

**THE HIGH COURT  
JUDICIAL REVIEW**

**2006 467 JR**

**BETWEEN**

**FLYNN MACHINE & CRANE HIRE LIMITED  
AND  
WICKLOW COUNTY COUNCIL**

**APPLICANT**

**RESPONDENT**

**JUDGMENT delivered by Mr. Justice O’Keeffe on 28th day of May, 2009**

1. On 24th April, 2006 leave to apply for judicial review for the following reliefs was granted to the Applicant herein:-

- (i) An order of *certiorari* to quash the Respondent’s decision made by Manager’s Order dated 8th February, 2006 to issue an Enforcement Notice.
- (ii) An order of *certiorari* to quash the Respondent’s Enforcement Notice dated 8th February, 2006.
- (iii) A declaration that the Respondent’s Manager’s Order and/or Enforcement Notice dated 8th February, 2006 are/is *ultra vires* and void.
- (iv) An order of prohibition prohibiting the Respondent from taking any steps and/or commencing any criminal proceedings in pursuance of the Enforcement Notice dated 8th February, 2006 and/or if necessary a stay on such criminal proceedings.
- (v) Further or in the alternative an injunction restraining the Respondent from taking any further steps and/or commencing any criminal proceedings on foot of the said Enforcement Notice dated 8th February, 2006.

The grounds on which relief was sought are:-

- (i) *Certiorari* by way of an application for judicial review to quash the Respondent’s decision made by Manager’s Order dated 8th February, 2006 to issue an Enforcement Notice of the same date.
  - 1. The Respondent is the planning authority for the County of Wicklow in which capacity it made a decision by Manager’s Order dated 8th February, 2006 to issue an Enforcement Notice of the same date pursuant to Part VIII of the Planning and Development Act 2000, as amended (“the 2000 Act”).
  - 2. The said decision is *ultra vires* and void in that it fails to set out the investigation, if any, made by the Respondents so as to enable it to make the decision
  - ...
  - 4. The said decision is *ultra vires* and void in that it fails to state that prior to making this decision, the Respondent considered the matters set out in section 153(3) of the 2000 Act in terms of the representations made to it, submissions or observations made and any other material considerations including the “sustainable” development of the area. [This ground was abandoned and not pursued at the hearing.]
  - 5. The said decision is *ultra vires* and void in that at paragraph 3 it orders that the Enforcement Notice be served on the Applicant wrongfully requiring the Applicant to desist from the usage of the site “for any other commercial operation without the prior benefit of planning permission”, thus disregarding the established non-conforming business user thereof which the Respondent had previously acknowledged in its decision to grant permission for a bungalow at Crosscoolharbour, Blessington dated 13th March, 1990 per Planning Register Number: 89/005054.
  - 6. The said decision is *ultra vires* and void insofar as it orders that the Enforcement Notice be served on the Applicant, but not the person carrying out the development fails to comply with section 154(3) of the 2000 Act in that at paragraph 4 thereof it requires the demolition of a wall located outside the Applicant’s property and the removal of the resultant rubble from the site which wall was neither developed nor owned by the Applicant.
  - 7. The said decision is *ultra vires* and void insofar as it orders that the Enforcement Notice be served on the Applicant by requiring the Applicant to desist from any other commercial operation it purports to go beyond requiring the alleged unauthorised development to cease.
  - 8. The said decision is *ultra vires* and void in that it fails to contain the mandatory provisions set out in section 154(5) of the 2000 Act [This ground was abandoned at the hearing.]
  - 9. The said decision is *ultra vires* and void in that it fails to set out the reasons for the Respondent’s decision to issue the Enforcement Notice and/or direct their entry in the register.

10. The said decision is *ultra vires* and void in that it fails to identify with proper particularity or at all the alleged unauthorised development and/or the land concerned.

...

12. The said decision is *ultra vires* and void in that the Respondent acted capriciously and without reasonable justification in issuing same.

13. The said decision is *ultra vires* and void in that it fails to set out that the Respondent considered the matters set out in section 157(4)(a)(i) of the Act.

(ii) *Certiorari* to quash the Respondent's Enforcement Notice dated 8th February, 2006 on the grounds

1. The Enforcement Notice is *ultra vires* and void in that Manager's Order sanctioning the issue thereof is *ultra vires* and void.

...

3. The said Enforcement Notice is *ultra vires* and void in that it fails to provide that it takes effect on the date of the service thereof as required by section 154(4) of the 2000 Act and/or to require the steps specified therein to be completed within six weeks of the date of service as required by the said Manager's Order.

4. The said Enforcement Notice is *ultra vires* and void in that it fails to refer to and/or to properly identify the land concerned.

5. The said Enforcement Notice is *ultra vires* and void in that it fails to comply with a mandatory provision set out at section 154(5) of the 2000 Act.

6. The said Enforcement Notice is *ultra vires* and void in that insofar as same is directed to the Applicant but not to the person carrying out the development it fails to comply with section 154(3)(a) of the 2000 Act insofar as it refers to the requirements stipulated at paragraph 1(d) thereof which requires the demolition of wall in its entirety which wall is located outside the Applicant's property and was not development by the Applicant.

7. The said Enforcement Notice is *ultra vires* and void in that it was issued in breach of section 157(4) of the 2000 Act and/or section 31 of the Local Government (Planning and Development) Act 1963 ("the 1963 Act") as amended by section 19(1)(a) of the Local Government (Planning and Development) Act 1992 ("the 1992 Act").

8. The said Enforcement Notice is *ultra vires* and void in that it wrongfully requires the Applicant to desist from the usage of the site "for any other commercial operation without the prior benefit of planning permission" disregarding the established nonconforming business user thereof which the Respondent had previously acknowledged in its decision to grant permission for a bungalow at Crosscoolharbour, Blessington dated 13th March, 1990 per Planning Register Number: 89/005054

9. The said Enforcement Notice is *ultra vires* and void in that by requiring the Applicant to desist from any other commercial operation it purports to go beyond requiring the alleged unauthorised development to cease.

11. The Enforcement Notice is *ultra vires* and void in that the Respondent acted capriciously without reasonable justification in issuing same.

(iii) A declaration that the Respondent's Manager's Order and/or Enforcement Notice dated 8th February, 2006 are/is *ultra vires* and void.

(iv) Prohibition or an injunction prohibiting (or restraining) the Respondent from taking any steps and/or commencing any criminal proceedings on foot of the Enforcement Notice dated 8th February, 2006

#### **Applicant's Summary of Grounds of Challenge**

2. At the court's request, counsel on behalf of the Applicant, Mr. Eamon Galligan, S.C., summarised the Grounds of challenge as follows:-

(a) The said Manager's Order/Enforcement Notice is *ultra vires* in that it wrongfully requires the Applicant to desist from the usage of the site "for any other commercial operation without the prior benefit of planning permission", thus regarding the established non-conforming business user which the Respondent had previously acknowledged in its decision to grant permission for a bungalow at Crosscoolharbour, Blessington, dated 13th March, 1990. [Grounds E(i)(5) and E(ii)(8) of the Statement of Grounds].

(b) The said decision (i.e. the Director of Services Order) is *ultra vires* and void in that the Respondent acted capriciously and without reasonable justification in issuing same) [Ground E.(i)(12)]

(c) The said Enforcement Notice is *ultra vires* and void in that the Manager's Order dated 8th February, 2006, sanctioning the issue thereof is *ultra vires* and void. [Ground E.(1)1]

(d) The said Enforcement Notice is *ultra vires* and void in that it fails to provide that it takes effect on the date of the service thereof as required by section 154(4) of the 2000 Act, and/or to require the steps specified therein to be completed within six weeks of the date of the service as required by the Manager's Order. [Ground E.(ii)(3)].

(e) The said Enforcement Notice is *ultra vires* and void in that it was issued in breach of section 157(4) of the 2000 Act [Ground E.(ii)(7)]

#### **Background to Application**

3. In an affidavit grounding the application, Ms. Laura Flynn, Company Secretary and Director of the Applicant describes the background to the Respondent's decision of 8th February, 2006, to issue the Enforcement Notice and also the Enforcement Notice itself served pursuant to section 154 of the Planning and Development Act 2000. She asserts that both the decision and the Enforcement Notice make reference to a site in terms, which are extremely imprecise with the decision not giving any address for the site and the Enforcement Notice referring to an address at Ashleaf House, Crosscoolharbour, Blessington, County Wicklow. She states that the terms of the decision and the Enforcement Notice suggest that the unauthorised development to which same refer is the subdivision of the site together with the intensification of usage of an existing roadside entrance, which was previously constructed by the Respondent and was serving the site on the N. 81, with consequential traffic hazard impacts, the establishment of an office facility by way of porto cabin thereon and the erection of a new boundary wall. She claims that the contrary is true that when the Applicant acquired (on 3rd August, 2005) the commercial lands and premises there was an existing unauthorised user, which had commenced in or about 1985, and which was, by virtue of the provisions of the Local Government (Planning and Development) Acts 1963-1999 ("the 1963 Act") and the Planning and Development Act 2000 as amended ("the 2000 Act"), immune from enforcement. This non-conforming use was of very long standing and had included the laying of a substantial hardcore base in the yard behind Ashleaf House. She referred to an affidavit of the previous owner, John Healy, setting out the history of the user of Ashleaf House. It was stated that when purchased, the Applicant obtained the benefit of the existing non-conforming commercial use, albeit unauthorised which itself was immune from any enforcement action because of the substantial passing of time which had occurred. She said that the core use of the premises by the Applicant is almost identical in type and character to the previous user and, indeed is probably less intrusive on amenities and the landscape generally as it does not involve any form of waste collection or storage.

4. Following purchase, there was no question of any discernable cessation of use and the entire process of handing over took approximately two days, which was completed on 5th August, 2005. The property, when sold, had the benefit of the existing commercial land user as was described in the auctioneer's sales brochure.

5. She referred to the warning letter dated 24th August, 2005, pursuant to s. 152 of the 2000 Act, which was issued in relation to the development of site for the commercial usage as a depot including office facilities for haulage and crane hire company without the benefit of planning permission. In that letter the Respondent claimed that the development did not constitute exempted development in the context of the latter parts of Planning and Development Legislation 2000 – 2004 and hence constituted unauthorised development. This letter was accompanied by a detailed letter of the same date sent by the Enforcement Section of the Respondent. In this letter, the Respondent explained that the previous commercial use of the site as a depot and headquarters for the operation of a skip hire company (Mr. John Healey, Blessington Plant Hire/Healey's) did not have planning permission and hence was an unauthorised use of the subject site. It was stated that whilst this development was in operation outside of the timeframe provided in section 157(4)(a)(i) of the Planning and Development Act 2000 wherein the Planning Authority was legally entitled to issue an Enforcement Notice/associated legal proceedings, this development remained an authorised development up until its cessation. Such immunity did not validate such a development and the site consequently did not enjoy any benefit of the exempted development provisions or planning and development legislation and hence any further development of it required planning permission even though such development may normally constitute exempted development. It was stated that the change of use of this unauthorised commercial site by the establishment of a new and different type of commercial development did not benefit from an exempted development provision and hence required planning permission. He further claimed that the fact that the site had not at the time it was redeveloped, the benefit of the exempted development provisions of planning and development legislation 2000 – 2004 it implied that any new developments therein including any site clearance and surfacing works and the provision of porto-cabin on site that had to that date taken place since the recommencement of its redevelopment, required planning permission and such works did not constitute any exempted development. It was also stated as a result of the nature and intensity of the usage of the site, the parking of heavy goods vehicles and existing (*sic*) and accessing of this site by such vehicles onto the N. 81 National Primary Road constituted an intensification of usage of the site from its previous use and also creates a traffic hazard on the adjoining N. 81. There had thus been, a "*material change of the commercial usage*" of the site which, in accordance with the provisions of section 3 of the Planning and Development Act 2000, is "*development*" that requires planning permission.

6. The Applicant's adviser, Mr. Liam Tobin, submitted a very detailed response dated 21st October, 2005 to the warning letter which letter contended *inter alia* that no cessation of the established commercial use on the site had occurred and that there was no material "*change of use*" of the subject site between the previous established use, established by John Healy/Blessington Plant Hire Limited and the current use by Flynn Machinery and Crane Hire Limited and that the current use did not constitute the establishment of a new and different type of commercial development which would require planning permission. A further letter seeking evidence in relation to the use of the means of access issued on [16th ] December, 2005. On 16th December, 2005, a further detailed letter was sent by the Respondent to the Applicant arising out of the Applicant's adviser's letter dated 21st October, 2005. In that letter, the Respondent stated that it remained its position that the said development constituted development within the context of the definition of "*Development*" outlined in section 3 of the Planning and Development Act 2000 and hence it was an unauthorised development because it did not have the benefit of planning permission as required accordingly. It stated *inter alia*, that the Respondent was satisfied that a new planning unit was established by the Applicant during July – August 2005, as a result of the subdivision of an area of land that had been until July entirely in the ownership of Mr. John Healy, Crosscool harbour into two individual sites. It also contended that the development of the second commercial site by the Applicant constitutes a "*Material Change of Use*" of the original site by virtue of an intensification of its use from one commercial site to two such sites, which represented a factual substantive change in the overall management and operation of the previous single planning unit.

7. A further warning letter dated 16th December, 2005, under s. 152 was issued by the Respondent to the defendant seeking relevant information. In an affidavit sworn in relation to this application, Mr. Doyle stated that as the duly designated officer in Wicklow County Council charged with responsibility for making an Enforcement order, he made the decision to issue the Enforcement notice pursuant to s. 154 of the 2000 Act. on 8th February, 2006 (the Manager's Order) having considered the reports of Tim Walsh, Senior Executive Planner dated 7th February, 2006, 13th December, 2005, and the earlier report, dated 16th August, 2005.

The decision recorded that the Enforcement Notice was to be served on Colm Flynn, Director, Flynn Machine and Crane Hire and Laura Flynn, Company Secretary and Director. It was to require them:-

(i) within four weeks of the date of such notice to cease the use of the said site defined as a depot with associated on-site office facilities for the operation of the company entitled "Flynn Machine and Crane Hire Limited". In this regard, all vehicles and Machinery in the ownership and associated with this company shall be removed permanently from the site within this four week period.

(ii) within four weeks of the date of such notice to remove entirely from the subject site outlined in the above hearing the porto-cabin and associated wooden deck that provides an office facility for "Flynn Machine and Crane Hire Limited" and to disconnect any sewer connection presently lining the toilet facilities therein to the effluent treatment system on the...

(iii) to desist from the usage of the subject site, outlined in the above heading for any other commercial operation without the prior benefit of planning permission.

(iv) within six weeks, of the date of such notice to demolish in its entirety the subject boundary wall positioned along the southern boundary of the subject site and remove the resultant rubble from the site.

The decision concluded by stating that the Enforcement Notice shall take immediate effect from the date of service thereof and shall require the steps specified in the Enforcement Notice to be completed within six weeks.

8. The Enforcement Notice was dated 8th February, 2006 and the relevant operative parts were as follows:-

*"Re:- Enforcement Notice – Section 154, Planning and Development Act 2000*

*Alleged Unauthorised Development; re: U.D. 1894; Alleged unauthorised Development consisting of the subdivision of a site for the establishment of a new second commercial site (i.e. a new Planning unit) where previously only one existed at 'Ashleaf House' Crosscoolharbour, Blessington, Co. Wicklow for the operation of a depot for a Crane and Machine Hire Company entitled 'Flynn Machine and Crane Hire Limited' including the significant associated intensification of the vehicular usage of an existing roadside entrance serving the site onto the N.81, the establishment of an associated office facilities in a porto-cabin thereon and the erection of a new boundary wall along the southern boundary of the new site to subdivide it from the remainder of the site in its previous remit now positioned to the south in the period since late July 2005 without the benefit of planning permission.*

*A substantial part of this site in the vicinity of the its western boundary embankment was the subject site of planning application register number 01/5127 received by Wicklow County Council on 03/09/01.*

*U.D./1984*

*Take notice that Wicklow County Council, being the Planning Authority for the area in which the above mentioned land is located and having investigated the matter has decided to serve this Enforcement Notice on you.*

*You are required as per section 154(5) of the above Act to:-*

*1(a) Within four weeks of the date of this notice cease the use of the said site defined in the above heading as a depot with associated onsite office facilities for the operation of the company entitled 'Flynn Machine and Crane Hire Limited'. In this regard, all vehicles and Machinery in the ownership and associated with this company shall be removed permanently from the site within this four week period.*

*(b) Within four weeks of the date of this notice remove entirely from the subject site outlined in the above heading the porto-cabin and associated wooden deck that provides an office facility for 'Flynn Machine and Crane Hire Limited' and disconnect any sewer connection presently lining the toilet facilities therein to the effluent treatment system on the...*

*(c) Desist from the usage of the subject site outlined in the above heading for any other commercial operation without the prior benefit of planning permission.*

*(d) Within six weeks of the date of this notice demolish in its entirety the subject boundary wall positioned along the southern boundary of the subject site and remove the resultant rubble from the site.*

*2. Please note:-*

*(A) that if within the period specified in 1 above or within such extended period as the planning authority may allow, the steps specified in 1 above are not taken:*

*(i) The Planning Authority may enter on the land and take such steps, including the removal, demolition or alteration of any structure and may recover any expenses reasonably incurred by them on your behalf; and*

*(ii) You may be guilty of an offence.*

*(B) Planning Authority will require that you refund to the Planning Authority the costs and expenses reasonably incurred by the authority in relation to the investigation, detection and issue of the Enforcement Notice received, and any warning letter under section 152 of the Act, including costs incurred in respect of the remuneration and other expenses of employees, consultants and advisors, and the Planning Authority may recover those costs and expenses incurred by it in that behalf.*

*(C) ..."*

9. The Enforcement Notice was signed by the Senior Executive Officer, Planning and Economic Development Enforcement Section.

#### **The Legislation**

10. Section 152 of the 2000 Act provides that where a representation is made to a planning authority by any person that unauthorised development may have been or is being carried out and it appears to the planning authority that the representation is not vexatious, frivolous or without substance or foundation or it appears to the authority that unauthorised development may have been, is being or may be carried out, the authority shall issue a warning letter to the owner, the occupier or any other person carrying out the development. The planning authority shall issue the warning letter not later than six weeks after the date of the representation and the section provides the matters the warning letter is to contain.

Section 153 provides as follows:-

*"(1) As soon as may be after the issue of a warning letter under section 152, the planning authority shall make such investigation as it considers necessary to enable it to make a decision on whether to issue an enforcement notice.*

*(2)(a) It shall be the duty of the planning authority to ensure that decisions on whether to issue an enforcement notice*

are taken as expeditiously as possible.

*(b) Without prejudice to the generality of paragraph (a), it shall be the objective of the planning authority to ensure that the decision on whether to issue an enforcement notice shall be taken within 12 weeks of the issue of a warning letter.*

*(3) A planning authority, in deciding whether to issue an enforcement notice shall consider any representations made to it under section 152 (1)(a) or submissions or observations made under section 152 (4)(b) and any other material considerations.*

*(4) The decision made by the planning authority under subsection (1) including the reasons for it shall be entered by the authority in the register.*

*(5) Failure to issue a warning letter under section 152 shall not prejudice the issue of an enforcement notice or any other proceedings that may be initiated by the planning authority."*

Section 154 provides:-

*"(1)(a) Where a decision to enforce is made under section 153 or where urgent action is required under section 155 , the planning authority shall, as soon as may be, serve an enforcement notice under this section.*

*(b) Where an enforcement notice is served under this section, the planning authority shall notify any person who made representations under section 152 (1)(a) and any other person, who in the opinion of the planning authority may be concerned with the matter to which the notice concerned relates, not being a person on whom the enforcement notice was served, of the service of the enforcement notice.*

*(2) Where the planning authority decides not to issue an enforcement notice, it shall notify any person to whom the warning letter was copied under section 152 and any other person who made a representation under that section of the decision in writing within 2 weeks of the making of that decision.*

*(3)(a) An enforcement notice under subsection (1) shall be served on the person carrying out the development and, where the planning authority considers it necessary, the owner or the occupier of the land or any other person who, in the opinion of the planning authority, may be concerned with the matters to which the notice relates.*

*(b) If, subsequent to the service of the enforcement notice, the planning authority becomes aware that any other person may be carrying out development or is an owner or occupier of the land or may be affected by the notice, the notice may be served on that person and the period specified for compliance with the notice shall be extended as necessary to a maximum of 6 months, and the other person or persons on whom the notice had previously been served under paragraph (a) shall be informed in writing.*

*(4) An enforcement notice shall take effect on the date of the service thereof.*

*(5) An enforcement notice shall refer to the land concerned and shall –*

*(a)(i) in respect of a development where no permission has been granted, require that development to cease or not to commence, as appropriate, or*

*(ii) in respect of a development for which permission has been granted under Part III, require that the development will proceed in conformity with the permission, or with any condition to which the permission is subject,*

*(b) require such steps as may be specified in the notice to be taken within a specified period, including, where appropriate, the removal, demolition or alteration of any structure and the discontinuance of any use and, in so far as is practicable, the restoration of the land to its condition prior to the commencement of the development,*

*(c) warn the person or persons served with the enforcement notice that, if within the period specified under paragraph (b) or within such extended period (not being more than 6 months) as the planning authority may allow, the steps specified in the notice to be taken are not taken, the planning authority may enter on the land and take such steps, including the removal, demolition or alteration of any structure, and may recover any expenses reasonably incurred by them in that behalf,*

*(d) require the person or persons served with the notice to refund to the planning authority the costs and expenses reasonably incurred by the authority in relation to the investigation, detection and issue of the enforcement notice concerned and any warning letter under section 152 , including costs incurred in respect of the remuneration and other expenses of employees, consultants and advisers, and the planning authority may recover these costs and expenses incurred by it in that behalf, and*

*(e) warn the person or persons served with the enforcement notice that if within the period specified by the notice or such extended period, not being more than 6 months, as the planning authority may allow, the steps specified in the notice to be taken are not taken, the person or persons may be guilty of an offence.*

*(6) If, within the period specified under subsection (5)(b) or within such extended period, not being more than 6 months, as the planning authority may allow, the steps specified in the notice to be taken are not taken, the planning authority may enter on the land and take such steps, including the demolition of any structure and the restoration of land, and may recover any expenses reasonably incurred by it in that behalf.*

*(7) Any expenses reasonably incurred by a planning authority under paragraphs (c) and (d) of subsection (5) and subsection (6) may be recovered –*

*(a) as a simple contract debt in any court of competent jurisdiction from the person or persons on whom the notice was served, or*

*(b) secured by –*

(i) charging the land under the Registration of Title Act, 1964 , or

(ii) where the person on whom the enforcement notice was served is the owner of the land, an instrument vesting the ownership of the land in the authority subject to a right of redemption by the owner within five years.

(8) Any person on whom an enforcement notice is served under subsection (1) who fails to comply with the requirements of the notice (other than a notice which has been withdrawn under subsection (11)(a) or which has ceased to have effect) within the specified period or within such extended period as the planning authority may allow, not exceeding 6 months, shall be guilty of an offence.

(9) Any person who knowingly assists or permits the failure by another to comply with an enforcement notice shall be guilty of an offence.

(10) Particulars of an enforcement notice shall be entered in the register."

### **The Applicant's Submissions**

11. Mr. Galligan S.C., on behalf of the Applicant submitted that it was appropriate for questions relating to the validity of Enforcement Notices to be brought before the High Court in advance of District Court proceedings. He relied on comments made in *Galway County Council v. Davoren* (Unapproved, 2005) by Quirke J. who suggested that relief by way of judicial review quash an Enforcement Notice on the grounds of illegality or invalidity was available to a party. It was submitted that some of the points raised went to the jurisdiction of the Planning Authority.

12. The Applicant submitted that there was a failure by the Respondent to identify the site to which the Enforcement Notice was referable as stated in Ground E (ii)(4). It was submitted that the Enforcement Notice was ambivalent in regard to the site to which it refers that it was unclear as to whether the steps which are required to be taken under the Enforcement Notice are to be taken in relation to the site owned by the Applicant or the entire site, including the site owned by Mr. Healy from whom the Applicant purchased its own lands. The Applicant referred to the manner in which the site was referred to at paras. 1(a), (b), (c) and (d) of the Enforcement Notice. Steps required to be taken on foot of the Enforcement Notice are predicated on an "alleged unauthorised development" referred to in the heading of the Notice. The site in respect of which the steps are to be taken is "the site defined in the above heading". It was submitted that two sites were referred to in the lengthy heading which referred to:-

*"Alleged unauthorised development consisting of the subdivision of the site for the establishment of a new second commercial site (i.e. a new planning unit...)"*

It was submitted that the heading also refers to:-

*"The erection of a new boundary wall along the southern boundary of the new site to subdivide it from the remainder of site."*

13. It was stated that the subject boundary wall was in fact located entirely within the property of Mr. Healy, the previous owner who had retained portion of the lands including the wall. (An Enforcement Notice was served on Mr. Healy requiring him to remove the wall and he subsequently complied with the request of the Respondent). It was submitted that the lack of precision in the Enforcement Notice is not merely a technical point but it relates to the ability to comply with the terms of the Enforcement Notice.

14. It was further submitted that insofar as it was alleged in the Enforcement Notice that the subdivision of the site led to a material change of use in planning terms, this can only be on the basis of intensification of use as the nature of the use had not changed. The Respondent has failed to have regard to the pre-existing commercial operation involving plant hire and the use of the overall site should be allowed to continue at least to the level of the pre-existing user. Insofar as the Enforcement Notice requires the Applicant to desist from the usage of the site "for any other commercial operation", it fails to acknowledge the entitlement of the Applicant to continue to use the site for the pre-existing established use, provided that the level of use does not materially exceed the pre-existing use. (In so submitting, the Applicant does not concede that there has been any intensification over and above the pre-existing use levels.) In respect of these contentions, relevant grounds are set out at paragraph E(i)7 and E(ii)8 of the statement of grounds which is in the following terms:-

*"The said decision is ultra vires and void in so far as it orders that the Enforcement Notice be served on the Applicant by requiring the Applicant to desist from any other commercial operation it purports to go beyond requiring the alleged unauthorised development to cease."*

15. Reliance was placed on a passage from *Mynors on Practical Planning an Enforcement* (1st Ed.) p. 71-72 which stated that the terms of an Enforcement Notice must not go beyond that which is necessary to remedy the alleges breach of planning control. It was submitted that the Enforcement Notice must expressly preserve any use which is immune from Enforcement. If there is "over-enforcement", it is submitted that this renders the Enforcement Notice invalid.

16. It was submitted that the Enforcement Notice is defective in two respects insofar as it is was required to specify the period within which the steps referred to in the Notice are to be taken. The compliance period specified in the Enforcement Notice is critical as it triggers the offence. The relevant ground is set out at paragraph E(ii)3 of the statement of grounds as follows:-

*"The said Enforcement Notice is ultra vires and void in that it fails to provide that it takes effect on the date of the service thereof as required by section 154(4) of the 2000 Act and/or to require the steps specified therein to be completed within six weeks of the date of service as required by the said Manager's order."*

17. The Enforcement Notice requires that the relevant steps to be taken "within four weeks of the date of this notice" in a case of paragraphs 1(a) and (b). In relation to paragraph 1(c), no period for compliance is specified up. Under paragraph 1(d), the period for compliance is within six weeks, the date of this Notice. The date of the Notice is 8th February, 2006 which was served by post and accordingly the date of service is later than the date of the Notice. Under section 154(4), the Enforcement Notice takes effect on the date of service of the Notice, not the date of issue of the Notice. It is submitted that the Respondent had acted *ultra vires* by in effect stipulating that the date upon which the Notice takes effect is the date of the Notice itself, i.e. the date of issue.

18. It is submitted that insofar as section 154(5)(b) provides that the Enforcement Notice shall "require such steps as may be

specified in the Notice to be taken within a specified period", the period referred to can only commence to run from the date upon which the Notice takes effect.

19. Reliance placed on the decision in *Dundalk Town Council v. Lawlor* [2005] 2 ILRM 106 where O'Neill J. stated at p. 110-111 as follows:-

*"The first thing that has to be borne in mind here is that a failure to comply with an Enforcement Notice is a criminal offence. It is well settled that criminal offences must be defined with clarity and precision so that a person can know whether his conduct is or is not a commission of an offence. (see King v. Attorney General [1981] I.R. 233.*

*What that means is that in construing s. 154 (5)(b) and also in construing any notice issued pursuant to s. 154, a strict construction is required i.e. the subsection in question and any Enforcement Notice must be construed in accordance with the natural and ordinary meaning of the words used and there is no scope for any kind of purposive or of teleological approach.*

*Subsection (5)(b) requires that steps 'be taken within a specified period'.*

*Any period in time necessarily requires for its definition or ascertainment a beginning and an end. A fortiori a 'specified' period must be capable of having its beginning and end clearly ascertained.*

*In my view the use of the word 'immediately' provides a beginning to a period but does not indicate when the period ends. In other words, it does not in fact create a period, it simply defines a point at which or from which something must be done but it entirely fails to describe or limit a time within which the step is to be accomplished."*

20. In the *Lawlor* case the Enforcement Notice required the steps to be taken immediately. In the present case, it was submitted a beginning an end to the period of compliance is specified in the Enforcement Notice. The non-compliance with the statutory provisions arise because the Respondent has specified a period commencing prior to the date of service of the Enforcement Notice and, therefore, prior to the taking effect of the Enforcement Notice.

21. Reliance was also placed on (*R*) *Lyons v. West Berkshire District Council* [2003] J.P.L. 1137, which was a case in which court observed (albeit in the context of a statutory regime which provided for an appeal the Secretary of State against an Enforcement Notice) that:-

*"...common sense would suggest that the compliance period would not commence until the notice has taken effect, otherwise the notice will have had effect before it is stated to take effect."*

### **The Respondent's Submissions**

22. Mr. Alexander Owens, S.C., on behalf of the Respondent submitted that a decision on whether or not to issue an "Enforcement Notice" is a stage in the process which, in general, is not amenable to judicial review unless the person attacking the decision can demonstrate a clear departure by the decision maker from his statutory remit: See *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39: *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, and *McCormack v. An Garda Síochána Complaints Board & Anor* [1997] 2 I.R. 487 at 497. It was submitted that when a warning letter is served under section 152, the person served with the warning letter is invited to deal with what he may have committed or that he may be about to commit an offence relating to the carrying out of unauthorised development. The planning authority then takes the decision on whether or not to issue an Enforcement Notice. Failure to comply with an Enforcement Notice is an offence under section 154(8) of the 2000 Act. The carrying out of an unauthorised development is an offence under section 151 of the 2000 Act. In the event of a prosecution under either of these provisions, it is open to the accused to make the defence under section 157(4)(c) that the criminal case is time barred or that the prosecution has not sufficiently proved that an unauthorised development has been carried out or is taking place.

23. In order to challenge the decision to issue the Enforcement Notice, it is necessary he submitted for the Applicant to show that the planning authority did not act *bona fide* or had regard to relevant considerations or carried out its decision making process in an unreasonable or irrational way. Judicial review was not an appellate process which permits the High Court to look at a decision made by a decision making body and substitute its decision for the decision of that body. He referred to *Stanley v. An Garda Síochána Complaints Board* [2000] 2 ILRM 121, where Laffoy J. at pp. 130-131 pointed out that factors which might incline the High Court to conclude that it might come to a different decision if it was given the power to make the decision sought to be in impugned were not relevant.

24. He submitted there was nothing in section 153(1) or any other statutory provision to oblige the Decision Maker to include in the documentary evidence of the making of the decision a summary of the investigation which is being carried out by the Respondent, or to recite that the Respondent had complied with section 153(3) of the 2000 Act.

25. It was submitted that the decision to issue the Enforcement Notice is not automatically *ultra vires* or void for the suggested reason (in Ground (e)(i)) on the basis that the requirement to the Applicant to "desist from usage of the site" for any other commercial operation without the prior benefit of planning permission disregarded the established non-conforming business user thereof, which the Respondent previously acknowledged in its decision to grant permission for a bungalow at Coolcross harbour, Blessington dated 13th March, 1990, per Planning Register No. 89/005054.

26. The Respondent submitted that relying on the affidavit of Brian Doyle (the decision maker) sworn on 11th July, 2008, and the exhibits thereto that the decision maker had sufficient information to justify a decision to issue the Enforcement Notice in the terms on which it was issued. It was not accepted that paras. 3 and 4 of the order embodying the decision to issue the Enforcement Notice were invalid as suggested in para. (e)(1)(5)(6) of the "statement required to ground the application for judicial review". If that submission were incorrect, it was submitted that this would not invalidate the balance of the decision or the validity of the other requirements set out in the Enforcement Notice as covered by the decision. Reference was made to severance of decisions on grounds of partial illegality and reliance was placed on para. 6-101 to para. 6-102 of the 5th Ed. of De Smith Woolf and Jowell's "*Judicial Review of Administrative Action*" at p. 355 – 357. There was it was submitted sufficient evidence for the decision maker to entitle the respondent to decide to issue an Enforcement Notice in respect of the wall which was on the boundary of the Applicant's property, and neither the decision to issue that Enforcement Notice insofar as it related to the wall nor the Enforcement Notice itself so far as it related to the wall it became invalid it was submitted because it can be demonstrated subsequently that the wall was erected by Mr. Healy and was solely on Mr. Healy's property. The respondent was not obliged it was submitted to make specific reference to the wall in a warning letter prior to the issue of the Enforcement Notice under section 153(5) of the 2000 Act.

27. The Respondent submitted that the decision to issue the Enforcement Notice specified that it required the Applicant "desist from any other commercial operation without the prior benefit of planning permission" was not *ultra vires* or that the relevant paragraph of the Enforcement Notice was invalid. It was submitted that if the Respondent was not entitled to use the yard and related buildings and facilities for its machine and plant hire business and associated activities, then it was not entitled to use them for any other commercial purpose. The existing development on site was not authorised and it was not possible for the Applicant to change the use of its site.

28. The Respondent submitted that the decision was not *ultra vires* and void in that it failed to set out the reasons for the Respondent's decision to issue the Enforcement Notice and/or direct their entry in the Register as is asserted in para. E(9) of the Statement of Grounds. The obligation to include a decision and reasons for it in the Register is set out in section 153(4).

29. It was submitted that there was nothing in section 153 which require that the written memorandum of a decision of enforcement must include a direction that the decision be entered in the Register. There was no requirement that the decision to issue an Enforcement Notice should be a lengthy judgment embodying the views of the decision maker on all of the issues. It was submitted it was clear that the Respondent was acting on the reports of Mr. Walsh.

30. It was submitted that the Enforcement Notice itself was referred to and identified the location of the unauthorised development.

31. In relation to para. (e)(1)(13) of the statement grounding the application, the Respondent referred to the Applicant's assertion that the decision was *ultra vires* and void as failing to set out "that the Respondent considers the matters set out in section 157(4) (a)(i) of the 2000 Act". The Respondent submitted that section 153 did not include any specification or list of formal matters which must be referred to or dealt within a memorandum embodying the section 153 decision.

32. In relation to the ground of complaint that in making the decision to issue the Enforcement Notice that the Respondent "acted capriciously and without reasonable justification". The Respondent submitted that the affidavits filed and the exhibits exhibited did not disclose any basis which supported such contention, and that the Applicant was in essence making a case that judicial review be widened to operate as an appeal against the merits of the conclusion of the Respondent as opposed to the issue that the development was unauthorised.

33. The Respondent submitted that the Applicant relies in his application to quash the Enforcement Notice on much of the same grounds as the Applicant relies on to quash the decision to issue the Enforcement Notice. The Respondent submitted that the Enforcement Notice did comply with section 154(5) of the 2000 Act. It specified the notice is to be complied with "within four weeks of the date of this notice" and that such was a sufficient specified period. The order dated 8th February, 2006, embodying the decision to issue the notice also speaks of "within four weeks of the date of this notice". The expression "within a specified period", may it was submitted be a specified period running from the date of the notice, or running from the date of service of the notice or a period ending on a specified date. Reference to "within six weeks of the date of this notice" in both the decision to issue the Enforcement Notice and the notice itself, only relates to the demolition of the wall.

34. It was submitted that the Respondent was entitled to take the view that development had taken place at the time that the Respondent acquired the lands and started to carry on business thereon because prior to that time there was an entire unit of occupation on which the previous occupier carried on the activities of dwelling house, together with plant storage etc. It was submitted that there was evidence from the Respondent could conclude that there was an unauthorised development consisting of sub-division and intensification of user (See *Monaghan County Council v. Brogan* [1987] I.R. 333).

35. In the second affidavit sworn by Mr. Tim Walsh, Senior Executive Planner of the Respondent (on 13th February, 2008) Mr. Walsh states at para. 18:-

*"On behalf of the Council, I say that the combined effect of the sub-division of a single commercial site in to two commercial sites, (with the user of that portion of the site acquired by the Applicant involving the use of vehicles as previously described of an entrance hither to seldom use) constitutes in my opinion (and the opinion of the Council) a material change of use. Ultimately, whether the County Council is correct in relation to the views which it holds, is a matter for the District Court to decide on foot of any prosecution which is brought in that court as a result of alleged non-compliance with the Enforcement Notice."*

I refer to this passage as it indicates the attitude of the respondent to the jurisdiction of the District Court in determining any prosecution.

## **Conclusion**

36. In this case, each of the parties have in relation to the matters the subject matter of this application, corresponded and communicated with one another. Each of the parties has, in considerable detail, set out their version of the facts, their contentions, their conclusions and their opinions. The Court has to remind itself that this application is not one whereby this Court is to decide the issues between both parties as if this Court were an appellate Court in relation to the matter. The matter has to be considered within the confines of an application for judicial review.

37. The decisions, the subject matter of this application are in general not amenable to judicial review unless the person attacking the decisions can demonstrate a clear departure by the decision maker from his statutory remit. Furthermore the onus lies on an applicant to establish that the respondent had no relevant material before it to support its decision, and in default of the applicant so establishing, this court can not reach a conclusion that the decision is irrational. See *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 38. I propose to look at the various grounds of challenge.

39. It is my opinion that the decision made by the Manager's order is not *ultra vires* and void in that there is no requirement in the statute to set out the investigation, if any, made by the Respondent as claimed.

40. The Manager's Order is not *ultra vires* and void in failing to state that prior to making its decision, the Respondent considered the matters set out in section 153(3) of the 2000 Act in terms of the representations made to it.

41. The Respondent reviewed the material it had prior to making the Manager's Order on 8th February, 2006, which it was entitled to make on the basis of the information it had. In its letter of 8th February, 2006, to the Applicant it is, *inter alia*, stated:-

*"It is the position of Wicklow County Council as outlined in the cover letters and Warning Letters issued to Flynn Machine and Crane Hire Limited. On 24th August and 16th December, 2005 that it considers such development to constitute non-*



*exempted development in the context of sections 3 and 4 of the Planning and Development Act 2000 and associated provisions of the Act and the Planning and Development Regulations 2001 (both amended) and that presently constitutes unauthorised development because such commercial usage does not have the benefit of planning permission which it requires by reason of its non-exempted status. The principal reason why Wicklow County Council as the planning authority for the Blessington area considers the said usage to be an non-exempted development is due to the fact that a material change of use took place on the subject site during July and August 2005 for the purpose of establishing a new planning unit separate from the previous commercial site that had operated on the same site without the benefit of planning permission since 1985 and thus resulting in an intensification of use of the site from its pre-July 2005 remit by virtue of its subdivision into two physically separated commercial sites (by means of a new block wall running from east to west). The establishment of this second planning unit and the associated establishment of a commercial depot thereon by 'Flynn Machine and Crane Hire Limited' constitutes development that comes within the scope of the definition of development in section 3 of the Planning and Development Act 2000 and is hence, non-exempted development. The other associated reasons that support the latter principle reason why this development is presently an unauthorised development are outlined in the said cover and Warning Letters issued on 24th August and 16th December, 2005 respectively. The said operation of the depot, its vehicular entrance onto the N. 81 and the continuous presence and operation of the said office facility is ongoing and thus unauthorised usage is ongoing."*

42. The said decision is not *ultra vires* and void because of the inclusion of the words "*for any other commercial operation without the prior benefit of planning permission*".

43. The decision is not *ultra vires* and void insofar as it orders that the Enforcement Notice be served on the Applicant by requiring the Applicant to desist from any other commercial operation it purports to go beyond requiring the alleged unauthorised development to cease. This is not fundamental to the decision to issue an Enforcement Notice.

44. The Manager's decision is not *ultra vires* and void in that the reasons for the decision are set out in the letter from the Respondent to the Applicant dated 8th February, 2006. There is no statutory obligation that the Manager's decision should record that the Respondent directed reasons for the decision to be entered in the register.

45. I am satisfied that the decision records with sufficient particularity, the alleged unauthorised development and/or the land concerned. This is apparent from the contents of the Manager's decision of 8th February, 2006. The Applicant's and its representatives and advisers engaged and corresponded with the Respondent on the basis of the said description. If there is any material point in relation to this issue, it cannot be determined factually by these judicial review proceedings. It can be canvassed in any court proceedings that may be brought for failure to comply with the Enforcement Notice.

46. The Respondent has had extensive correspondence and communication with the Applicant and its advisers. For its part, the Respondent has set out the reasons why it made the decision to issue an Enforcement Notice. There is no evidence to suggest that in making the Manager's Order, it acted capriciously and without reasonable justification. Moreover, the affidavits filed on behalf of the Respondent indicate that there were extensive reports and other information upon which it relied in making its decision.

47. As I have come to the conclusion that the Respondent was entitled to make the decision to issue the Enforcement Notice in respect of the development carried on by the Applicant and described in the title to the Enforcement Notice, consideration of section 157(4)(a)(i) of the 2000 Act does not arise as the development for which no permission has been granted had not commenced after seven years. It is contended by the Respondent that the development complained of took place on the subject site during July and August 2005 and that it commenced at that time for the purpose of establishing a new planning unit separate from the previous commercial site (as described in the letter of 8th February, 2006, above referred to from the Respondent to the Applicant).

48. In relation to the Enforcement Notice issued 8th February, 2006 since I find that the Manager's Order is not *ultra vires* and void, the Enforcement Notice is not *ultra vires* and void on that count solely.

49. It is claimed that the Enforcement Notice is *ultra vires* and void in that it fails to provide that it takes effect on the date of service thereof as required by section 154(4) of the 2000 Act. Whilst section 154(4) does provide that the Enforcement Notice should take effect on the date of service thereof, it does not specify that its provision shall be stated in the Enforcement Notice nor is it so required to do so under subsection 5. It was contended that it is *ultra vires* and void in that it fails to require specified steps to be completed within six weeks of the date of service as required by the Manager's Order. The Manager's Order provides that the Enforcement Notice shall take effect immediately from the date of service thereof and that it shall also require the steps specified in the Enforcement Notice to be completed within six weeks. The only mention of six weeks in the Enforcement Notice is in relation to the period specified to demolish the boundary wall along the southern boundary of the site and to remove the resultant rubble from the site. In fact, the Manager's Order is itself contradictory in that it requires the steps which are outlined at paragraphs 1 and 2 to be taken within four weeks of the date of the notice whilst specifying at the foot of the Order that the steps specified in the Enforcement Notice should be completed within six weeks. As there is the potential for a criminal prosecution to be taken against the Applicant for failure to comply with the requirements of the notice and having regard to what was stated by O'Neill J. in *Dundalk Town Council v. Lawlor*, I find that the failure to specify the six week period and to state a specified period as a result within which such steps should be taken results are fundamental flaws in the Enforcement Notice. The Enforcement Notice does not take effect until the date of service thereof (s. 154(4)), whilst the notice which was issued specified a period of weeks from the date of the notice. The six-week period is required for the purpose of calculating the specified period under section 154(5)(b) as set out in the decision of the Respondents dated 8th February, 2006.

50. I am satisfied that the Enforcement Notice properly identifies the land concerned, the subject matter of the Enforcement Notice.

51. No issue arises by way of concession in relation to the demolition of the wall.

52. It is claimed that the Enforcement Notice is *ultra vires* and void in that it wrongfully requires the Applicant to desist from the usage of the site "*for any other commercial operation without the prior benefit of planning permission*" thus disregarding the established non-conforming user thereof which the Respondent had previously acknowledged in its decision to grant permission for a bungalow at Crosscoolharbour, Blessington dated 13th March, 1990 per Planning Register No. 89/005054. Section 152 of the 2000 Act is the basis for initiating a warning letter to an owner, occupier or any other person carrying out unauthorised development. The warning letter under section 152(4)(c) is required to state when a planning authority considers that unauthorised development has been, is being or may be carried out an Enforcement Notice may be issued. Following the issue of the warning letter, the planning authority is required to make such investigation as it considers necessary to enable it to make a decision on whether to issue an Enforcement Notice. The Enforcement Notice shall in respect of a development where no permission has been granted require that development to cease or not to commence as appropriate (section 154 (5)(a)). Such development, in my opinion is the unauthorised

development that triggers a warning letter under section 152(4). Section 154(5)(b) provides the Enforcement Notice shall require such steps as may be specified in the notice to be taken within a specified period, including, where appropriate, the removal, demolition and alteration of any structure and the discontinuance of any use and insofar as is practicable, the restoration of the land to its condition prior to the commencement of the development. This subsection must, in my opinion, refer back to the initial unauthorised development which has taken place which in the context of the present application is the development and activity set out in the Enforcement Notice, in particular, in the title thereof. In my opinion, it cannot be a user that has not yet been complained of. No "*other commercial operations*" was complained of in the warning letter. It has been suggested by the Respondent that severance could apply in certain instances in relation to the contents of an Enforcement Notice. This matter has not been argued in any great detail although referred to in the written submission. I am prepared to hear the parties in relation to this matter.

53. On 24th June, 2009, I heard submissions from each of the parties in relation to whether severance could apply in relation to the contents of the Enforcement Notice. Specifically, the issue is whether paragraph 1(c) would be severed from the rest of the Enforcement Notice. Written and oral submissions were made to me. Each of the parties referred to DeBlacam on *Judicial Review* (2nd Ed.) para. 7.13 and referred to the authorities there set out. In my opinion, the provision in 1(c) namely:-

*"Desist from the usage of the subject site outlined in the above heading for any other commercial operation without the prior benefit of planning permission"*

is separate and independent from the other matters set out, namely 1(a) and (b), and is capable of severance.

I am supported in this by the decision in *Bord na Mona v. An Bord Pleanála* [1985] I.R. 205 (to which each counsel referred).

54. Accordingly, I make an order severing paragraph 1(c) from the remainder of the Enforcement Notice.