning Authority. The importance of the agreement of the Planning Authority is crucial - clearly an acceptance of a derisory, sum by way of security would not be within the context of so large and complex a development viewed by a court as genuine and proper compliance. However, an element of judgment is left with the Planning Authority - with a default mechanism if the amount tendered by Shell is inadequate or the amount sought by the Planning Authority was excessive or an uncommitted letter were tendered. Likewise the planning authority must agree to the form of security offered, whether it be in the form of a letter of comfort or other form is a matter within their judgment. What is required in security in the context of the condition is an assurance that the reason for its imposition can be realised. Searching through legal dictionaries for definitions in a variety of different statutes and circumstances is

interesting but of little real assistance in the instant case. The approach to be adopted is that in XJS Investments Limited (earlier referred to).

53. Agreement implies acceptance by the planning authority. The importance for acceptance of was highlighted in *The State (Finglas Industrial Estates Limited) -v- Dublin County Council* (unreported, Supreme Court, 17th February 1983) which considered that even where a planning authority were offered (after the invocation of a default mechanism to determine the amount and method of payment or of a contribution to a public water supply and piped sewerage in the area) a cheque and accompanying letter and they refused acceptance: an order of *Mandamus* should not be made compelling the Council to accept the cheque. While there were very specific facts in this case, it nonetheless emphasises the central determinant - "agreement".

54. Objection is taken in the instant case not to any question of amount, but the form of the document (letter of 10th December 2004) as not being "a security" and that what was being tendered was a promise that Shell's parent company in the Shell Group would provide a guarantee, but this itself would require the formal approval of the parent company and that a period of six months would be required to finalise all arrangements. In my judgment this is a case in which if matters had progressed as envisaged in December 2004 all the necessary form of documentation as a matter of probability would have been duly executed.

55. Furthermore I entertain no doubt that if there were any default by Shell in reinstatement to occur, the Court would have no hesitation lifting the corporate veil in the interest of justice to ensure that the guarantee offered by the parent could be resorted to. *The State* (*Thomas McInerney Limited) -v- Dublin County Council* [1985] IR 1 is of no assistance to the applicant in the instant case.

56. In my judgment the planning authority were entitled to agree to the form and amount of the security proffered. They have agreed with Shell to accept the security; its noncompletion is overtaken by events initially in December 2004 (the Judicial Review proceedings). In March 2005 these proceedings began and notwithstanding that the bulk of the complaints made were answered by replying affidavits in that month, the complaints were allowed to stand on the Court file and not withdrawn for almost an entire year. In my judgment the planning authority could have had no doubt as to what was required by the condition. Indeed it is a condition they themselves could have imposed in any grant of planning permission they may have given to Shell as provided by the Act of 2000 S34(3)(g) which provides that a planning authority shall when considering an application for permission under this section have regard to specific matters set out in the Act and then impose conditions which include conditions "for requiring the giving of adequate security for satisfactory completion of the proposed development".

57. I find as a fact and as a matter of law that there has been substantial compliance with Condition 37. Undoubtedly there remains outstanding, as agreed by Mr. Maurice Collins SC appearing for Shell, certain formalities to be fulfilled. In the course of the submissions no authority was advanced to the Court substantiating the right of a third party to challenge an agreement actually made between a planning authority and a "developer" and to invoke the discretion of the Court to set aside such agreement.

58. In the course of his judgment in *Dublin Corporation -v- McGowan* [1993] 1IR 405 at 411, Keane J. (as he then was) stated that the predecessor to Section 160 (S. 27 of the Local Government (Planning and Development) Act 1976) was "intended as a "fire brigade" section to deal with an urgent situation requiring immediate action to stop clear breaches of the Act". A number of decided cases have emphasised the breadth of discretion that a court enjoys when considering an application for relief under Section 160. Even if there has been noncompliance with a term of a planning permission or unauthorised development has occurred, the Court enjoys the discretion which has been traditionally held in relation to issues of injunction. This had already been established as far back as *Avenue Properties -v- Farrell Homes Limited* [1982] ILRM 21 Barrington J. at p26 that:

> *"... it would appear that applicants under Section 27 could range from a crank or busybody with no interest in the matter at one of the scale to, on the other end of the scale, persons who have suffered real damage through the unauthorised development or who though, they have suffered no damage peculiar to themselves, bring to the attention of the Court outrageous breaches of the Planning Act which ought to be restrained in the public interest. In these circumstances it appears to me all the more important that the Court should have a wide discretion as to when it should and when it should not intervene."*

59. That case was concerned with a large commercial development in a highly built-up area of Dublin city. In the course of his judgment in the Supreme Court in *White -v- McInerney Construction* [1995] 1 ILRM 374, Blaney J. having emphasised the very wide discretion enjoyed by the Court observed as follows :

> *"Counsel for the applicant contended that the Court was bound to exercise its discretion in a particular way, namely, in order to ensure compliance with the planning acts and accordingly an injunction ought to have been granted stopping the development until all the conditions which were to be performed before development commenced had been complied with. Counsel did not, however, refer the Court to any authority which supported this restriction on the exercise of the court's discretion and I am satisfied that it would be wholly inconsistent with a wider discretion given to the Court under S. 27.*

60. *Morris -v- Gaffney* [1983] IR 319, invoked a "gross violation" by a developer of terms of a planning permission. Henchy J. considered that there was no inhibition on the granting of an injunction in a situation particularly where there was a severe impact on the applicant, the neighbour of the offending party.

61. In *Leen -v- Aer Rianta Plc* [2003] IR 394, McKechnie J. in considering the earlier decisions and in particular that of Morris -v- Garvey observed that it was quite clear that Henchy J. in Morris's case did not intend the excusing circumstances identified as being exhaustive (as every court must decide each case on the individual facts and circumstances surrounding it). Even if I were wrong in the determinations which I have made both as matters of fact and law concerning Conditions 1 and 37 as above and Shell were considered as having failed to comply with the conditions or had engaged in unauthorised development, I would nonetheless exercise the discretion under Section 160 not to make an order having regard to the following factors:

(a) The trivial and/or technical nature of the breaches;

(b) The *bona fide* Shell;

(c) The attitude of the planning authority;

(d) The public interest and hardship to third parties;

(e) The delay on the part of the applicant in particular making it necessary to have an extension of time in which to

proceed;

(f) The failure to respond promptly to the replying affidavits, leaving on the Court file a large number of complaints concerning the development which were wholly unwarranted.

62. There have been a number of cases over the last 20 years in which the Court could have exercised its discretion not to grant an order under Section 160 when the breach complained of was trivial or technical. These are *Dublin County Council -v- Mantra Investments Limited* [1980] 114 ILTR 102, *Grimes -v- Punchestown Developments Company Limited* [2002] 1 ILRM 409, and *Mountbrook Homes Limited -v- Oldcourt Developments Limited* [2005] IEHC 171 (22 April 2005). Finnegan J. (as he then was) in *O'Connell -v- Dungarvan Energy Limited*, 22 February 2001, held that an immaterial variation from permitted development would not even constitute unauthorised development. In that case Finnegan J. quoted with approval the following passage from the judgment of Lord Denning in *Lever (Finance) Ltd -v- Westminster Corporation* [1973] All E.R. 496:

> *"In my opinion a planning permission covers work which is specified in the detailed plans and any immaterial variation therein. I do not use the words "de minimis" because that would be misleading. It is obvious that, as the developer proceeds with the work there will necessarily be variations from time to time. Things may arise which are not foreseen. It should not be necessary for the developers to go back to the planning authority for every immaterial variation. The permission covers any variation which is not material."*

63. A like approach was adopted by Finnegan J. in *Cork County Council -v- Clifton Hall Ltd* (High Court, 26th April 2001).

64. While the actions of a developer may be *bona fidei*, this does not of necessity excuse him from being the subject of a Section 160 injunction. However, as observed by Keane J. (as he then was) in McGowan's case, earlier cited, it would be:

> *"Manifestly unjust to have the draconian machinery of the section brought into force against a person who behaved in good faith throughout."*

65. O'Sullivan J. in *Altara Developments -v- Ventola Ltd* [2005] IEHC 312 (6th October 2005) refused to make an order under Section 160 in circumstances where the respondent had received professional advice that what he was doing was in compliance with planning permission before proceeding with a particular phase of the development in question. O'Sullivan J. observed :

> *"This is not a case of a developer pushing ahead regardless. On the contrary it has proceeded since November 2004 with the active support and blessing of the planning authority and in the reasonably held opinion that it was not in breach of the planning permission. In the circumstances I decline to make any order curtailing the respondent's construction works as requested by the applicant."*

66. Good faith was also a relevant factor highlighted in both O'Connell's case and Leen's case earlier referred to and in *Grimes -v- Punchestown Development* [2002] 1 ILRM 401 at 414. While I am satisfied there has been no breach by Shell of the terms of the planning permission or exempted development regulations, nonetheless, if I were incorrect in that regard, there has not been any deliberate disregard by Shell of the requirements or any attempt to avoid the obligations imposed by same.

67. The delay in giving necessary follow-up documentation on foot of the agreement is explicable in my judgment in the light of the multifarious pieces of litigation that have surrounded this development. Clearly what was required was that the form and amount would be agreed prior to developments. That has occurred. The attitude of the planning authority to proceedings taken by way of injunction before the courts has been noted as of importance in a number of cases, some of which are reported and others not, e.g. *White -v- McInerney Construction* [1995] 1 ILRM 374*, Mahon -v- Butler* [1998] 1 ILRM 284, *Grimes -v- Punchestown Development Company* [2002] ILRM 401 at 414 per Herbert J.

68. The instant case is stronger than many of the foregoing in that the planning authority in this instance have refrained from not only enforcement proceedings but confirmed that it is satisfied that Shell has complied with the conditions as issued so far as it is concerned. While I accept Dr. Forde's submission that a planning authority's view is not determinative, if there has been a failure by the planning authority to properly understand the terms of the condition laid down by the Board, I am satisfied in the instant case they have not mistaken their rights, duties or obligations under the condition. They have agreed with the amount and form of the security, that they were entitled to do. They do not require any further documentation prior to the carrying out of the development. They certainly require to have the back-up documentation in place as soon as is possible. The interval of time suggested given the magnitude of the sum and the complexity of the development is not unreasonable.

69. While the public interest and hardship to third parties may not be of immediate concern in that there has been a stoppage of development on site since mid 2005, nonetheless, I am satisfied that even if there had been the noncompliance that is contended for, I would regard same as technical and have regard to the fact that Shell is operating an important facility and has the interest of employees to consider. Furthermore, the longer the development is delayed, the longer the public will be discommoded. Counsel on behalf of Shell cited number of authorities under this heading, *Stafford -v- Roadstone Ltd* [1980] 1 ILRM 1, *Dublin County Council -v- Sellwood Quarries Ltd* [1981] ILRM, *Leen's* case and *Grimes'* case already referred to, and O'Sullivan J. in *Altara Developments Ltd* where he had express regard to the potential hardship to employees of the respondent.

70. While the delay in taking the proceedings 10th December 2004 to March 2005 by the applicant may not be fatal, it has to be taken in conjunction with the other features of this case. Delay is a matter entitled to be taken into account by the Court, per Finlay P. in *Dublin Corporation -v- Mulligan* (the High Court, 6th May 1980):

> *"The length of time between the commencement of an unauthorised use or the making of an unlawful development and the time when the application is made to the Court under Section 27 must always remain one of, but not the only material factor in regard to the exercise by the Court of its discretion as to whether or not to make an order under Section 27."*

71. Likewise in *Dublin Corporation -v- Lowe* per Morris J. (unreported, High Court, 4th February 2000) and Herbert J. in *Grimes'* case.

72. In the instant case I have particular regard to the fact that it is apparent from paragraph 17 of the affidavit of the applicant, Mr. Bergin carried out an inspection on 15th January 2005. However, proceeding were not instituted until 9th March 2005 by which time Shell had carried out substantial realignment roadworks at considerable expense. No explanation has been offered by the applicant for this delay. The effect of the delay was such that the affidavit sworn by the applicant and Mr. Bergin on his behalf are materially inaccurate in a number of important respects and failed, for example, to disclose that the road alignment works on R314 had been

completed to the satisfaction of the planning authority on 18th February 2005. The delay on the part of the applicant also prejudiced Shell in its defence of the proceedings in that it had been unable to verify the position in relation to the allegations of water pollution from deposited peat in circumstances where it was informed of the applicant's allegations in that regard almost two months after they had allegedly occurred. However, I do not attach enormous significance to this feature as the question of run off was abandoned by Dr. Forde during the course of the proceedings. I do however attach some significance to the position averred to in Mr. Costello's affidavit at paragraph 20 wherein he avers as follows, and I quote:

> *"On 28th February 2005 at approximately 11:00a.m. Simcim-Roadbridge was delivering machinery to the temporary compound site at Rossport. Flagmen were in place to minimise local traffic disruption, in accordance with the Road Traffic Act and the Project Traffic Management Plan. It was anticipated that the road junction would be closed for at most five minutes while a bulldozing machine was unloaded from the truck. As the bulldozer was being unloaded Mr. Sweetman appeared, ignored the flagman and placed himself in the path of the bulldozer so that it could not be unloaded. Mr. Sweetman was asked to move away several times as he was causing an unsafe situation. Mr. Sweetman remained in this location for approximately half an hour demanding to speak to someone important from Shell. When finally he was advised that there was no one for him to speak to, he moved away and the bulldozer was unloaded. I say and am advised that the operation took more than half an hour whereas it should have taken less than five minutes."*

73. This position was confirmed in the exhibit to Mr. Costello's affidavit referred to as Exhibit "GC3" being a letter or statement of Clive Kelly as of 28th February 2005. He was the driver of a Jeep in front of the loader from Bangor Erris to the T-junction at Rossport. He was doing the escort duty for the safety of the bulldozer as a wide load. This offers a most serious challenge to the averments stated in paragraph 29 of Mr. Sweetman's affidavit. When the matter is put in issue it is not replied to by Mr. Sweetman. This represents a very serious distortion of facts placed before the judge who dealt with the matter in the first instance. A court granting of any form of injunctive relief is dependent (it being effectively ex parte) on the veracity and completeness of the information given to the Court in the first instance.

74. Where an injunction under the Planning Act would cause gross or disproportionate hardship to a respondent relief may be withheld. In Avenue Properties -v- Farrell (as earlier cited) Barrington J. declined to grant an order because it would have been "unduly harsh and burdensome to grant an injunction notwithstanding the fact that the respondents are formally in the wrong." Likewise, the potential hardship to the respondent has also been recognised as a relevant factor in the exercise of the court's discretion. (*Dublin County Council -v- Sellwood Quarries, O'Connell -v- Dungarvan Energy Ltd, Grimes -v- Punchestown Development*, and *Leen -v- Aer Rianta Plc*).

75. Evidence establishes that Shell has expended very considerable monies and circumstances where it bona fide believed that the planning authority agreed that it had complied with the conditions of the planning permission. Even if I were wrong in my determination as fact and law as to conditions 1 and 37, I would exercise my discretion in refusing the grant the relief sought by reason of the hardship to Shell especially having regard to the delay on the part of the applicant which has had the effect of very significantly increasing the financial loss that would be suffered if an order under Section 160 had the effect of delaying the completion of the development were now made.

76. Even if it is objected that no specific advice or evidence has been tendered in this regard, evidence has been tendered in the course of the documentation that very large sums of money have been paid by way of agreed contributions as provided for in other conditions of the planning permission not the subject of the this judgment. Furthermore if these proceedings have in any way as (a matter of probability that they had) some contributory factor in the cessation of works on site, then clearly they have brought additional hardship, if not to Shell at least to employees and other suppliers of goods, materials, and services.

77. I am satisfied and find as a fact and as a matter of law that as from the date of the filing of the replying affidavits in this case on 31st March 2005, it would be untruthful to say that Shell have failed to comply with any of the terms and conditions of the planning permission or carried out any unauthorised development as alleged in these proceedings. I dismiss the application.