THE HIGH COURT

2017 No. 86 MCA

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

BETWEEN:-

ST MARGARET'S CONCERNED RESIDENTS GROUP; HELENA MERRIMAN; MICHAEL REDMOND; ADRIENNE MCDONNELL; PETER COLGAN; ELIZABETH MCDONNELL; TREVOR REDMOND; PATRICIA DEIGHEN; MARGARET THOMAS; NOEL REILLY; HELEN GILLIGAN; JAMES SCULLY; FERGUS RICE; NOEL DEEGAN; VALERIAN SALAGEAN; SIDNEY RYAN; GREG FARRELL; SHEELAGH MORRIS; JIMMY O'CONNELL; SILE HAND; DECLAN MCDONNELL; ELIZABETH ROONEY AND DESMOND O'CONNOR

Applicants

– AND –

DUBLIN AIRPORT AUTHORITY PLC

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 21st November, 2017.

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I

Overview

1. Dublin Airport Authority did not do as was strictly required of it by a planning permission but contends that it has done enough to justify the refusal of the declaratory reliefs now sought against it. The applicants maintain that such non-compliance as has occurred is of material consequence and that the declaratory reliefs sought ought now to be granted.

II

Background and Reliefs Sought

(i) Background.

2. This application, made under s.160 of the Planning and Development Act 2000, as amended ('PADA'), arises out of a planning permission granted by An Bord Pleanála on 29th August, 2007. That permission relates to the development of a new runway at Dublin Airport. That runway, if constructed, will be 3,110 metres long and 75 metres wide. The building of the new runway requires the demolition of various structures, among them a fire-training unit and ancillary buildings, as well as other works of a significant nature, including the closing of portions of roads and the related realignment of roads. So it is a substantial infrastructural development. At the time when planning permission was sought, the applicants objected to the development. Having considered matters, An Bord Pleanála, in granting permission, attached various conditions to the permission, including one particular condition (Condition 12) that is the condition of focus in this case.

3. Dublin Airport Authority did not proceed with the development in 2007. In fact it did nothing to proceed with the development until 2016. The Great Recession played a part in this slow progress. One of the things Dublin Airport Authority did in 2016 was, on 6th October 2016, it sent to Fingal County Council what was referred to at the hearing of the within application as a 'compliance submission'. To understand the significance of this compliance submission, the court looks, in the next part of its judgment, at the substance of the planning permission. But before doing that it is useful briefly to touch upon the reliefs now sought.

(ii) Reliefs Sought.

4. The two principal reliefs sought by the applicants are:

> (1) [per item (4) of the notice of motion] a declaration that the works carried out by Dublin Airport Authority, its servants and/or agents, commencing on 16th December, 2016 until 15th February, 2017, comprising, *inter alia*, (a) the establishment of a contractor's compound, (b) hedge-row removal and tree-felling works (including along Barberstown Lane, Co Dublin), (c) the erection of site security fencing to the site perimeter, (d) the demolition of the former Airport Fire Training Ground buildings and Training structures (including the house, aircraft simulators, smoke training buildings and fuel management system), (e) the demolition of existing high mast lighting and associated cabling at the former Airport Fire Service Training Ground and the removal of existing hard standings, (f) the demolition of the existing farm outbuildings adjoining the former Airport Fire Service Training Ground and (g) associated works in respect of all of the foregoing constitute unauthorised development comprising unauthorised works which have been carried out without planning permission and/or in non-compliance with the Planning Permission granted by An Bord Pleanála on 28 August 2007 (Ref. No. PL. 06F.217429), in particular Condition No 12 of same; and
>
> (2) [per item (3) of the notice of motion] an order directing that any development that is being and/or may be carried out pursuant to Planning Permission Ref. No. PL 06F.217429 by the Respondent, its servants and/or agents and/or any connected persons is to be carried out in conformity with said planning permission and every condition to which said planning permission is subject.

III

Planning Permission

5. The planning permission takes the usual form of such permissions. It recites the detail of the proposed development, states that the An Bord Pleanála's decision is to grant permission, identifies the reasons and considerations that inform that decision, and sets out the conditions applicable to the permission. So, for example:

> – Condition 1 provides, *inter alia*, that "*The development shall be carried out in accordance with the plans and particulars".*
>
> – Condition 2 provides that "*This permission is for a period of 10 years from the date of this order."*
>
> – Condition 3 provides, *inter alia*, that "*On completion of the construction of the runway hereby permitted, the runways at the airport shall be operated in accordance with the mode of operation, option 7b – as detailed in the Environmental Impact Statement Addendum…as received by the planning authority on 9th day of August, 2005".* These include, for example, that *"Runway 10L-28R shall not be used for take-off or landings between 23:00 hours and 07:00 hours".* The permission then gives a reason for Condition 3: *"[T]o ensure the operation of the runways in accordance with the mitigation measures set out in the Environmental Impact Statement".*
>
> – Condition 5 provides, *inter alia*, that "*On completion of construction of the runway hereby permitted, the average number of night time aircraft movements at the airport shall not exceed 65/night (between 23:00 hours and 07:00 hours) when measured over the 92 day modelling period."*

IV

Condition 12

6. Condition 12 of the runway planning permission, the key condition at issue in the within application provides as follows:

> *"Prior to commencement of development, the developer shall submit to the planning authority for written agreement a comprehensive environmental protection plan to minimise the impacts of the construction processes…"*

7. The applicants in the within proceedings have been at pains to emphasise to the court the impact and importance of the just-quoted sentence. It requires a submission, which is to be the subject of written agreement by the planning authority, and that submission is to contain a comprehensive environmental protection plan that has as its aim the minimisation of the impacts of the construction processes. What Condition 12 shows is that, from the outset, it was clear that An Bord Pleanála was prescribing the need for Dublin Airport Authority, to provide for environmental impact mitigation by way of a comprehensive environmental protection plan. Condition 12 goes on to state as follows:

> *"The plan shall provide, inter alia, for:*
>
> *(a) provision for loading and unloading of materials,*
>
> *(b) storage of plant, materials, operatives' vehicles,*
>
> *(c) provision of temporary offices and car parking,*
>
> *(d) temporary site access,*
>
> *(e) identification of the main routes to be used by construction traffic having regard to the location of residences in the area and the standard of roads to be used. Option B, as outlined in the Environmental Impact Statement, shall not be used),*
>
> *(f) a survey of the road and pavement conditions affected by the construction route,*
>
> *(g) measures to minimise dust and spillages or deposits of clay or other materials along the route. Such measures should include wheel washes and other cleaning mechanisms,*
>
> *(h) a waste management plan to ensure the minimisation of waste, reuse or recycling of materials or recycling of materials, and*
>
> *(i) access to the site, minimising construction access during the AM and PM peak periods.*
>
> ***Reason:*** *In the interest of traffic safety and amenity."*

[Emphasis in original].

V

Letter of 28th October, 2016

8. Dublin Airport Authority made its compliance submission to Fingal County Council on 6th October, 2016. On 28th October, 2016, that compliance submission was deemed by the Council to be adequate, save as regards Condition 12(h). A letter issued from the Council to Dublin Airport Authority on 28th October, 2016, which stated, *inter alia*, as follows:

> *"I refer to your submission received on 06-Oct-2016 to comply with Condition No. 12 of Register Reference F04A/1755. I wish to inform you that your submission is in compliance with the requirements of Condition 12[a], [b], [c], [d], [e], [f], [g] and [i].*
>
> *Please note the following with regard to Condition 12[h]:*

While the intention to prepare a WMP [waste management plan] has been outlined in Section 3.8.2 of the submitted document, Condition 12[h] requires the EPP [environmental protection plan] *to provide a waste management plan. The WMP shall be submitted by the contractor to FCC* [Fingal County Council], *once the contractor is appointed by the DAA. The DAA should also note that the re-use of by-product off-site will require the submission of an Article 27 notification to the Environmental Protection Agency".*

9. It is clear from this letter that it is the waste management plan dimension of the environmental protection plan and not the wider environmental protection plan that is of concern.

VI

Council's Deliberations Previous to Letter of 28th October, 2016

10. The issuance of the letter of 28th October, 2016, was preceded by an executive consideration within Fingal County Council of the compliance submission. The court has had exhibited before it the record of that executive consideration. Headed "*RECORD OF EXECUTIVE BUSINESS AND CHIEF EXECUTIVE'S ORDER*", it reads, *inter alia*, as follows:

"This is a compliance submission in respect of Condition 12 of [a] *Decision of An Bord Pleanála, Reference Number PL 06F.217429….*

The submission was lodged on 6th October 2016. An addendum was subsequently submitted on 25th October…

[Condition 12 is then recited].

The submission includes a document entitled: Dublin Airport northern runway, Environmental Protection Plan for north runway construction [30 September], prepared by AECOM for DAA.

An addendum to this submission clarifying the situation regarding trees on the site was subsequently submitted on 25 October 2016.

The objective of this document [Environmental Protection Plan for north runway construction – dated 30 September], is stated to outline the environmental requirements that the Contractor carrying out the works will be expected to adhere to when delivering the Project. This document it is stated will form part of a series of documents that shall be adopted by the Contractor before carrying out their activities.

The report addresses items [a] to [i] inclusive in condition 12.

The report states inter alia the following in relation to the following matters....

Waste management: Section 3.8.2 of the document states that the Contractor shall be responsible for developing the Waste Management Plan (WMP) related to construction activities….

Environment: The Environment Division is satisfied that the Environmental Protection Plan (EPP) for North Runway Construction dated 30th September, 2016 is in compliance with condition 12 (a, b, c, d, e, g and i) subject to ground water or surface water from the site shall not be discharged to waters or sewers unless licensed under Section 4 or Section 16, whichever is appropriate, of the Local Government (Water Pollution) Acts 1977 and 1990.

It points out that while Condition 12[h] requires a waste management plan to ensure the minimisation of waste, re-use or recycling of materials. Section 3.8.2 of the submitted document states that 'The contractor shall be responsible for developing the Waste Management Plan (WMP) related to construction activities…'. It also notes that the re-use of by-product off-site will require the submission of an Article 27 notification to the Environmental Protection Agency.

Assessment

Condition 12 [a], [b], [c], [d], [e], [f], [g] and [i] are deemed to be complied with.

In relation to the Condition 12[h] which requires the EPP to provide a waste management plan, the intention to prepare a WMP has been outlined in Section 3.8.2 of the submitted document and this should be submitted to FCC by the contractor, once the contractor is appointed by the DAA. The DAA should also note that the re-use of by-product off-site will require the submission of an Article 27 notification to the Environmental Protection Agency….

Recommendation

Condition 12[a], [b], [c], [d], [e], [f], [g] and [i] are deemed to be complied with.

No te

The applicant shall note the following with regard to Condition 12[h]:

While the intention to prepare a WMP has been outlined in Section 3.8.2 of the submitted document, Condition 12[h] requires the EPP to provide a waste management plan. The WMP shall be submitted by the contractor to FCC, once the contractor is appointed by the DAA. The DAA should also note that the re-use of by-product off-site will require the submission of an Article 27 notification to the Environmental Protection Agency.

I recommend that the applicant be informed accordingly….

[Signed by a named Senior Executive Planner, Fingal County Council]

Order: Applicant to be informed as set out in the above report.

Dated 27th October, 2016

[Signed by a named Senior Planner, Fingal County Council]"

VII

Application for Extension of Duration of Permission

11. On 11th January, 2017, Fingal County Council received from Dublin Airport Authority an "*Application for Extension of Duration of Permission"* (the 'Extension Application'). The background to that application is as follows. The duration of the runway planning permission was for ten years. The planning permission was granted in 2007. So it was going to expire in 2017. Dublin Airport Authority had a concern as regards the pending deadline and was desirous of seeing the permission extended. The Extension Application form was submitted for that purpose. It is a document which invokes the jurisdiction of s.42 of PADA. The court turns to consider the detail of that statutory provision later below. For now, it focuses on the detail of the Extension Application form which, *inter alia*, contains the following detail:

> **"1. Name of Applicant**: *DUBLIN AIRPORT AUTHORITY PLC…*
>
> 5. The development to which the permission relates*: DEVELOPMENT OF A 3,110M RUNWAY, TAXIWAYS, SITE + ALL ANCILLARY WORKS…*
>
> 7. Date development **commenced:**
>
> 15/12/16
>
> [The court assumes this date is a slip of the pen. The affidavit evidence before the court is that the works commenced on 16th December, 2016. Thus Mr Dee, a town planner employed by Dublin Airport Authority avers, *inter alia*, that "On 16 December 2016, *the first phase of construction works under the planning permission commenced at Dublin Airport*."].
>
> …
>
> 9. Date permission will **cease to have effect**:
>
> 26/11/17
>
> [In fact condition 2 of the permission provides that "*This permission is for a period of 10 years from the date of this order."* Thus, but for the extension granted by Fingal County Council, it would have expired in August 2017.]
>
> …
>
> 10. Date Permission **sought to be extended to:**
>
> 25/11/22
>
> …
>
> 11. Where the application is made on the basis of compliance with Section 42(1)(a)(i) particulars of the **substantial works carried out** pursuant to the permission before the expiration of the appropriate period.
>
> N/A" [*sic*]
>
> **OR**
>
> 12. Where the application is made pursuant to Section 42(1)(a)(ii), information regarding the considerations of a commercial, economic or technical nature beyond the control of the applicant, which substantially militated against the commencement of the development **OR** the carrying out of substantial works, (please list and provide documentary evidence).

PLEASE SEE ATTACHED LETTER."

12. The attached letter is a lengthy document. Perhaps the section of the greatest interest is para. 3.4 which reads as follows:

> **"3.4 Requirements Under Section 42(1)(a)(ii)(IV)**
>
> Section 42(1)(a)(ii)(IV) states that the Planning Authority must be satisfied that:
>
> **'where the development has not commenced***, that an environmental impact assessment, or an appropriate assessment, or both of those assessments, if required, was or were carried out before the permission was granted.'* [Our emphasis]
>
> *Following the final discharge on Thursday, 15th December 2016, of the entire prior to commencement of development conditions, construction works commenced on Friday, 16th December 2016, on the first [North Runway] Construction Package 1 (NRCP1). The main elements of NRCP1 are outlined in Appendix E and daa can confirm to Fingal County Council that the follow[ing] works have commenced, namely:*

☐ *Establishment of the Contractors' Compound,*

☐ *Hedge Row removal and Tree Felling Works, including along Barberstown Lane,*

☐ *Site security fencing to the site perimeter,*

☐ *Demolition of the Former Airport Fire Service Training Ground Buildings and Training Structures including the house, aircraft simulators, smoke training buildings and fuel management system.*

☐ *Demolition of the existing high mast lighting and associated cabling at the Former Airport Fire Service Training Ground, and the removal of the existing hard standings,*

☐ *Demolition of the existing Farm Outbuildings adjoining the Former Airport Fire Service Training Ground,*

☐ *All associated permitted works.*

A map illustrating the locations where works have commenced is included at Appendix F.

As work on foot of the planning permission have commenced, it is submitted that the requirements of Section 42(1)(a)(ii)(IV) of the Planning & Development Act, 2000 (as amended) do not apply and that therefore an Appropriate Assessment of the project is not required in this instance.

It should also be noted that the original planning application was subject to EIA in the Board's assessment of [the runway planning application]".

13. As will be seen later below, it has been submitted that it was not correct of Dublin Airport Authority to assert in its affidavit evidence that the first phase of construction works commenced on 15th December, 2016. The court turns to this submission later below.

14. The letter continues as follows under the heading "*VALIDITY OF APPLICATION*":

"In order for Fingal County Council to determine this application, the submission must be in accordance with the provisions of Article 42 of the Planning and Development Regulations, 2001 (as amended). The requirements of this Article are listed below and a response to each requirement is indicated.

(1) An application under section 42 or section 42A of the Act to extend the appropriate period as regards a particular permission shall be made in writing, and shall be accompanied by the appropriate fee as prescribed by Article 170 of these Regulations and shall contain the following information. This information includes:

Sub-article	**Response:**
(h) the date on which the permission will cease to have effect,	26th November 2017 having regard to Section 251 of the Planning and Development Act, 2000 (as amended).
(i) where the application is made on the basis of compliance with subparagraph (i) of section 42(1)(a) or subparagraph (i) of section 42A(1)(a), particulars of the substantial works carried out or which will be carried out pursuant to the permission before the expiration of the appropriate period,	Not applicable.
(j) where the application is made pursuant to subparagraph (ii)(I) of section 42(1)(a) or subparagraph (ii)(I) of section 42(1)(a), information regarding the considerations of a commercial, economic or technical nature beyond the control of the applicant which substantially militated against the commencement of the development or the carrying out of substantial works,	See section 3 of this letter
(k) the date or projected date of commencement of the development to which the permission relates	15th December, 2016
(l) the additional period by which the permission is sought to be extended, and	Five years.
(m) the date on which the development is expected to be completed.	March 2020.

15. Again, all of the above-quoted text makes clear that Dublin Airport Authority maintained that the works described in the Extension Application commenced on 15th December 2016. Moreover, in para. 3.4 (under the heading "*Requirements Under Section 42(1)(a)(ii)(IV)***"**), the Authority states that "*Following the discharge on…15th December, 2016, of the entire prior to commencement of development conditions, construction works commenced on…16th December, 2016, on the first construction package*." Again, however, the affidavit evidence before the court is that the works commenced on 16th December, 2016. Thus Mr Dee, a town planner employed by Dublin Airport Authority avers, *inter alia*, that "*On 16 December 2016, the first phase of construction works under the*

planning permission commenced at Dublin Airport."

16. The court notes in passing that Dublin Airport Authority's application for extension of the life of the runway planning permission was successful, with Fingal County Council deciding, in a decision dated 7th March, 2017, to extend the lifetime of the permission by five years.

VIII

Letters of 9th February, 2017

(i) Letter to Dublin Airport Authority.

17. The letter of 9th February, 2017, from O'Connell & Clarke, solicitors for St Margaret's Concerned Residents Group, to Dublin Airport Authority reads, *inter alia*, as follows:

> *"We confirm that we act for St. Margaret's Concerned Residents Group who instruct us that there is unauthorised development being carried out in and around lands at Dublin Airport, the subject of the above planning permission granted by An Bord Pleanála. Our clients are very concerned that you appear to have indicated in correspondence with Fingal County Council that this development has commenced and works are ongoing contrary to the requirements of planning permission…granted by An Bord Pleanála. In particular we are instructed that a number of 'prior to commencement of development' conditions have not been complied with, specifically conditions 12 and 19.*
>
> [Condition 19 is not at issue in the within application.]
>
> *We hereby call upon you to cease all unauthorised activity on the site and revert with your undertaking that until there is full compliance with all 'prior to commencement' conditions no further works will be carried out.*
>
> *We further put you on notice that failing to hear from you with the above undertaking, by return, we are instructed to commence proceedings pursuant to Section 160 of the Planning and Development Act 2000 and we will use this letter to you with the costs of same."*

(ii) Letter to Fingal County Council.

18. On 9th February, 2017, O'Connell & Clarke, Solicitors, also wrote, *inter alia*, as follows to Fingal County Council Planning Enforcement Section:

> *"We confirm that we act for St Margaret's Concerned Residents Group who instruct us that there is continued and unauthorised development being carried out in and around lands at Dublin Airport, the subject of the above planning permission granted by An Bord Pleanála.*
>
> *Our clients are very concerned that the Dublin Airport Authority has indicated in correspondence with Fingal County Council that they have commenced development, albeit minor works. This is in breach of planning permission…in circumstances where prior to commencement of development conditions have not been complied with, namely conditions 12 and 19.*
>
> *We are instructed that the DAA made an Application for the Extension of Duration of Permission on the 11th of January 2017, and we call upon you to refuse this application in circumstances where the DAA are not in compliance with their planning permission.*
>
> *Our client is calling upon Fingal County Council to investigate this complaint of alleged unauthorised development pursuant to Section 152 of the Planning and Development Act and to take the appropriate action. Our client is also requesting a copy of the planning authority's findings together with any reports and photographs and that they make this request in accordance with the provisions of the Access to Information on the Environmental Regulations 2007, as amended."*

IX

Submission of Waste Management Plan on 10th February, 2017

19. Unknown to the applicants, and there is no reason why it ought to have been made publicly known, by separate letter of 10th February, 2017, Dublin Airport Authority at last submitted a waste management plan to Fingal County Council that reads, *inter alia*, as follows:

> ***"Re: Formal Compliance with Condition No 12H of the Permission Relating to the Development of a New North Runway at Dublin Airport***
>
> *…*
>
> *Please find attached a Waste Management Plan (4 no. copies) in compliance with Condition 12(h) of [the runway planning permission]….Also, for reference please see attached a letter from Fingal County Council dated 28th October 2016 discharging condition 12 with the exception of sub-condition 12(h) which required daa to submit a Waste Management Plan to Fingal County Council."*

20. That letter is notable in a number of respects:

> (1) there is no question of "*Formal Compliance*" with Condition 12(h), as though somehow there had been informal compliance to this time. Condition 12(h) required the submission of a comprehensive environmental protection plan "[p]*rior*

to commencement of development" and commencement occurred (per the Extension Application Form) several weeks previous to the letter.

(2) stating "*Please find attached a Waste Management Plan…in compliance with Condition 12(h)"* is an entirely inaccurate sentence. Condition 12(h) required the submission of a comprehensive environmental protection plan "[p]*rior to commencement of development*" and commencement occurred (per the Extension Application Form) several weeks previous to the letter. What was being done was the submission of documentation that ought, having regard to Condition 12(h), to have been done weeks previously.

(3) the letter expressly acknowledges that Condition 12(h) had not been "*discharged*" by Fingal County Council, or, more accurately, had not been held by Fingal County Council to have been complied with.

(4) although the letter states that "*sub-condition 12(h)…required daa to submit a Waste Management Plan to Fingal County Council"*, it would more accurately have stated that Dublin Airport Authority was required so to do "[p]*rior to commencement of development*", which element of Condition 12 had not been complied with.

X

Waste Management Plan

21. The court has had exhibited before it the waste management plan that was submitted by Dublin Airport Authority to Fingal County Council. One notable feature of the document as submitted is that the text "*REVISION: Draft – DATE 12-12-16*" that appears at the bottom of each page. This Waste Management Plan, as submitted, provides, *inter alia*, as follows:

> ***"1h): Hazardous Material: (Asbestos)***
>
> *Hazardous materials such as oils, paints, fuels and other chemicals etc. will only be removed by a licensed specialised contractor (E.g. ENVA) and will be stored in the interim, as per their instructions and requirements. If necessary, a Trans-frontier Shipment Notification and Final Certificate of Disposal will be obtained by the disposal contractor.*
>
> [The effect of this provision is, *inter alia*, that if, for example, it was necessary to send material out of the jurisdiction, the stated certificate would have to be obtained from the person or body that engaged in the final disposal of the material].
>
> *An Asbestos survey has been carried out. There is ACM* [Asbestos Containing Material] *in some of the derelict buildings which needs to be disposed of. A registered contractor will remove (following correspondence with the HSA), the Asbestos Containing material following strict controls and a safe system of work detailed in the method statement. The asbestos will not be disturbed putting it in the low risk category. A waste transfer note will be obtained which will detail quantities and destination of the waste….*
>
> ***Handling & Storage*** *Hazardous materials will be carefully handled and stored on-site in designated areas. These areas will be separate from non-hazardous materials to avoid contamination and pollution. Depending on the quantities of hazardous materials accepted at the site it may be necessary to provide a temporary bunded area. This will need to be reviewed and monitored during construction.*
>
> ***Prevention*** *A policy of tight estimation of materials will prevent excess materials delivered. Sub-Contractors employed will be responsible for the hazardous waste arising from their activities and will require to conform to the requirements of the site C&D Plan.*
>
> ***Re-Use off-site*** *Excess materials which are not used on site will be stored safely and removed by an appropriate contractor.*
>
> ***Waste Recovery*** *Hazardous waste materials generated on site will be stored*
>
> ***or Disposal*** *safely and removed off-site by an appropriate contractor permitted to transport hazardous waste for safe disposal."*

22. In the waste management plan one has a document which, in the form in which it was submitted to the Council (and exhibited before the court), came into existence, it appears, on 12th December, 2016. The plan clearly provides for the disposal of hazardous waste, including asbestos, and is quite specific in the provision it makes. But what is perhaps most notable about it is the date on which it was lodged with Fingal County Council (10th February, 2017), *i.e*. several weeks after development works had commenced.

XI

The Response Given to the Waste Management Plan

23. On 15th February, 2017, Fingal County Council issued a letter to Dublin Airport Authority, which letter stated, *inter alia*, as follows:

> *"I refer to your submission received on 10-Feb-2017* [*sic*; the Extension Application Form is date-stamped as having been received on 11th February, 2017] *to comply with Condition No. 12(h) of Register Reference F04A/1755. I wish to inform you that your submission is acceptable on planning grounds and is in compliance with the requirements of Condition No. 12(h)."*

24. There are a couple of points to note about this letter:

> (1) as of 15th February, 2017, there could be no timely compliance with Condition 12(h). That condition, it will be recalled requires that "*Prior to commencement of development, the developer shall submit to the planning authority for written agreement a comprehensive environmental protection plan to minimise the impacts of the construction processes…"*. As

of 15th February, 2017, commencement had started almost two months previously, on 16th December, 2016.

(2) it follows from (1) that Fingal County Council was in error to write "*I refer to your submission…to comply with Condition No. 12(h)"* and also "[Y]*our submission is…in compliance with the requirements of Condition No. 12(h)*". All that could transpire as of February 2017 was a sequence of events which would bring Dublin Airport Authority into as close as possible a position as that which An Bord Pleanála had required by way of Condition 12 to pertain "[p]*rior to commencement of development".*

XII

Council's Deliberations Previous to Letter of 15th February, 2017

25. The issuance of the letter of 15th February, 2017, was preceded by an executive consideration within Fingal County Council of the compliance submission. The court has had exhibited before it the record of that executive consideration, headed "*RECORD OF EXECUTIVE BUSINESS AND CHIEF EXECUTIVE'S ORDER",* it reads, *inter alia*, as follows:

"Planning Officer's Report*…*

Submission lodged on: 10 February 2017

This is a COMPLIANCE submission in respect of Condition 12[h]….

[The detail of Condition 12 is then recited.]

Previous Compliance Submission in Respect of Condition No. 12….

[Mention of the compliance submission of 6th October 2016 and the letter that issued on 28th October (highlighting the non-compliance with Condition 12(h)) is then made.]

Current Compliance Submission in Respect of Condition 12(h)

On 10 February 2017, the DAA submitted [1] a waste management Plan prepared by Roadbridge [Dated 12 December 2016] together [with] [2] a covering letter and [3] the FCC letter [dated 28 October] with regard to C11 [presumably this is a typo and the author intends to refer to C12].

An email submitted by the DAA to FCC on 13 February listed the following key dates in relation to the Waste Management Plan required by Condition 12(h). It states as follows:

☐ *Condition 12(a), (b), (c), (d), (e), (f), (g) and (i) discharged by FCC on 28th October 2016.*

☐ *ROADBRIDGE were appointed as main contractor on 18th November 2016.*

☐ *The Waste Management Plan was adopted on 12th December 2016.*

[It is a mystery as to whom it is intended to refer when it is stated that the waste management plan was "*adopted*" on 12th December 2016, let alone how that unknown person "*adopted*" the Plan. On its face the plan appears to be a draft; and there is no evidence before the court from the purported adopter saying 'We adopted this on 12th December, 2016'].

☐ *Final discharge of prior to the commencement condition on 15th December 2016*

☐ *Commencement of development on 16th December 2016.*

☐ This Waste Management Plan has been followed by ROADBRIDGE since the commencement of development.

Environment Division Report

The report from the A/Senior Engineer in the Environment Division states as follows: 'I have examined the Waste Management Plan, for construction activities, developed by Roadbridge, Civil Engineering & Building Contractors and submitted to your office by the DAA and am satisfied that it complies with condition 12(h) of the above grant of permission.'

[Again, the court notes that all that could transpire as of February 2017 was a sequence of events which sought to bring Dublin Airport Authority into as close as possible a position as that which An Bord Pleanála had required by way of the relevant planning permission to pertain "[p]*rior to commencement of development"*].

Assessment

ROADBRIDGE was formally appointed as the contractor for North Runway Construction Package No.1 [NRCP1] on 18th November 2016. Construction works on the North Runway Construction Package No. 1 commenced on Friday, 16th December 2016. The Submitted Waste Management Plan dated 12 December 2016, was prepared by Roadbridge. The DAA state that this Waste Management Plan has been followed by Roadbridge since the commencement of development.

The Submitted Waste Management Plan dated 12 December 2016 is considered acceptable. Condition 12[h] is therefore deemed to be complied with.

I recommend that Condition 12[h] is deemed to be complied with.

I recommend that the Applicant be informed accordingly.

[Signed by a named Senior Executive Planner, Fingal County Council]

Order: Applicant to be informed as set out in the above report.

Dated 15th February, 2017

[Signed by a named Senior Planner, Fingal County Council]".

26. By the phrase "*deemed to be complied with*", the court understands the Senior Executive Planner to mean that Dublin Airport Authority should in effect be treated for all intents and purposes as though it had submitted the waste management plan "[p]*rior to commencement of development".* Curiously, by the time the letter of 15th February, 2017, issued from Fingal County Council to Dublin Airport Authority, the notion of 'deemed' compliance got no mention and Dublin Airport Authority was informed instead that its submission (the one date-stamped as received on 11th February, 2017) was "*in compliance with the requirements of Condition No. 12(h)."*

XIII

Letter of 16th February, 2017

(i) Events Previous to 16th February, 2017.

27. It will be recalled that on 9th February, 2017, the solicitors for the applicants in the within application had written, *inter alia*, to Fingal County Council Planning Enforcement Section, stating, *inter alia*:

> *"[W]e act for St Margaret's Concerned Residents Group who instruct us that there is continued and unauthorised development being carried out in and around lands at Dublin Airport, the subject of the above planning permission granted by An Bord Pleanála.*
>
> *Our clients are very concerned that the Dublin Airport Authority has indicated in correspondence with Fingal County Council that they have commenced development, albeit minor works. This is in breach of planning permission…in circumstances where prior to commencement of development conditions have not been complied with, namely conditions 12 and 19."*

28. Subsequent to this letter, there came:

> (1) on 10th February 2017 (date-stamped as received by Fingal County Council on 11th February, 2017) the submission by Dublin Airport Authority of the waste management plan that it was required by the planning permission to have submitted "[p]*rior to commencement of development";*
>
> (2) Fingal County Council's decision of 15th February, 2017, that Dublin Airport Authority should, in effect, be treated for all intents and purposes as though it had submitted the waste management plan "[p]*rior to commencement of development*"; and
>
> (3) the letter of 15th February, 2017, in which Fingal County Council stated, *inter alia*, to Dublin Airport Authority, "*I refer to your submission received on 10-Feb-2017* [*sic*; the Extension Application Form is date-stamped as having been received on 11th February, 2017] *to comply with Condition No. 12(h) of Register Reference F04A/1755. I wish to inform you that your submission is acceptable on planning grounds and is in compliance* [not just deemed compliance] with the requirements of Condition No. 12(h)."

29. In passing, the court notes that in his affidavit evidence, Mr Dee, a town planner with Dublin Airport Authority avers that *"I say and believe that once the draft plan was confirmed by Fingal County Council it became the final plan which was adopted by daa on 16th February 2017."* There is no instrument exhibited before the court in which Dublin Airport Authority accepts or adopts the final plan. Presumably what Mr Dee means is that he accepted it and that at the moment he did so "*it became the final plan".*

(ii) Letter of 16th February, 2017.

30. On 16th February, 2017, a letter issued from Fingal County Council to the solicitors for the applicants to the within proceedings, which letter stated, *inter alia*, as follows:

> *"I acknowledge receipt of your correspondence dated 9th February 2017….*
>
> *Please be advised that Condition No 12(a), (b), (c), (d), (e), (f), (g) and (i) of* [Planning Permission 429]…*was discharged on the 28th October 2016. Condition (h) was discharged on the 15th February 2017….*
>
> *Therefore there is no basis for enforcement action at this time in respect of non-compliance with Condition No. 12…".*

XIV

The Rilta Documentation

(i) Overview.

31. It will be recalled that Mr Dee has averred that "*On 16 December 2016, the first phase of construction works under the planning permission commenced at Dublin Airport*." It is in this context that the Rilta documentation became the subject of some focus in the submissions made by counsel for the applicants at the within proceedings.

32. Before proceeding to consider the Rilta documentation, the court (a) pauses to note that Rilta Environmental Limited is a reputable firm that specialises in total hazardous waste management, and (b) emphasises that, as regards Rilta, no criticism of any nature whatsoever (i) has been levelled by any of the parties to these proceedings, or (ii) is made by the court in this judgment or

otherwise.

(ii) The Waste Disposal/Recovery Certificate.

33. In his affidavit evidence, Mr Dee avers, *inter alia*, as follows:

> *"Ms Merriman takes issue with my averment that I have inspected the documentation on file with the daa relating to the removal of waste from the development site and that this conforms that waste has been managed in accordance with the provisions of the WMP. Ms Merriman notes that I have not exhibited this documentation. For the sake of completeness, therefore, I beg to refer to copies of the receipts for the disposal of waste…covering the period from 16 December 2016 to 15 February 2017….These receipts are consistent with the disposal of waste in accordance with the WMP as approved by Fingal County Council on 15 February 2017."*

34. Among the documents exhibited by Mr Dee is a Waste Disposal/Recovery Certificate of 8th February, 2017, that issued from Rilta. The substance of that Certificate is set out below:

"[Rilta Name, Address and EPA Licence No.]

Waste Disposal/Recovery Certificate

Certificate Number*:** ***138787	***Collection Date*:** ***02-December-2016***	***Date Delivered to Rilta*:** ***2-December-2016***

Source of Waste: Harrington Precast Concrete Ltd/Dublin Airport – Runway Enabling Works

WTF	*Waste Description*	*EWC Code*	*Qty*	*Container*	Wgt	D/R Site	D/R Code	TFS Cert. (Attached)	Despatch Date
FCC 0161519	*Asbestos*	*170605**	*1*	*FIBCs*	*327kg*	*Biffa Waste Services Ltd [Northern Ireland address given*]	*D5*	*IE317427-116*	*09-Dec-2016*

> ***We confirm that the waste material listed above has been disposed of or recovered in accordance with current national and EU waste management regulations.***

[**Signed by a named Logistics Manager**] *Date: 08 February 2017".*

> [Court Note: For the sake of completeness, the court emphasises that, as with Rilta, there is no suggestion by any party to the proceedings, and no finding by the court, that Biffa Waste Services Ltd, is anything other than a reputable and law-abiding firm].

35. The Waste Disposal/Recovery Certificate is clearly a serious document intended formally to certify certain matters for the benefit of the addressee, if not the world at large. But if the development that is the subject of the runway planning permission commenced on 16th December, 2016, how can it be that on 2nd December, 2016, Rilta was collecting 327kg of asbestos that required disposal as a result of "*Runway Enabling Works*"?

(iii) The Movement Document.

36. A couple of pages after the Waste Disposal/Recovery Certificate, there is exhibited a *"Movement document for transboundary movements/shipments of waste*", the transboundary movement of waste in this case being the despatch of the above-referenced asbestos waste from this State to Northern Ireland. The Movement Document is a very detailed document, too detailed to be recited in full in the within judgment. Suffice it to note that (1) it refers to the transportation of "*Waste asbestos (dusts and fibres)"* from this State to Northern Ireland, (2) certifies that as of 6th December, 2016, *inter alia*, the necessary consents were in place from the competent authorities of the two jurisdictions allowing the transboundary movement of the said waste, and (3) certifies that the waste transfer has been effected and completed on 9th December, 2016. But if the development that is the subject of the runway planning Permission commenced on 16th December, 2016, how can it be that on 9th December, 2016, the asbestos waste from the "*Runway Enabling Works*" referenced in the Waste Disposal/Recovery Certificate was lawfully despatched by Rilta to a waste disposal entity in Northern Ireland?

37. In Mr Dee's final affidavit, he avers, *inter alia*, as follows:

> *"[W]hile there may have been technical non-compliance, when the WMP was submitted to FCC it was approved without any alteration whatsoever. This surely indicates that Fingal were satisfied with the measures outlined therein and I am at a loss as to how Mr. Farry could conclude otherwise….*
>
> *At paragraph 18 of his affidavit Mr. Farry refers to the absence of technical reports, which indicate the various types of waste that were removed from site and disposed of at licensed disposal facilities. There was no requirement to prepare technical reports. In any event all receipts and documentation of the handling of waste have been previously exhibited by me.*
>
> *I say and believe that the removal of asbestos containing materials, which were removed by a specialist contractor, did not constitute works and therefore no development occurred by virtue of the removal of the materials."*

38. A couple of points arise. First, the averment that "[W]*hile there may have been technical non-compliance*" is viewed by the court as a concession that there was in fact non-compliance with Condition 12(h) (and patently there was). Second, the averment that "*the removal of asbestos containing materials, which were removed by a specialist contractor, did not constitute works and*

therefore no development occurred by virtue of the removal of the materials" is, with respect, entirely wanting in credibility. If the court looks to the waste management plan, it states, *inter alia*, under the heading "*DEMOLITION PROCEDURES*" that

> "*There is a need for demolition of derelict buildings, the following steps will be followed:*

Demolition Activity Sequence	*General Description*

...

Inventory of Hazardous Wastes	*e.g. Asbestos, etc.*

...

Removal of Asbestos/Hazardous Materials	*e.g. Application of H&S Procedures*

39. What Mr Dee is averring in the above-quoted averment is, in effect, that the procedures described in the above-quoted extract from the waste management plan do not comprise "*works*" within the meaning of the Act of 2000.

XV

Materiality

40. A term much-used in the within proceedings is the materiality (or otherwise) of what the applicants have come to court complaining about. In this regard, it is useful to consider certain of the affidavit evidence before the court. In his second affidavit, Mr Dee, a town planner with Dublin Airport Authority, avers, *inter alia*, as follows:

> *"I note that…Ms. Merriman – who as I understand it is not a planner – disputes my opinion that the failure to submit the WMP to Fingal County Council for agreement between 16 December 2016 and 10 February 2017 falls into the category of an immaterial breach of planning condition. I reiterate that this opinion is based on my professional experience and expertise as a planner….*
>
> *In this context I also wish to make three further observations….*
>
> *First…I use the date 10 February 2017 in this context because the obligation which condition no. 12 placed on the daa was to submit the relevant material to the planning authority for written agreement.*
>
> *Second, it is not case that the majority of works to which the waste management plan related had been completed by the time I submitted the WMP to Fingal County Council, as Ms. Merriman suggests…nor that the entirety of the development to which the WMP related had been completed at that time, as she seems to suggest….*
>
> *While it is the case that demolition works were carried out prior to submission of the waste management plan to Fingal County Council, these works did not commence until 16th December 2016. For the reasons already explained in my previous affidavit and above, the commencement of these works on that date was in the bona fide belief that all aspects of the 'prior to commencement of development' conditions had been complied with."*

41. Leaving aside for a moment the issue concerning the Rilta materials, the court accepts that, through oversight, Dublin Airport Authority was possessed of the *bona fide* belief to which reference was made, notwithstanding the content of the letter of 28th October, 2016; even Homer nods.

42. Mr Dee continues as follows in his affidavit evidence:

> *"With reference to Ms. Merriman's averment…in relation to asbestos it was necessary prior to commencement of the development works to first remove asbestos-containing materials identified in two areas on site. This was necessary in order to make the site safe in advance of the demolition works to be carried out on site. This entailed the safe removal by hand of asbestos-containing materials in cement roofing from a lean-to building and asbestos pipe gaskets from the former fire....facility area by a specialist firm and their appropriate disposal by Rilta Environmental Ltd"*

43. No date is mentioned when it comes to the just-referenced works (which are, presumably, the works of 2nd-9th December, 2016). Moreover, it does not appear from the evidence that Fingal County Council was apprised in February 2017 that there had been removal of asbestos waste up to that point in time. In this last regard, it has been contended by the applicants that there was a less than frank disclosure to Fingal County Council of the true circumstances that had prevailed in December 2016, the purported "*dishonesty*" of which is manifested by the reality that asbestos waste was removed from the runway development site prior to what the DAA chose to describe as the commencement of the development on 16th December, 2016. While the level of disclosure in February 2017 was, perhaps, less than exhaustive, in life matters are sometimes so for no other reason than that they are so. It would require rather more by way of evidence before the court could conclude that a want of frankness evidenced, let alone necessarily evidenced a lack of honesty. For the avoidance of doubt, the court emphasises that it finds no dishonesty to present in the evidence before it. In his affidavit evidence, Mr. Dee avers, *inter alia*, as follows:

> *"Ms. Merriman's contention that the failure to submit the WMP prior to 10 February 2017 was 'conscious, deliberate and calculated to assist the daa in obtaining the extension of the appropriate period of the planning permission' is not only untrue, but also completely illogical. It was certainly not in my personal interest, nor in the interests of my employer, that I omit to submit the WMP after it had been agreed between the DAA and the contractor, Roadbridge, on 12th December 2016. Moreover, such oversight could not logically – and did not assist the daa in securing an extension of the planning permission for the construction of the North Runway."*

44. The court notes and accepts this evidence.

XVI

Some Further Aspects of the Affidavit Evidence

(i) Determination of Fingal County Council to Facilitate Airport Extension?

45. Condition 12, it will be recalled, provides that "[p]*rior to commencement of development*" Dublin Airport Authority was to submit to Fingal County Council "for written agreement a comprehensive environmental protection plan to minimise the impacts of the construction processes". Focusing for a moment on the "Prior to commencement of development…" dimension of Condition 12, Ms Merriman, a member of the St Margaret's Concerned Residents Group avers, *inter alia* as follows, in her affidavit evidence:

> *"[B]y way of application dated 11 January 2017, the Respondent replied to Fingal County Council for an extension of duration of the aforesaid planning permission under Section 42 of the Planning and Development Act 2000, as amended. I say that in a letter from the Respondent dated 11 January 2017 attached to the Application for Extension of Duration of Permission Form, the Respondent expressly states that development on foot of the Planning Permission granted by An Bord Pleanála on 29 August 2007…commenced on Friday 16 December 2016.*
>
> [Ms Merriman then refers to such works as had been done.]
>
> *….They [the Dublin Airport Authority] represented that they had complied with Condition 12 and they relied on the works already done to justify not complying with the requirements of, in particular, the Habitats Directive.*
>
> [Ms Merriman refers then to the letter of 28th October, 2016, that issued from Fingal Council and to the executive deliberations within the Council that preceded the issuance of same]."

46. Under s.42 of PADA:

> *"On application to it in that behalf a planning authority shall, as regards a particular permission, extend the appropriate period by such additional period not exceeding 5 years as the authority considers requisite to enable the development to which the permission relates to be completed provided that each of the following requirements is complied with…*
>
> *(a) either –*
>
> *(i)* [it is not necessary to consider s.42(a)(i) because the answer of Dublin Airport Authority to Q.11 on the Extension Application form makes clear that s.42(a)(i) was not being invoked by it]…
>
> *or*
>
> (ii) *the authority is satisfied* [as to various matters, including]…
>
> *(IV) where the development has not commenced, that an environmental impact assessment, or an appropriate assessment, or both of those assessments, if required, was or were carried out before the permission was granted."*

47. What Ms Merriman seems to be getting at in her affidavit evidence is that the Council wished to find, and was willing to help to create, a situation in which development could be said to have commenced and thus in which s.42(a)(ii)(IV) could not come into play. Thus, avers, Ms Merriman:

> *"I say that we are completely dismayed and disappointed with Fingal County Council who are determined to facilitate this airport extension at our expense as is clear from the agreement reached with the Respondent in respect of Condition 12(h) only a few days after we raised legitimate and well-founded concerns regarding compliance with same vis our solicitors."*

48. The court respectfully does not see from the evidence before it that Fingal County Council is guilty of the machination contended for.

(ii) Oversight by Dublin Airport Authority.

49. In his affidavit evidence, Mr Dee avers, *inter alia*, as follows under the heading "*Oversight in relation to the submission of the WMP to Fingal Co. Council":*

> *"The WMP was not submitted to the planning authority for its approval after the plan had been agreed between the daa and Roadbridge on 12 December 2016. This was entirely due to an oversight on my part, which occurred in the context of the overall complexity of this project and the fourteen other conditions requiring matters to be attended to prior to the commencement of development, including the eight other aspects of Condition no. 12."*

50. The just-quoted averment features a noble admission on the part of Mr Dee. However, it seems to the court that Mr Dee takes too much onto his shoulders. For Mr Dee's averment reflects in truth a remarkable oversight on the part of Dublin Airport Authority. It is Dublin Airport Authority which (1) made its compliance submission to Fingal County Council on 6th October, 2016, (2) was advised in the Council's letter of 28th October, 2016, that the compliance submission was deemed by the Council to be adequate, save only as regards Condition 12(h), and (3) so structured its affairs that when the waste management plan was agreed with Roadbridge, it did not (to borrow from Condition 12) "*submit to the planning authority for written agreement*" that waste management agreement until February 2017, a timeframe which was clearly not (to borrow again from Condition 12) "[p]*rior to commencement of development*". And yet the court accepts that remarkable oversights can occur, and that all persons, institutions and individuals, are capable of innocent error, even the level of innocent error to which Mr Dee avers – and the court accepts that the error arising in this regard was innocent and neither contrived nor malign, as was the related error that arose "*when I* [Mr Dee later avers] *lodged the daa's application for an extension of the duration of the planning permission with Fingal County Council on 11 January 2017…in the genuine [but entirely mistaken] belief that the daa had fully complied with all 'prior to commencement of development' conditions."*

(iii) Locus Standi.

51. There is no *locus standi* requirement under the express terms of s.160 which provides, *inter alia*, as follows

> *"(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority* **or any other person***,* **whether or not the person has an interest in the land***, by order require any person to do or not to do, or to cease to do, as the case may be,*

anything that the Court considers necessary and specifies in the order…" [Emphasis added].

52. Of course the courts have discretion to refuse relief where, for example, applicants are vexatious or meddlesome litigants. (See, e.g., *Stafford v. Roadstone Ltd* [1980] 1 I.L.R.M. 1, 19). However, the applicants in the within proceedings are anything but vexatious or meddlesome. In terms of the applicants' *bona fides* as regards the bringing of the within application, which *bona fides* are entirely accepted by the court, Ms Merriman avers as follows:

> *"The issues involved in Condition No. 12(h) are matters of enormous significance to the residents of St. Margaret's including me, in particular given the likely impact of waste on our amenities and the value of our dwellings and our health and well being in general. Having regard to the area of runway proposed there is an enormous amount of material to be removed and the process of removing that waste, the storage of it on-site, the likely impacts relating to waste during construction and what will happen thereafter and how the waste is to be treated are all matters of enormous significance and potentially extraordinarily adverse effects on the residents' dwellings….[T]he permission envisages the demolition of buildings, many of which contain hazardous or dangerous waste, all occurring on lands adjacent to our homes and where the manner in which this waste is dealt with is of enormous concern and which works of demolition and waste removal have all been carried out without any reference to and in non-compliance with Condition No. 12 of the permission….*
>
> [G]*iven the fact that the commencement of the development and unauthorised works by the DAA in this regard was relied upon by the DAA in order to secure an extension of the appropriate period of planning permission insofar as commencement of the development effectively circumvented the requirement to carry out an Appropriate Assessment. It appears from all of the documentation exhibited in these proceedings and from what is available on the public planning file on Fingal County Council's website that the only reason that an Appropriate Assessment has not been carried out is because of the assertion by the developer of the commencement of the development as they assert that works which the DAA commenced on or about 16th December 2016 dis-apply the Habitats Directive. While more properly a matter for legal submissions, I say and believe and am so advised that, in circumstances of the kind as arise in this case whereby an Appropriate Assessment is required but has not been carried out, had the development not been commenced, then the DAA would not have been able to obtain an extension of the appropriate period of the planning permission as it is precluded by the statute. Moreover, insofar as Mr. Dee states…[in] his Affidavit that his oversight in submitting the Waste Management Plan to Fingal County Council did not result in any adverse environmental impact and that the achievement of Condition No. 12 was not put at risk, there is no documentary or other evidence exhibited by Mr. Dee in respect of this averment that might be said to corroborate or substantiate same, which I say effectively renders this point an unverifiable and bold assertion on the part of Mr. Dea. Indeed I believe the opposite is the case as the lack of any agreed controls on the demolition and disposal of waste, including hazardous waste, was a serious breach of the terms of the permission."*

XVII

Section 160

(i) Substance.

53. Section 160 of PADA provides, *inter alia*, as follows:

> *"(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:*
>
> *(a) that the unauthorised development is not carried out or continued;*
>
> *(b) in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;*
>
> *(c) that any development is carried out in conformity with–*
>
> *(i) in the case of a permission granted under this Act, the permission pertaining to that development or any condition to which the permission is subject…".*

(ii) Prospective Effect?

54. In *Morris v. Garvey* [1982] I.L.R.M. 177, the Supreme Court was concerned with the issue of whether, when (a) a person gets permission to carry out a development for which permission is required (at that time under s.24 of the Local Government (Planning and Development) Act 1963) and (b) that person proceeds to carry out the development without complying with the conditions attached to the permission, (c) the High Court had jurisdiction (then under s.27(2) of the Local Government (Planning and Development) Act 1976, a provision very similar to s.160 of PADA) (i) to order the demolition of building work done in breach of the permission, or (ii) was limited to issuing a jurisdiction restraining the person aforesaid from proceeding with the unauthorised development work.

55. Expounding on the ambit of s.27(2), Henchy J. observed, *inter alia*, as follows, at 179-80:

> *"S.27(2) is one of the most important and least understood or used provisions of the planning code. The section expressly recognised for the first time that a member of the public (as well as the planning authority), regardless of his not satisfying any of the qualifications based on property or propinquity or the like (which are usually required to justify bringing proceedings), once he discovers that a permitted developer is not complying with, or has not complied with, the conditions of the relevant development permission, may apply in the High Court for an order compelling the developer to do or not to do, or to cease to do, as the case may be, anything which the court considers necessary to ensure that the development is carried out in conformity with the permission and specifies in the order.*
>
> *The jurisdiction thus vested in the High Court is extremely wide. It recognises the fact, which has been stressed in other decisions of this Court, that in all planning matters there are three parties: the developer, the planning authority (or the*

Planning Board, in the case of an appeal) and the members of the public. Compliance with the statutory conditions for development is expressly recognised in s.27(2) to be the legitimate concern of any member of the public. We are all, as users or enjoyers of the environment in which we live, given a standing to go to court and to seek an order compelling those who have been given a development permission to carry out the development in accordance with the terms of that permission. And the court is given a discretion sufficiently wide to make whatever order is necessary to achieve that object.

If s.27(2) were to be treated as merely giving the court power to interdict a continuance of the development in an unauthorised manner, the new jurisdiction given by the subsection would be self-defeating and would run contrary to the expressed purpose of the subsection, which is, to ensure that the development is carried out in accordance with the permission. This Court has judicial notice, from what it has known to have happened in other cases, that developers who have contravened the conditions of the development permission and for motives which may be put down to expediency, avarice, thoughtfulness or disregard of the rights or amenities of neighbours or of the public generally, knowingly proceeded with unauthorised development at such a speed and to such an extent as they hoped would enable them to submit successfully that the court's discretion should not be exercised against them under s.27(2), on the ground that the undoing of the work done would cause them undue expense or trouble.

For my part, I would wish to make it clear that such conduct is not a good reason for not making an order requiring work carried out in such circumstance to be pulled down. When s.27(2) is invoked, the court becomes the guardian and supervisor of the carrying out of the permitted development according to its limitations, and in carrying out that function it must balance the duty and benefit of the developer under the permission as granted against the environmental and ecological rights and amenities of the public, present and future, particularly those closely or immediately affected by the contravention of the permission. It would require exceptional circumstances (such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship or such like extenuating or excusing factors) before the court should refrain from making whatever order (including an order for attachment for content in default of compliance) as is necessary to ensure that the development is carried out in conformity with the permission. An order merely restraining the developer from proceeding with the unpermitted work would not alone fail to achieve that aim but would often make matters worse by producing a part-completed structure which would be offensive to the eye as well as having the effect of devaluing neighbouring property.

In the present case, I wholeheartedly support the order of demolition made by Costello J."

56. To the court's mind, the above-quoted text, though concerned with s.27(2) of the Act of 1976, captures the purpose that the Oireachtas had when it enacted s.160 of PADA. The way s.160 works is as follows: if the court is satisfied that there has been unauthorised development (which, of course, may arise by reason of a breach of condition) the question arises as to what order the Court might make within the powers given to it by that section. Those powers are not restricted to the restraining of future rights; that is clear from the above-quoted passage.

(iii) Unauthorised Development.

57. Section 160 of PADA, as amended, concerns "*an unauthorised development*". Dublin Airport Authority maintains that, in the case at hand, no "*unauthorised development*" has taken place. It is therefore necessary to look at the precise terms of s.160, the substance of which has been recited above. The decisions of the Superior Courts in *Morris and Fortune (No 4)* support the submission made by counsel for the applicants that the court is empowered to make the declaration and order sought by the applicants in the within proceedings and detailed at the outset of this judgment. This is a matter that is returned to later below. However, of interest in this regard are the following averments of Mr Farry, a planning and development consultant engaged by the applicants[1]:

"Mr Dee…treats this case as an 'immaterial breach of planning condition'…I disagree with this view, partly because I can identify no legal or policy provision which excuses compliance with planning conditions on the basis that the breach is inconsequential. Three reasons are advanced by Mr Dee for classifying this error as immaterial, the first of which comprises the 'relatively short period of time involved', although I do not agree with his classification of a two-month period of construction and demolition operations on a large project in such a manner and indeed, Mr. Dee has accepted that this period of non-compliance with condition 12(h) would have been of greater duration if the Applicant had not notified the Respondent of this transgression….

The final factor prompting this 'immaterial' classification comprised the view that 'the oversight in submitting the WMP did not result in any adverse environmental impact' and I note the absence of any technical reports to substantiate this conclusion. In this regard, Mr Dee…specifically admits that the Respondent removed asbestos before the WMP had even been submitted to the Planning Authority for its consideration. I disagree with the related intimation, in the same paragraph, that the removal of toxic material is separate from the general construction and demolition process and the associated implication that the removal of hazardous waste could be undertaken without breaching the time clause in Condition 12 ('it was necessary, prior to commencement of the development works, to firstly remove asbestos')….

The Respondent's request to extend the life of this original permission confirmed that work had begun before its extension-of-duration application was lodged, with such operations comprising the establishment of a contractor's compound, the erection of site fencing, the removal of vegetation, tree-felling, demolition of several commercial buildings and furl-handling equipment, removal of physical infrastructure and all associated permitted works. I do not categorise such operations as trivial or immaterial and, notwithstanding the sheer scale of the proposal in hand I would otherwise class such work as a large project in itself. Indeed this works schedule is paraphrased from correspondence which accompanied the Respondent's extension-of-duration application which was submitted to the Council on 11th January 2017 and, as operations continued for a further month before the Planning Authority ultimately endorsed the WMP, the nature and extent of on-site activities could have expanded prior to the final endorsement of the WMP over a month later….

As works had been ongoing on-site for almost two months before the Respondent lodged a compliance submission pursuant to Condition 12(h) of the Board's order, the proposal which was contained therein invariably covered the previous period for which operations had already been ongoing and were thus presented to the Planning Authority as a fait accompli. I say that the Council's discretion to fully consider such details was reduced as a result of the sequence of events. I further say that, as there are no statutory timescales governing the analysis of reserved matters of this nature, decisions on such submissions often take several months to be determined and I note the unusually short period of five days between the lodgement of the plan and the Council's endorsement….

This assessment contains no evaluation as to the degree to which the WMP would comply with domestic and international waste management objectives and obligations…and no discussion as to the impact of the WMP on amenity or traffic safety which comprise the fundamental objectives underlying Condition 12….

Indeed, Mr Dee…acknowledges that works had been ongoing for a period before confition 12(h) was satisfied and suggests that, as the matter had been regularised before proceedings were instigated on 6 march 2017, 'there is no basis for the invocation of this Court's jurisdiction'. I interpret this as meaning that, as the problem had occurred in the past and had since been retrospectively resolved, the Court itself should accept the Respondent's noncompliance with the terms of its original permission as a fait accompli. Indeed, a similar approach is also advocated…[in] Mr. Dee's initial affidavit, wherein he avers that 'as of the date of the issue of these proceedings the Applicant was aware that the daa was deemed to have been in compliance with condition no 12(b)' which implies, to my mind, that the Applicant should not now query the Respondent's conduct in contravening condition 12, on the basis that nothing can now be done to rectify non-compliance with this requirement….

Experience also shows that a similar approach can be adopted by a planning authority where a compliance submission of this nature may not be inherently objectionable per se but where a different methodology might otherwise provide improved results."

[1] In passing, the court notes that Mr Farry is the only independent expert witness in the within application. It is true, having regard to *Galvin v. Murray* [2001] 2 ILRM 234, that Mr Dee is also an expert witness; however, he is an expert witness whose independence is naturally impacted by his employment.

XVIII

Some Case-Law of Relevance

(i) Mahon v. Butler

[1998] 1 I.L.R.M. 284

58. This judgment is relied upon by Dublin Airport Authority in support of the contention that the court has no jurisdiction to grant the declaratory relief sought. It is a case that attracted a lot of public attention at the time it was decided. The facts underlying the case are as follows. 'U2', a popular music group, was due to visit Dublin and play two concerts at the old Lansdowne Road stadium at the end of August 1997. All of a sudden, in the last week of July, some local residents obtained what was in effect a *quia timet*-type injunction under s.27 of the Local Government (Planning and Development) Act 1976, i.e. an injunction to restrain wrongful acts which were imminent but which had not yet commenced. Insofar as the *quia timet* aspect of the case is concerned, matters have moved on because the way in which section 160 is worded now allows for quia timet relief. However, the principles established by the Supreme Court in *Mahon*, by reference to *quia timet* relief, in a successful appeal against the granting of the quia timet-style injunction are of continuing application to whether the court has jurisdiction to grant the declaratory relief sought in the within application.

59. Turning to the judgment of the Supreme Court, three preliminary issues are identified by Denham J. for the Supreme Court, at 287, two of which are of interest in the context of the within application, *viz*. that (1) s.27 did not permit an application for an anticipated breach of the planning code, and (2) (this being the point of most direct relevance to the within application and one that is comprehensively addressed by McKechnie J.'s recent comments in Murray as to the interplay between equity and s.160) that the remedy under s. 27 was a specific statutory injunction; it was not an injunction under the general equitable jurisdiction of the High Court and consequently it does not encompass that jurisdiction. Denham J., at 289 concludes (re. point (1)) that s.27 *"refers plainly to events occurring in the present or which have occurred in the past. There is no reference to future events*." As regards point (2), Denham J. observes as follows, at 290:

"The trustees' third preliminary submission was that the remedy under s. 27 is a statutory injunction which is distinct from the general equitable jurisdiction of the High Court and that the learned High Court judge had no jurisdiction to expand the statute by invoking the court's equitable jurisdiction. I am satisfied that this is correct. S. 27 provides a precise statutory remedy. In making an order under that section the court cannot exceed the jurisdiction conferred by that section. It is a clear and comprehensive code which should be construed strictly. The court has a discretion to exercise in a s. 27 application but that is within the ambit of the section and is not to extend the jurisdiction. The learned High Court judge fell into error in construing the section so as to empower the court:

> *… to exercise its equitable jurisdiction to prohibit the anticipated commission of those wrongful acts." (See the decision of Gannon J in* Dublin County Council v. Kirby *[1985] ILRM 325, and* Dunnes Stores Ltd v. MANDATE *[1996] 1 ILRM 384)."*

60. Having regard to the just-quoted reasoning, counsel for Dublin Airport Authority makes the following submission:

"[B]*y analogy section 160, provides a precise statutory remedy. The court can't exceed the jurisdiction conferred by the section, it is a clear and comprehensive code, to be construed strictly. Now, the references here are to the court's 'equitable jurisdiction'. We see when we come to Mr. Justice Hogan's comments in Fortune that he's talking about the inherent jurisdiction, the jurisdiction of the Court under Article 34 of the Constitution. The same principles apply. The Supreme Court is saying in terms that the predecessor of section 160 is a precise remedy and that the court cannot exceed the jurisdiction conferred by the section. If you can't expand the wording of section 27 pre the 2000 Act to allow for quia timet injunctions, likewise we would say you can't expand it to allow for declaratory applications."*

61. The court respectfully does not accept this reasoning, preferring instead the logic deployed in this regard by Hogan J., at paras. 8-12 of his judgment in *Fortune* (No 4) (considered later below), which logic, as the court shows in its consideration (also later below) of the decision of the Supreme Court in *Murray*, has been neither displaced nor repudiated by the Supreme Court and thus remains binding on this Court. As to the suggestion by counsel for Dublin Airport Authority that if Hogan J. is correct in the reasoning at paras. 8-12 of his judgment, this could yield a (perceived) jurisdictional anomaly whereby two courts enjoying ostensibly concurrent jurisdiction would each have available a non-identical panoply of reliefs, so be it if so: that is a matter which can be resolved by legislating further as regards the jurisdiction of the Circuit Court, if thought necessary.

(ii) Sweetman v. Shell E&P Ireland Ltd

62. This is one of several cases that arose as a result of the commercial exploitation of the Corrib gas-field off County Mayo. Condition 37 of the planning permission required Shell to provide security to Mayo County Council for the cost of ensuring satisfactory reinstatement of the site. Shell proposed furnishing a guarantee from its parent company to cover the cost of the reinstatement. Mr Sweetman argued that such a guarantee was not 'security' within the meaning of the planning permission. In the High Court, Smyth J. refused the relief sought. At para. 52 he states:

> *"I find as a fact and as a matter of law that there has been substantial compliance with condition 37. Undoubtedly there remains outstanding…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",*

and at para.60, Smyth J. further observes, *inter alia*, as follows:

> *"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…occurred."*

63. A number of points can be made by reference to this observation and the facts at play in the within application:

> (1) The case was one concerned with the provision of security, not with the doing of works.
>
> (2) Smyth J. found there to be "*substantial compliance with condition 37".* Here there has been the clearest breach of Condition 12(h).
>
> (3) Smyth J. found that there had been "*substantial compliance with condition 37", i.e.* he focused and was satisfied to focus on compliance with an individual condition within the context of a planning permission as a whole.
>
> (4) the requirement in Condition 12 that the matters to which it refers be done "[p]*rior to commencement of development*" was a requirement imposed by An Bord Pleanála, a body that is notably expert in planning matters and the decisions of which are entitled to no little deference and respect by the court. It seems to the court notable that An Bord Pleanála did not, in Condition 12(h), require that the matters referred to therein be attended to 'in or about or sometime around or after the commencement of development'; it required that they be attended to "[p]*rior to commencement of the development".*
>
> (5) Condition 12(h) was not, unlike it seems the situation that presented as regards Condition 37 in *Sweetman*, a condition which had been part-satisfied and not fully completed. Condition 12(h) was plainly and simply breached: what it required to be done "[p]*rior to commencement of development*" was not so done.
>
> (6) to the extent that Smyth J. may have been animated (if he was animated) by a sense that he was presented with a third-party who was something of an intrusive protestor, that is not a feature of the within proceedings: the applicants in the within proceedings fall to be intimately affected by the new runway development.
>
> (7) it is clear, from his observations at para. 60 of his judgment, that Smyth J. considered the applicant (and/or some unidentified body of opponents to the development) and the litigation that he (and/or they) had brought, to have contributed to such failing as had arisen. Nothing of the like presents here. Dublin Airport Authority alone erred, freely admits that it alone erred, and, it seems, only recognised this error on its part when it was drawn to its attention by the applicants to the within application.
>
> (8) Smyth J. found that the substance of what was required by Condition 37 to be done "*prior to developments*" had been done, even if the detail had yet to be finalised. Here, by contrast, what was required to be done "[p]*rior to commencement of development"* was just not done.

64. Smyth J. moves on later in his judgment to consider, *inter alia*, the type of factors to which the court may have regard in deciding an application such as that now presenting. Though his observations are of interest, they seem, with respect, to have been rather overshadowed by the comprehensive judgment of McKechnie J. in the recent decision of the Supreme Court in *Murray* which, at this time, is the primary authority in this regard and is of course followed by the court in the within judgment.

65. The decision in *Sweetman* was later the subject of unsuccessful appeal to the Supreme Court (see *Sweetman v. Shell E&P Ireland Ltd* [2016] IESC 2). Notably, in her judgment for the Supreme Court, Dunne J. observes as follows, at 23:

> "*I am satisfied having regard to decisions such as* Mountbrook Homes Limited v. Oldcourt Developments Limited *[[2005] IEHC 171] and* Conroy v. Craddock *[2007] IEHC 336 that notwithstanding the fact that a pre-commencement condition requiring agreement between the developer and the planning authority on a particular issue has not been concluded but where there is subsequent agreement, a court will not generally grant relief pursuant to s.160 of the Act."*

66. The court does not read the just-quoted statement to mean that a court would never give relief under s.160 where there is *post factum* compliance but rather to mean no more and no less than what it says, viz. that the courts will not generally grant relief (a perhaps surprisingly sweeping observation) but remain free so to do on the facts of any one case.

(iii) Conroy v. Craddock

[2007] IEHC 336

67. These were s.160 proceedings arising from the development of lands in a business park, with the applicants seeking to restrain the respondents and their servants, *etc*. from carrying out development other than in accordance with a particular planning permission. The case was relied on by counsel for Dublin Airport Authority in particular to address two issues presenting in the within application: (1) can there be post-commencement compliance with a condition required to be satisfied pre-commencement; and (2) the relevance of substantial compliance in the context of (1). When it comes to these issues, Dunne J. observes, *inter alia*, as follows, at 11-12:

"It goes without saying that there has been a breach of condition 5 in the sense that no plans were submitted before the commencement of the development. It is clear that there can be belated compliance with a pre-commencement condition as was acknowledged in the case of Mountbrook Homes Limited v. Oldcourt Developments Limited, High Court, Unreported, April 22nd, 2005. In this case it is not contested that revised floor level plans were submitted for approval of the Council and, as pointed out previously by letter dated 1st March, 2006, the same were approved. I accept that those plans show not a reduction but an increase in the floor level for the relevant units.

Whilst condition 5 spoke of the submission of revised plans showing a reduction of the finished floor level, it is clear that the detail of any such reduction was not specified and, accordingly, it seems to me that this was a detail which would have had to be considered by Amey and the Council in accordance with the provisions of s. 34(5) of the Planning and Development Act, 2000 as referred to in the letter of the 6th November 2002 from Amey to the Council. It is interesting to note that condition 5 did not specify in any way the extent of any possible reduction.

In consideration of the issue as to whether there has been a prima facie breach of condition 5, I am satisfied that it is necessary to look at the purpose of condition 5. Its purpose was to achieve the reduction of the visual impact of the units on the M9 motorway in the interests of visual amenity. I do not think that this condition can be considered without reference to conditions 6 and 7. The approach of the Council was also to consider condition 5 in conjunction with conditions 6 and 7 as set out in the letter of the 1st March 2006. The Council is satisfied as to the effect of the finished floor levels having regard to the visual impact on the motorway. In all the circumstances, I have come to the conclusion that there has been substantial compliance with condition 5 of the planning permission."

68. This is a case that is clearly favourable to Dublin Airport Authority.

(iv) Dandean Ltd v. Talebury Properties Ltd

[2008] IEHC 422

69. In *Dandean*, s.160 proceedings were taken by the applicant trader, which traded a business adjacent to lands which were being developed by the respondent trader. Although a number of complaints were made, Conditions 17 and 25 of the relevant planning permission were the subject of especial focus by the court in its judgment. Condition 17 required the developer to "*facilitate the Planning Authority in the archaeological appraisal of the site and in preserving and recording or otherwise protecting archaeological materials or features which might exist within the site*" and to "*notify the Planning Authority in writing at least four weeks prior to the commencement of any site operation...and to employ a qualified archaeologist prior to the commencement of the development*." Condition 25 perhaps resonates more with the condition that is at issue in the within application. Thus it required that "*Prior to the commencement of development a construction management plan shall be submitted to the Planning Authority for written agreement. This plan shall provide details of intended construction practice for the development…*". In the High Court, Edwards J., in an ex tempore judgment, decided not to grant the relief sought, observing, *inter alia*, as follows:

"23. The case is made on behalf of the respondents that they did submit a construction management plan prior to the commencement of development. There is some dispute between the parties as to when in fact development commenced, but I am not convinced that anything very much turns on it. If it is the case that the applicants are correct rather than the respondents, and the applicants contend for a somewhat earlier date, it is clear to me that such works as were taking place were preparatory works, but the main construction works had not commenced before the date contended for by the respondents. The construction management plan is primarily intended to address concerns during the main construction phase, though, of course, it may also be relevant to the pre-construction phase. On balance, I am of the view that the respondents have complied with their requirement to submit a plan for agreement, and that they submitted it at a very early stage. It is quite clear from the document that has been exhibited before me that it is a very comprehensive and detailed document.

24. The plan submitted has not been agreed, but that is not the fault of the respondents. They have submitted their document to the Planning Authority in accordance with the condition and they are awaiting the response the Planning Authority. There is reason to believe that the relevant response will be forthcoming before too long. Correspondence was exhibited before me earlier this week indicating that Drogheda Council is waiting the observations of Louth County Council before responding to the respondents.

25. In all the circumstances, I am not satisfied that there has been a breach of condition No. 25. I think the respondents have done what is expected of them pursuant to the condition. They have prepared a very thorough plan and they have submitted it. I do not interpret the condition as requiring that they must await the agreement of the Planning Authority before proceeding. Rather, I accept the legal submissions of the respondents that the respondents' obligations are fulfilled by the submission of the plan. Obviously, if on receipt of that plan the Local Authority had communicated a desire to the developer not to proceed pending the resolution of some significant concern that would be a different matter. But, in this particular instance, there has been no such communication and the attitude of the Local Authority is that they have no concerns under this heading. So I do not consider that there is a breach of condition No. 25. If there has been a breach, if I am wrong about that, I would take the view that the breach is technical in nature and that it is not a significant or material breach in the circumstances of this case.

26. With respect to condition No. 17, it is accepted by the respondents that there was a breach of a technical nature in respect of that condition. However, since the commencement of this case the Local Authority has confirmed that there has been full compliance with condition No. 17. There was very substantial compliance in any event up to that point as far as the Court is concerned. What the condition required was that the Planning Authority be notified prior to the commencement of any site operation. The notice required had to be in writing and four weeks was required.

…

31. [Edwards J. was concerned here, and in para.32, with Condition 17.] *It is true that no such agreement was arrived at prior to the commencement of construction works. To some extent the reason for that was that Drogheda Borough Council, although it was the relevant Planning Authority, delegated consideration of the archaeological report to a third party agency, i.e. to a section of the Department of the Environment. They were apparently awaiting a response from that agency.*

32. Be all that as it may the Court was informed that, subsequent to the commencement of this case, the planning

authority has heard back from the relevant experts and they have communicated to the first-named respondent that they regard condition No. 17 as having been fully complied with. So if there were breaches at all of condition 17, and there were I think some technical breaches of condition No. 17, that is all that they were, namely technical breaches. The objective of the condition has been fulfilled. Appropriate steps were taken and continue to be taken to conserve the archaeological heritage of the site, and to secure the preservation of any remains which may exist within the site. So I think that at this point the complaint made with respect to technical breaches arising in relation to condition No. 17 is to some extent academic.

…

36. With respect to the conduct of the respondent, I am satisfied that the respondent has acted at all times responsibly. I am impressed by the fact that the Local Authority supports the respondent. I am impressed by the fact that the Local Authority has no concerns about whether or not the respondent is a responsible developer and has not thought it necessary or appropriate that they should take any kind of action against the respondent. Moreover, it is quite clear from the evidence before me that to the extent that there were defaults they were, in almost in every instance, to do with the fact that the respondent was waiting to hear back from the Planning Authority. Where plans were required to be submitted, they were in general submitted. Where reports were required to be submitted, they were in general submitted. In very many of the instances complained of, the only outstanding matter was that a formal response was awaited from the Planning Authority in circumstances where there had been no informal intimation of a likely or possible problem."

70. In the above-quoted text, Edwards J. has clear regard to the views of the local authority. In this case, the local authority is not a party. Moreover, Edwards J. finds that where "*there were defaults they were, in almost in every instance, to do with the fact that the respondent was waiting to hear back from the Planning Authority*." Nothing similar presents here: Dublin Airport Authority is fully and solely responsible for its lack of compliance with Condition 12(h). Neither Fingal County Council nor the applicants were in any way responsible for that. In fact, each at different times had to remind Dublin Airport Authority of Condition 12(h).

(v) Boliden Tara Mines Ltd v. Cosgrove and ors

[2010] IESC 62

71. This is a case which involved an application for rectification of a deed of amendment to a pension scheme. The High Court refused the application, being sceptical about the evidence which had been produced on the part of the parties seeking rectification, notwithstanding the absence of any contradictory evidence. Successful appeal was made to the Supreme Court, Hardiman J. observing as follows, at 17-18 under the heading "*Rectification and questions of Evidence":*

"The issues which arose on the trial of this matter in the High Court were exclusively issues of evidence. The representative defendant, who opposed the granting of the relief sought, did not contradict any of the deponents who swore affidavits on behalf of the plaintiff on their evidence. He did not put forward contradictory evidence himself.

In the words of the learned trial judge…

'The principal ground upon which the application for rectification is opposed on behalf of the representative beneficiary is that the evidence relied on by the plaintiff and supported by I.P.T. and the current trustees to establish an intention of the company in I.P.T. to exclude I.C.P. beneficiaries from the amendment…falls short of the 'convincing proof' or 'cogent evidence' required in accordance with the principles set out above."

It cannot be too strongly emphasised that where evidence is presented on affidavit, a party who wishes to contradict such evidence must serve a Notice of Intention to Cross-Examine. In a case tried on affidavit, it is not otherwise possible to choose between two conflicting versions of facts which may have been deposed to. In a case where there is no contradictory evidence, an attack on the evidence which is before the Court must include cross-examination unless the contradicting party is prepared to rely wholly on a submission that the plaintiff has not made out its case even taking the evidence it has produced at its height."

72. Counsel for Dublin Airport Authority suggests that *Boliden* is of relevance in the within proceedings because of the scepticism expressed by counsel for the applicants as to Mr Dee's evidence. This is accepted by the court. Counsel for the applicants contends that it is a matter for the court to interpret the documentary evidence and the implications arising from the exhibits placed before it, that if the court looks to Mr. Dee's affidavit evidence, he avers, *inter alia*, that "[I]*t was necessary, prior to the commencement of the development works, to first remove asbestos-containing materials identified in two areas on site*", and yet the exhibits proven by Mr. Dee show that there was a disposal of hazardous waste before the commencement of the works that have been deposed to as having been commenced on 15th/16th December. But that, reduced to a nutshell, involves counsel for the applicants urging on the court that Mr Dee's affidavit evidence is to be disbelieved in the absence of contradicting affidavit evidence from the applicants. That is what Hardiman J. emphatically asserted in *Boliden* is a process that in procedural and evidential terms does not suffice. To borrow again from the judgment of Hardiman J., "*The issues which arose on the trial of this matter* [in *Boliden* and, as it happens, in the within proceedings]…were exclusively issues of evidence….*In a case where there is no contradictory evidence, an attack on the evidence which is before the Court must include cross-examination unless the contradicting party is prepared to rely wholly on a submission that the plaintiff has not made out its case even taking the evidence it has produced at its height."* There is no evidence before the court to contradict the evidence as to the date of commencement of the works. There are particularly skilful submissions made by counsel for the applicants, but no evidence. And so the court finds on the affidavit evidence before it, and having due regard to the binding judgment of Hardiman J. in *Boliden*, that the works in this case commenced on 16th December, 2016.

(vi) Wicklow County Council v. Fortune (No 4)

[2014] IEHC 267

73. This was a s.160 application in which the issue that arose was whether a formal declaration should be granted to the effect that a small chalet constructed by Ms Fortune without planning permission had been illegally constructed. Counsel for Ms Fortune argued that the court had no jurisdiction in s.160 proceedings to grant such a declaration. Counsel for the Council contended that it was appropriate that the court should grant such a declaration in order fully to give effect to the letter and spirit in certain related proceedings in which the Council and Ms Fortune had been joined. Per Hogan J., at paras. 8–12:

"8. It is true that s.160(1) of the 2000 Act does not expressly vest the court with a jurisdiction to grant a declaration to the effect that a development was unauthorised. Yet here it may be recalled that s.160 is simply a lex specialis which simply gives the court a wider jurisdiction to grant an injunction in respect of unauthorised development in planning cases than might have been the case under the ordinary law.

9. The statutory power to grant an injunction is found in s. 28(8) of the Supreme Court of Judicature (Ireland) Act 1877 ('the 1877 Act'). Although that sub-section does not expressly empower the court to grant a declaration in lieu of granting an injunction, it has never been doubted but that the courts could make such a declaration in such circumstances. After all, both the injunction and the declaration were regarded as independent and, to some degree and in certain circumstances, interchangeable remedies developed by the Court of Chancery in the decades leading up to the creation of one unified High Court by the (English) Supreme court of Judicature Act 1873 and, in Ireland, by the 1877 Act….It may be that, in strictness, even if the remedy was developed by the Victorian Chancery judges, a declaratory judgment has its origins in statute and rules of court rather than equity as such, so that 'it is not true equitable relief''…..

10. What is clear, however, is that the first general statutory recognition of the power to grant a declaration which was contained in the s.155 of the Chancery (Ireland) Act 1867 – which stated that no action should be open to the objection that a merely declaratory order was sought thereby – acknowledged this remedy as an independent and free standing judicial power. Although this section was subsequently repealed, the actual language of s.155 of the 1867 Act is now reflected in the wording of the present O.19, r.29 of the Rules of the Superior Courts 1986 and the principle is now one which has been firmly embedded in our legal system for well over a century.

11. In any event, the declaration is simply an essential aspect of this Court's general and full original jurisdiction. After all, Article 34.3.1 of the Constitution provides that this Court shall have a 'full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.' If this Court [cannot] grant a declaration of right in an appropriate case, it is hard to see how this constitutional mandate 'to determine all matters and questions' could properly be fulfilled and this is so even when this Court is sitting (as here) in its appellate capacity.

12. Moreover, as I pointed out in Albion Properties Ltd v. Moonblast Ltd [2011] IEHC 107…the express language of Article 40.3.2 of the Constitution requires the courts to furnish an adequate and effective remedy."

74. The court considers below how the decision in *Fortune (No. 4)* has been received in subsequent case-law. However, the court accepts *Fortune (No. 4)* as continuing and binding authority for the proposition that it is open to the court to grant the declaratory relief sought by the applicants in their notice of motion.

(vii) Meath County Council v. Murray

[2017] IESC 25

75. This case involved an unsuccessful appeal by a developer in respect of an order under s.160, requiring the removal of a house which constituted an unauthorised development. The Murrays had applied for permission to build a family home, and that application was refused. Within six months thereafter they constructed a house which was twice the size of that for which permission had been refused, and moved into it. The planning authority threatened enforcement unless demolition took place. An unsuccessful application for retention occurred. A further application for a slimmed-down version of the construction was likewise unsuccessful. Section 160 proceedings ensued, with the trial judge characterising the breach in question as flagrant and making an order for demolition. Four aspects of the judgment of McKechnie J. for the Supreme Court seem worthy of particular note in the context of the case at hand.

76. First, McKechnie J.'s consideration as to "*what way, if any, equitable principles influence the operation of the discretion contained within section 160*." (para.74). In this part of his judgment, the point that McKechnie J. was keen to emphasise that judgments "*equating section 160 with the exercise of an equitable jurisdiction*" are not correct to the extent that they make such an equation. Per McKechnie J., at paras. 76-77:

"[T]he separate and distinctive nature of the section must be maintained….This very point, namely that the statutory injunction had a basis distinct from the general equitable jurisdiction of the High Court, was made and accepted in Mahon v. Butler *[1997] 3 I.R. 369. Denham J., in giving judgment for this Court, held that the learned trial judge fell into error in construing the section so as to empower the court 'to exercise its equitable jurisdiction to prohibit the anticipated commission of those wrongful acts.' She went on to acknowledge the existence of a discretion, but pointed out that such could only be found within the parameters of the section itself. In other words, external considerations based on a general equitable jurisdiction, could not be used to extend, alter or modify what the section, correctly construed, give rise to. I respectfully agree with that decision."*

77. So to the extent that there is judicial discretion exercisable (and there is) that discretion exists and falls to be applied within the parameters of s.160. Section 160 does not hand the wand of equity of the courts and direct or permit the courts to wave that wand as they will.

78. Second, following an analysis of case-law, McKechnie J., at paras. 90-91, under the heading "*Factors to be Considered*" identifies a helpful, albeit not exhaustive, list of the factors which play into the exercise of such discretion as a court enjoys in the context of s.160, and makes some related comment:

"From a consideration of the case law, one can readily identify, inter alia, the following considerations:

(i) The nature of the breach: ranging from minor, technical, and inconsequential up to material, significant and gross;

(ii) The conduct of the infringer: his attitude to planning control and his engagement or lack thereof with that process:

- *Acting in good faith, whilst important, will not necessarily excuse him from a s. 160 order,*
- *Acting mala fides may presumptively subject him to such an order;*

(iii) The reason for the infringement: this may range from general mistake, through to indifference, and up to culpable disregard;

(iv) The attitude of planning authority: whilst important, this factor will not necessarily be decisive;

(v) The public interest in upholding the integrity of the planning and development system;

(vi) The public interest, such as:

- *Employment for those beyond the individual transgressors, or*
- *The importance of the underlying structure/activity, for example, infrastructural facilities or services.*

(vii) The conduct and, if appropriate, personal circumstances of the applicant;

(viii) The issue of delay, even within the statutory period, and of acquiescence;

(ix) The personal circumstances of the respondent; and

(x) The consequences of any such order, including the hardship and financial impact on the respondent and third parties,

91. The weight to be attributed to each factor will be determined by the circumstances of a given case. Some, because of their importance, may influence whether an order is or is not in fact made: others, the scope, nature or effect of that order. This list is not in any way intended to be exhaustive, and it may well be that other matters might require consideration in an appropriate case…..However, the above list is generally representative of the type of factors which the judge will normally be called upon to consider."

79. Third, what McKechnie J. styles "*The Constitutional Argument*" (para. 92) and not, the court notes, '*The Constitutional Arguments', i.e.* there is one constitutional argument that is being addressed – and it is clear from para. 92 onwards that what McKechnie J. is concerned with is Hogan J.'s focus on the potential effect of Art.40.5 of the Constitution as a defence in the context of a s.160 application. It is in this context that McKechnie J. observes that "*Although I do not share the views of Hogan J. in the* Fortune *cases above discussed, I wish to acknowledge at the outset the legal and constitutional ingenuity that led him to the conclusion which he reached."* (para. 109). It is obvious from the paragraph in which the just-quoted text appears, and from the preceding and succeeding paragraphs that what McKechnie J. is concerned with in this context is the Art.40.5 logic deployed by Hogan J. in the *Fortune* cases, no more and no less. So, while a focus on the just-quoted sentence alone might suggest (the, in truth, unlikely to present scenario) that an appellate judge (McKechnie J.) is disagreeing in every conceivable respect and on every conceivable count with every single thing that a trial judge (Hogan J.) has said, a reading of the preceding and succeeding paragraphs of the judgment makes patently clear that this is not what McKechnie J. is about in his judgment in *Murray*. McKechnie J. disagrees with Hogan J.'s particular deployment of Art. 40.5; that is all. So when it comes to *Fortune (No. 4),* which was not the particular focus of *Murray*, though it would be caught by references to 'the *Fortune* cases', the judgment of McKechnie J. does not speak at all to those observations of Hogan J. to which the court has made reference in its consideration of *Fortune* and which remain binding on the court.

80. Fourth, criticism had been levelled at Hogan J. for having decided a novel point of law in an appeal from the Circuit Court. McKechnie J., at para.133 of his judgment, gives this criticism short shrift:

> "[A]*s to the appropriateness of deciding a novel point of law in a Circuit Appeal, I would say only this: it is both the legal and constitutional duty of each judge to determine all relevant issues raised before him, in whatever form they appear, once he has jurisdiction to do so. Hogan J. was therefore not only entitled but was obliged to deal with the points articulated on behalf of Mrs Fortune, however novel, complex or difficult they may have been."*

81. This is an observation that has a particular resonance in the within application. In the within application there is, as it happens, a novel point presenting in that this is a case where none of the counsel on either side has been able to unearth a case concerning the breach of a condition which related to environmental protection. So it is a new point, and the onus falls on the court to determine what relief, if any, should be granted.

82. In passing, the court notes that as the judgment of McKechnie J. in *Murray* contains a thorough consideration of the decision of Kearns P. in *Wicklow County Council v. Kinsella* [2015] IEHC 229 and its interplay with the Fortune cases, it does not seem necessary to the court to give the judgment in *Kinsella* separate consideration; it simply proceeds cognisant of the substance of same.

XIX

Some Statutory Provisions of Relevance

83. The court has been referred by counsel to various statutory provisions of relevance, including (1) the definitions of "*unauthorised development*", "*unauthorised works*", and "*works*" (s.2, PADA), (2) the definition of "*development*" (s.3, PADA), (3) the general obligation to obtain permission contained (s.32, PADA), (4) the provision as to the granting and refusal of permission (in s.34, PADA), and (5) the power to extend the appropriate period (s.42, PADA). It does not seem to the court to be necessary to recite the substance of those statutory provisions in the within judgment. It has had regard to those statutory provisions and such other provisions as are referred to in this judgment.

XX

The Importance of the Dublin Runway Development

84. Of relevance to the exercise of the court's discretion is the public interest in an infrastructural development such as the second runway and the financial consequences that might flow from any orders that the court might make. The court has been referred in

this regard to an affidavit of Mr Heffernan, the Chief Development Officer of Dublin Airport Authority. In his affidavit, Mr Heffernan avers, *inter alia*, as follows:

> *"The North Runway Project comprises a major infrastructural project entailing the construction of a new runway which will be 3.1km in length, together with all associated works at Dublin Airport ('the Project')…..*
>
> *The Project is one of the biggest capital infrastructure projects currently being implemented in the State. The development costs of the Project, including all design and construction costs, fees, levies and mitigation measures, is estimated at being in the region of €320,000,000….*
>
> *However, the Project is not just commercially significant in its own right – i.e., in terms of the value of commercial construction contracts and the creation of construction-related employment – but is also of fundamental importance to the economic development of the State as a whole. Dublin Airport is the principal gateway to Ireland….*
>
> *In August 2015, the Government, through the Department of Transport, Tourism and Sport, published a National Aviation Policy for Ireland ('NAP')….*
>
> *The NAP includes among its goals the enhancement of Ireland's connectivity and to maximise the contribution of the aviation sector to Ireland's economic growth and development. With specific reference to Dublin Airport, the NAP notes that the size and location of Dublin Airport distinguishes it from the other State airports and the current increases in the number of transfer passengers using the Airport represents a significant benefit to the broader economy. The NAP recognises that an opportunity now exists to develop Dublin Airport as a vibrant secondary hub, competing effectively with the UK and other European airports for the expanding global aviation services market, and also states that the support and promotion of Dublin Airport as a hub airport is an important means of maximising air access for the Irish economy….*
>
> *In this regard, the NAP goes on to note that it will be important that Dublin Airport has sufficient capacity, including a second, parallel runway, to facilitate its development as a hub".*

85. Of course, Dublin Airport Authority does not contemplate that any of these commercial objectives fall properly to be attained in deliberate contravention of law. But it does contend, to borrow from its counsel, that "[1] Once there has been substantial compliance there's no unauthorised development and…[2] section 160 is a discretionary section. The Court has a broad discretion and in the exercise of the Court's discretion in considering whether or not to grant relief, the nature of the breach…is certainly relevant."

XXI

Conclusion

86. This is a case about the commencement of an enormous infrastructural development without there having been previous satisfaction, as required, of a planning condition that was intended to protect the community and the environment from the effects of that development. The fact that the events at issue in the within application are past events does not mean that the court's jurisdiction under s.160 falls away. Nor does it mean that the making of an order of any type becomes some sort of a *quia timet* order. Moreover, a careful consideration of the decision of the Supreme Court in *Murray* shows (as demonstrated above) that the court, when it comes to the High Court decision of Hogan J. in *Fortune (No. 4),* continues to be presented with binding precedent to the effect that the court may grant the type of declaratory relief that is sought by the applicants; that binding precedent has not been disavowed by any of the other jurisprudence that has been opened to the court. In deciding whether or not to grant any or all of the declaratory reliefs sought, the court has been influenced, in particular, by the following factual and legal considerations:

> (1) the breach presenting was remedied to the extent that it could be remedied before the commencement of the within proceedings; of course, as a temporal matter, Dublin Airport Authority can never do pre-commencement what was not done pre-commencement; however Dublin Airport Authority has, and had before the commencement of the within application, belatedly achieved in substance all that was required of it by the runway planning permission.
>
> (2) the applicants contend at this time that any breach of a planning condition requiring particular steps to be taken prior to the commencement of development can never be rectified once development has commenced. (Notably, however, their letter to Dublin Airport Authority on 9th February, 2017, contemplated that there *could* be post-commencement compliance with a pre-commencement decision). Clearly, a court cannot reverse time so that what was done post-commencement is re-ordered so as to have been done pre-commencement. However, the applicants are, with respect, not correct that this temporal impossibility has the result that breach of a pre-commencement decision carries the necessary consequence that an affected development necessarily falls to be treated as unauthorised development for all time. (see further *Sweetman* (SC)).
>
> (3) further to (2), there can be no 'necessary consequence' to a s.160 application; it is a discretionary jurisdiction and factors such as the inadvertent nature of the error, the *bona fides* of Dublin Airport Authority, and the public and national interest in having an additional runway at Dublin Airport, are all factors to be weighed into the exercise of the court's jurisdiction.
>
> (4) it is a well-established principle of Irish planning law that the courts will disregard immaterial deviations from a planning permission, or trivial or technical breaches of same. (*Sweetman*, (SC)). The question of the nature of any breach of planning permission is relevant on two levels. First, from a general perspective a breach may be sufficiently immaterial or trivial as not to amount to unauthorised development. Second, in the specific context of the discretionary nature of s.160 proceedings, even if there has been unauthorised development, the trivial or immaterial nature of any breach may be such that it is not appropriate to grant relief. In the court's view, the facts at issue in the within proceedings come into this second category.
>
> (5) the breach of condition presenting in the case at hand was temporary and although, again, one cannot change history and transform what was done post-commencement into something that was done pre-commencement, the substance of what was required has been remedied so that the essential substance of what was required has been achieved.
>
> (6) looked at in the overall context, the breach – notwithstanding the sincerity and depth of feeling on the part of the applicants – was not great in circumstances where, *inter alia*, the parameters of the waste management plan had been

laid down in the environmental protection plan submitted to, and agreed with, Fingal County Council in October 2016.

(7) for the reasons identified previously above, the court rejects the submissions that works commenced at start-December 2016 and accepts the affidavit evidence before it that the works in fact commenced on 16th December, 2016.

(7) the waste management plan was in operation from 16th December, 2016, notwithstanding that it was not agreed with Fingal County Council until February 2017. So any works from that date were captured by same.

(8) there is no evidence of bad faith on the part of Dublin Airport Authority; on the contrary, Dublin Airport Authority has acted in good faith, not least in acting swiftly to rectify its error when it was drawn to its attention; while case-law makes clear that the absence of bad faith is, in itself, not determinative, it is a factor that ought properly and sensibly to be weighed in aid by a court in arriving at a proper conclusion as to how properly to proceed in a s.160 application.

(9) further to (8), the court notes that Dublin Airport Authority's failing was one of innocent oversight. In this regard, the court notes that "*genuine mistake*" is a circumstance referred to by Henchy J. in *Morris*, at 180, as a circumstance in which a court could decline to make an order securing (or presumably concerning) conformity with a planning permission.

(10) the court notes that Fingal County Council appears from the evidence before the court to be benevolently disposed towards Dublin Airport Authority. The supportive stance of the local authority was a factor to which Edwards J. had regard in *Dandean*.

(11) there is no concern presenting from the facts at hand regarding the integrity of the planning system; if anything, the facts show Dublin Airport Authority to be a responsible developer that respects the planning system, takes inadvertent error seriously, and acts in good faith to remedy any such error as quickly as possible.

(12) the national strategic importance of the new runway development has been emphasised at the within proceedings; the new runway project is fundamental to the economic development of the State, and the grant of any relief casting a shadow over the legal status of such works as have been done would be inimical to the infrastructural development of the State and the public interest. That said, the court would lay down a marker in this regard. The court is a court of law tasked with ensuring the rule of law. Were it the case, for example, that Dublin Airport Authority had acted with heedless disregard of the law (and it did not), the national strategic importance of the runway would quickly flounder in the face of the undeniable public interest that the law should reign supreme and the rule of law prevail. The national strategic importance of the runway development enjoys the relevance that it does in the context of (not despite) all of the other factors of relevance that the court has identified in this judgment.

87. Laws matter; rules matter; but mistakes happen. There may be cases in which even an innocent mistake would yield a situation in which the administration of justice and the preservation of the rule of law would require a court to issue one or more declarations of the type that the applicants now before the court have come seeking. The court is entitled at law to make such declarations as the applicants have sought; however, it is also entitled in the proper exercise of its discretion under s.160 to refuse such reliefs as are sought by those who invoke that provision. For all of the reasons aforesaid, and notwithstanding the sympathy that the court has for the applicants and the unenviable predicament in which they find themselves, the court respectfully declines to grant any of the reliefs now sought.