Neutral Citation Number: [2010] IEHC 356

THE HIGH COURT

2009 724 JR

IN THE MATTER OF SECTION 50 OF THE PLANNING

AND DEVELOPMENT ACT 2000 (AS AMENDED BY SECTION 13

OF THE PLANNING AND DEVELOPMENT (STRATEGIC INFRASTRUCTURE) ACT 2006

BETWEEN

DEVILS GLEN EQUESTRIAN CENTRE LIMITED

APPLICANT

AND

WICKLOW COUNTY COUNCIL

RESPONDENT

Judgment of Mr. Justice Hedigan delivered on the 12th day of October, 2010.

1. Introduction

1.1 The applicant is the owner of an equestrian centre on lands at Devils Glen, Ashford, Co. Wicklow which is used for the training of horses and has been in operation for about 11 years. On the 16th of June 2009, the respondent, Wicklow County Council, issued an enforcement notice in relation to an "all weather gallops" constructed by the applicant at the equestrian centre. The applicant now seeks declaratory relief that this notice is invalid.

2. Background facts

2.1 In 2009, upon the advice of its planning experts that planning permission was not required, the applicant constructed at the equestrian centre an all weather training area for horses which was partly covered with an all weather surface (the "gallops"). The gallops comprise circa 2,000 metre long elongated loop on an approximately east-west alignment. From its starting point at the east end, the horses are galloped uphill for circa 1,000 metres; this part of the gallops consists of a proprietary material known as Ecotrack, an all weather material which is meant to simulate the grip that horses get on turf, laid on a draining bed comprised of stone overlaid by porous tarmacadam. The material itself consists of sand, fibres and rubber which have been molecularly coated in wax. The next 1,000 metre portion of the gallops is known as the bridle path. This has been surfaced with broken stone and "dirty pit-dash run" fine gravel, *i.e.* gravel that has not been washed and contains small quantities of dirt or clay.

2.2 On the 6th March, 2009 the respondent served a notice letter upon the applicant warning that the gallops was possibly an unauthorised development. The applicant responded by letter of the 11th March, 2009 stating that they had consulted an architect in relation to the construction of the gallops and had been unequivocally advised that the works were exempt development. The applicant further responded by way of a written submission, drafted by the applicant's architect, T. O'Phelan Design Limited dated the 1st April, 2009 arguing that the gallops was an exempt development under Article 6 and Class 10, Part 3, Schedule 2 of the Planning and Development Regulations 2001 (the 2001 Regulations). Class 10 provides exemption for:-

> "The erection of an unroofed fenced area for the exercising or training of horses or ponies together with a drainage bed or soft surface material to provide an all weather surface."

2.3 Prior to the issue of the enforcement notice, the respondent wrote a second warning letter on the 4th June, 2009 (the second warning letter) to the applicant. It provided as follows:-

> "The development of the subject "all weather gallops" conforms more to actual race and exercise track (includes in part at this stage the standard race course metal railings) then an enclosed paddock arena and thus it does not come within the exempted provisions of Class 10, Part 3, Schedule 2 of the Planning and Development Regulations 2001 (as amended). It is the opinion of the Planning Authority that the latter exemption provisions apply to enclosed paddock arenas that have a soft ground surface. A section of the "all weather gallops" that is defined as "gallops" on the site layout plans submitted with the said submission of T. O'Phelan Design Limited has been surfaced to date with a layer of tarmacadam. The provision of such a hard surface automatically places this development outside of the provisions of the said Class 10 exemption provisions, but in any event the nature (*i.e.* its appearance and layout) and extent (*i.e.* the cumulative length of the track of some 2,000 metres) of the subject all weather equestrian facility is considered by the Council to be a development that is not covered by Class 10. The full wording of this provision of the 2001 Planning Regulations is included at the foot of this letter.
>
> You will note that the scope of the wording of this exemption provision does not provide for the development of ancillary vehicular parking and horse assembly area. Therefore the development by you of such an area at the south eastern end of the subject site, constitutes a non-exempted development *per se*.
>
> Therefore Wicklow County Council considers that the development of the subject "all weather gallops" is in its entirety including the bridle path and ancillary car park constitutes a non-exempt development with reference to the provisions of s. 3(1) and (4) of the 2000 Planning Act and the associated planning regulations.
>
> In addition, the planning authority considered that the full operation of the subject "all weather gallops" at a completed stage would possibly give rise to increased traffic into the Devils Glen Equestrian site, and thus will "endanger public safety by reason of traffic hazards" and thus come within the de-exemption provisions of Article 9(1)(a)(iii) of the

Planning and Development Regulations 2001 (as amended).

There is also a possibility that the completion of the subject "all weather gallops" and its full operation will give rise to an intensification of use of an existing equestrian facility that will be of material significance (*i.e.* a material change of use) for planning control purposes such as impacts on traffic safety on the adjoining regional road, create traffic congestion on the site – endanger the health and safety with respect to other users of the internal access routes that straddle and transgress the subject gallops and bridle track. Such a material change of use *per se* is likely to bring this development within the scope of the definition of development in s. 3(1) of the 2000 Planning Act."

2.4 The respondent issued an enforcement notice on the 16th June, 2009 (the Notice), which required the applicant to cease all works and use with respect to all features of the gallops until such time as the development obtained the benefit of planning permission. On the 27th June, 2009, the applicant was granted leave to seek judicial review to challenge the validity of the notice. The applicants contend that the second warning letter shows that the respondent applied incorrect reasoning in the issuing of the notice.

3. The applicant's submissions

3.1 The applicant contends that the development constitutes an exempted development under s. 4 of the Planning and Development Act (the 2000 Act), particularly s. 4(1)(a) which exempts certain developments from the requirements to obtain planning permission, including such developments:-

"consisting of the use of any land for the purpose of agricultural and development consisting of the use of that purpose of any building occupied together with lands so used."

Section 2 of the Act of 2000 defines "agriculture" as including (*inter alia*):-

"The training of horses and the rearing of bloodstock …"

3.2 The 2001 Regulations provide for exemptions from the requirement to seek planning permission. The applicant referred the Court to Article 6 and Class 10, Article 3, Schedule 2 of the 2001 Regulations, which provides exemptions to planning permission for areas for the training of horses. The conditions for the application of this exemption are set out in Class 10 as follows:-

"1. No such structure shall be used for any purpose other than the exercising or training of horses or ponies.

2. No such area shall be used for the staging of public events.

3. No such structure shall be situated within 10 metres of any public road, and no entrance to such area shall be directly off any public road.

4. The height of any structure shall not exceed 2 metres."

The applicant submitted that the gallops satisfied these conditions and therefore comes within the exemption.

3.3 The applicant submitted that because the respondent asked the wrong question of themselves prior to the issue of the notice they fell into an error of law. The argument of the applicant is that in examining the validity of the notice the relevant test is not the test in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 (*i.e.* whether a respondent disregarded reason and commonsense in reaching its decision) but as to whether the respondent erred in law in the matter.

3.4 The applicant submitted that the considerations applied by the respondent in the second warning letter took into account inappropriate matters outside the scope of matters which properly should have been taken into account by the respondent, being that:-

(a) The fact that the "all weather gallops" appeared to the respondent to conform more to an "actual race or exercise track" and the reference to "standard race course metal railings" is bringing into play irrelevant considerations which are not referred to in the Regulations;

(b) The applicant submits that the gallops have a soft surface and the existence of a layer of tarmacadam does not mean that the complete development would not meet the requirements of the 2001 Regulations. The applicant submitted that the tarmacadam observed on the gallops by the respondent was part of the sub-surface and not part of the surface of the gallops;

(c) The consideration of the respondent that the "all weather gallops" at a completed stage will possibly give rise to increased traffic in and out of the equestrian centre or to some intensification of the existing equestrian facility are speculative considerations which were not borne out in any way by the information available to the respondent at the time of sending the warning letter.

3.5 The applicant argues that the respondent's report in relation to the railing on the gallops was factually incorrect. They were in fact plastic railings. In addition, the tarmacadam surface observed by the respondent's official prior to the issue of the notice was not in fact part of the surface but part of the sub-surface of the gallops. He presumably saw the track before it had been completed by the addition on top of the tarmacadam of the final soft surface. On this basis, irrelevant considerations were taken into account by the respondent prior to the issuing of the notice. In the applicant's submission, the porous tarmacadam was an integral part of the specifications for the gallops designed to provide a free draining separation layer between the stone base and the all weather surface metal material, Ecotrack, which prevents the stone from becoming mixed in the surface material. Expert evidence on affidavit was presented to the Court stating that Ecotrack was a soft surface material of the kind that would put the gallops within Class 10 of the Regulations. Further evidence was presented to the Court from the manufacturers of the material which states that they recommend that the material should be compacted to a depth of 175 mm, laid on a drainage bed of 60 mm porous tarmacadam laid on a drainage stone base of 150 mm. This evidence further stated that the surface of the gallops had been laid in two such specifications.

3.6 It was submitted that the considerations taken into account by the respondent prior to the issuing of the notice rose from the respondent asking itself the wrong question in relation to the issue of whether or not the gallops were exempted, and that because of this the notice should be quashed in accordance with the judgment of the Supreme Court in *White v. Dublin City Council* [2004] 1 I.R. 545.

3.7 In *White*, Fennelly J. applied the earlier Supreme Court judgment in *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 and *O'Keeffe v. An Bord Pleanála*, to a decision of the Planning Officer in Dublin City Council (one Mr. Rose). Fennelly J. found that although the decision of the Planning Officer was not in itself a flawed decision, it was based on an exclusion from consideration of particular relevant factors. At p. 560 of the decision, Fennelly J. wrote:-

> "I would certainly be prepared to accept that the Court should be extremely slow to interfere with the decisions of experts in planning matters. If the decision explained by Mr. Rose were a substantive decision of the first respondent or of An Bord Pleanála to grant planning permission in spite of the degree of overlooking of the applicant's property, in circumstances where the applicants had been on notice and whether or not they had objected, it would have been extremely difficult if not impossible to quarrel with it, still less judicially review it.
>
> I believe, however, that Mr. Rose's reasoning was flawed. He was, in reality, acting as if he was deciding whether permission should be granted. In considering whether the modified plans should be re-notified, he should rather have asked himself, in the circumstances of the application before the first respondent, whether some members of the public might reasonably wish to object to the plans as modified. …. Mr. Rose, by assessing the degree of overlooking without allowing for the possibility of objection, was effectively deciding, without hearing possible objectors, that there was no reasonable basis for objection. …
>
> Mr. Rose's planning expertise is undoubted. I consider rather that Mr. Rose, on behalf of the first respondent, excluded from his consideration the likelihood that the applicants would want to object and that, if they did, the first respondent would have had to consider the objection. This was, no doubt, an understandable oversight on the part of a person exercising an expert planning function. Nonetheless, I am satisfied, given the very particular circumstances of this case, that he did not give proper consideration to the radical effect of the required modifications. In that sense, it was unreasonable and irrational."

3.8 The applicant further submitted that the respondent fell into fundamental error in considering the potential traffic impact of the gallops; The applicant submitted that as they contended that the gallops was an exempted development, it was incumbent on the respondent to rely on evidence that the gallops would, not could, give rise to adverse traffic impacts.

3.9 It was submitted by counsel for the applicant that the respondent applied the incorrect test in their analysis of whether the gallops was a de-exempted development under the restrictions provided for under Articles 9(1)(a)(i) and (iii) of the 2001 Regulations. Under these provisions, an otherwise exempted development is de-exempted and must seek planning permission:-

> "(a) If the carrying out of such development would
>
> (i) contravene a condition attached to permission under the Act or be inconsistent with any use specified in a permission under the Act …
>
> (iii) endanger public safety by reason of traffic hazard or obstruction of road users."

3.10 The applicant submitted that Article 9 requires that the carrying out of the relevant development would endanger public safety and the respondent in their second warning letter applied a "could" test. It was submitted that it was not open to the respondent to have issued the notice simply on the basis of information available to them that the development could endanger public safety by reason of a traffic hazard as provided in Article 9(1)(a)(iii).

3.11 It was submitted by the applicant that the respondent erred in reaching its decision to issue the notice in that they took into account matters which properly ought not to have been taken into account: in this respect they fell foul of the reasonableness test set out by the Supreme Court in *Keegan v. Stardust Compensation Tribunal* [1986] I.R. 642 where Finlay C.J. approved the "*Wednesbury* test" applied in the English Court of Appeal case of *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223 where at pp. 233 – 4 of that decision Lord Greene M.R. stated:-

> "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere."

3.12 The applicant pointed out that a number of recent cases have adopted this approach in relation to the validity of various administrative decisions of statutory bodies. In *Cork County Council v. Shackelton* [2007] IEHC 241, Clarke J. held that it followed from the fact that a property arbitrator was carrying out a public law function that he was amenable to judicial review and that the ordinary rules of judicial review apply. At paragraphs 9.6 to 9.10 of the decision Clarke J. states:-

> "9.6 In *Radio Limerick One Limited v. Irish Radio and Television Commission* [1997] 2 I.R. 291 Keane J. said the following:-
>
> > "Apart from those considerations, it would seem self evident that, if the exercise of the statutory discretion is grounded on an erroneous view of the law, it should not normally be allowed to stand. Thus, in the present case, if the only ground on which the Commission terminated the applicants contract was the carrying out of the outside broadcasts and they were wrong in law in treating as they did, those broadcasts as advertisement within the meaning of the Act, it is difficult to see how the decision could be described as "reasonable" either in the *Wednesbury* sense or on the application of the criteria proposed by Henchy J. in *Keegan*".
>
> 9.7 It seems to me to follow that, where there has been a significant error in the interpretation of a material statutory provision leading to a decision of the property arbitrator being wrong in law, any such decision should, *prima facie*, be quashed.
>
> …
>
> An error, if an understandable one, in adopting an inaccurate construction of the section is, therefore, in my view a sufficiently fundamental matter which should lead to the quashing of the arbitrator's determination."

3.13 This approach was again endorsed by the High Court in *McKernan v. EAT* [2008] IEHC 40 where Feeney J. states at paragraphs 4.7 to 4.9:-

> "This Court must therefore give consideration as to whether or not the decision of the Tribunal contained a significant error of a material matter leading to the decision. The Court must consider whether or not the decision of the Tribunal was grounded on an erroneous view of the law and whether the decision turned on an incorrect and wrong determination of a legal issue."

The necessity of a link between the incorrect understanding of the law and a decision, is further illustrated in the case of *Murphy v. Minister for Social Welfare* [1987] I.R. 259 concerning the decision of a social welfare appeals officer, where Blayney J. held (at page 301):-

> [The decision of the Appeals Officer] was based on a single ground, namely that the applicant was not employed under a contract of service. In the result it seems to me that the Appeals Officer did not understand correctly the law which he had to consider in coming to his decision, and it follows that his decision is vulnerable on the ground of illegality as understood in the sense explained by Lord Diplock in his judgment in *Council of Civil Service Unions v. Minister for the Civil Service* (1985) A.C. 374 at 410. That approach clearly identifies the willingness of the High Court to quash decisions where there was an incorrect interpretation of the law which had to be considered and indeed in that case underpinned the single ground of the decision of the Appeals Officer."

3.14 A considerable amount of technical material was presented by the respondent on the potential traffic impacts of the gallops, and the applicant, in turn presented further material to refute the respondent's findings. The respondent argued that an earlier planning permission, which required that access to the equestrian centre should only be available through the western entrance, gives rise to a prohibition of any access to the equestrian centre at an eastern point in the site.

3.15 However, it was argued by the applicant that this planning permission was not taken into account by the respondent at the time of the issuing of the notice and that it is not appropriate for the respondent to seek retrospectively to "reconstruct" its position in relation to possible traffic impacts from the gallops. In this respect it was submitted that the Court should focus solely on the validity of the justification of the notice at the time of it being issued and not by reference to a recent traffic appraisal compiled after the issuing of the notice. It was submitted that at the time of the making of the decision to issue the notice, the respondent had no traffic information which would have given rise to an informed view that the gallops was not an exempted development under the 2000 Act and the 2001 Regulations. The report of the investigation of the respondent's senior planning officer of the 15th June, 2009 stated that the potential obstruction of a right of way caused by the gallops was not at that stage "a clear cut issue".

3.16 It was further argued by the applicant that any departure from the earlier planning permission is a stand alone matter for enforcement by the respondent and does not impact on the exemption applicable on the gallops. The applicant argued that it is not open to the respondent to retroactively bring the earlier planning permission into play as a basis for the disapplication of the exemption for the gallops.

3.17 Section 5 of the 2000 Act
Section 5 states as follows:-

> *"(1) If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter."*

The applicant submitted that the procedure under s. 5 of the 2000 Act would not provide an adequate remedy. Section 5, it was argued, does not allow the consideration of other issues relevant to the validity of the notice such as arise in these proceedings, and the outcome of a reference under s. 5 is confined to the making of a declaration concerning the planning status of a particular development and there is no proviso for granting relief to set aside an enforcement notice or to stay enforcement proceedings. In this respect the applicants argue that even following the section 5 route they could still be open to prosecution for failure to comply with the notice. Under s. 152 of the 2000 Act, a party who fails to meet its obligations under an enforcement notice is liable to prosecution and it is not open to the party in receipt of the enforcement notice to raise a defence that the development is exempted.

4. The respondent's submissions
4.1 The arguments of the respondents are as follows:-

> (a) The enforcement notice procedure is a stage in the process which, in general, is not amenable to judicial review unless the person attacking the decision can demonstrate a clear departure by the decision maker from his statutory remit.
>
> (b) The applicant has other recourses to determine the issues in dispute which has not been exhausted and it is inappropriate that the Court should intervene to grant judicial review. Judicial Review is not an appropriate forum to determine whether a development is or is not exempted.
>
> (c) The respondent also submitted that the applicant did not demonstrate that the decision to issue the notice was unreasonable, at variance with law or disproportionate to an extent which would justify the Court setting it aside. It was submitted that there was no maladministration by the respondent of the sort that would justify intervention.

4.2 In relation to judicial review of enforcement notices, the respondent referred the Court to the case of *O'Connor v. Kerry County Council* [1988] I.L.R.M. 660 where Costello J. stated as follows:-

"As to the issue of whether or not the development is exempted development, I think that the submissions made by Mr. O'Sullivan on behalf of the Council are correct, it seems to me that if the only issue which the Court is asked to decide is whether or not a development which has occurred is an exempted development, the Court in its exercise of its discretion should refuse an application for an order of *certiorari*. It seems to me that there is specifically provided for in section 5 of the 1963 Act (as amended), a procedure by which an issue of this sort can be determined by a body that is much more qualified to determine it than the court. There is provision under the section by which, if any question arises as to whether or not any particular development is an exempted development, the matter must be referred to and decided by the Planning Board. If a person on whom an enforcement notice is served objects to the notice on the grounds that the development is exempted development, it seems to me that he has a remedy in

that he may apply to the Planning Board to determine the question. When matters of a technical nature are involved, as arises here, it is not appropriate that the Court should be asked to determine whether or not the development that is in issue is exempted or not. This is not, in my view, the proper function for an application for *certiorari*."

4.3 The only exception which the judgment acknowledges is the case where it has been demonstrated that the Planning Authority deciding enforcement "has acted in a way that is so unreasonable in the decision that it took than an application for *certiorari* could or arise and be granted". The respondent also referred the Court to the case of *Flynn Machine and Crane Hire Limited v. Wicklow County Council* [2009] IEHC 285 in which case the applicants were seeking a declaration of *certiorari* in relation to an enforcement notice. In refusing to fully quash the enforcement notice, O'Keeffe J. stated at paragraph 37 of his decision:-

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

The respondents submitted that there are few cases where judicial review is the appropriate forum to review a decision to issue an enforcement notice and this case is not within them.

4.4 It was submitted by the respondent that judicial review should not be a "dry run" for a section 5 reference or a defence of "no authorised development" in the event of a prosecution under the 2000 Act. The respondent argued that the issue of an enforcement notice is a stage in a process of planning enforcement and is not proof, in a prosecution for failure to comply, that the development is unauthorized. The onus is on the defendant to establish it is exempt. The respondent pointed to the fact that the applicant did not avail of the section 5 route at what they considered to have been the appropriate time, *i.e.* on receipt of the decision of the respondent on the applicant's submission of the 1st April, 2009.

4.5 The respondents submitted that the reasons which were the basis for the decision to issue the notice, were justified either at the time of the decision or in retrospect when further facts came to light, in particular with respect to traffic issues. The respondent argued that the use of the gallops would result in the blocking off of the western entrance in contravention of the earlier planning permission. The respondent argues that these issues are matters to be taken up in the context of a section 5 reference and that the applicant has chosen an inappropriate venue to resolve them.

5. The Decision of the Court

5.1 The respondent argued that judicial review was an inappropriate form to decide the issue raised by the applicant namely the issuing of the enforcement notice. As seen above, the respondent argued that the correct route to follow was to seek a declaration under section 5 of the 2005 Act that the development is exempt. The respondent relies in this regard upon the decision in *O'Connor v. Kerry County Council*. It seems to me that the respondent is correct that it is not open to a court to declare whether or not a development is an exempted development under the 2000 Act unless it comes under the exceptions outlined by Costello J. in *O'Connor* e.g. if the Planning Authority has acted in a way that is so unreasonable in the decision that it took that an application for a declaration could arise and be granted. It seems to me that the real thrust of this application is that the court find the development is exempt.

5.2 The local authority are charged by the Oireachtas through the planning code to ensure that developments proceed in accordance with law. This necessarily involves investigation of possible breaches of the planning code. This investigation may naturally lead to suspicion and ultimately to a conclusion that a particular development is unauthorised. It is an ongoing process from investigation to suspicion to conclusion. Where the local authority suspects an unauthorized development may be in train, it is obliged to act and to do so promptly. This obligation in the circumstances prevailing herein was met by their firstly serving a warning letter on 6th of March. This letter reflected a suspicion that an unauthorized development was in train. The applicants subsequently made a submission on the 1st April which was considered by the respondent. It came to the conclusion that the development was not an exempt development and was therefore unauthorized. In the result, it issued its letter of 4th June, 2009 and later on the 16th June, 2009 an enforcement notice. It is to be noted that the work on this development continued after the service of the first warning letter of 6th of March. It goes without saying that this was a hazardous course for the applicants to follow. It was a course that showed scant regard for the role of the local authority and its role in determining the status of the development. It showed little understanding that ultimately it would be the Planning Authorities and not the development advisors who would decide what was or was not exempted development. The decision was made by the respondent to serve a notice which prevented use of the development rather than ordered its demolition. This was done, the respondents say, in order to provoke a dialogue with the developers. It is a great pity that dialogue did not take place. Had it taken place this matter would in all probability have been resolved long before now.

5.3 The applicants upon receipt of the enforcement notice proceeded to obtain leave to seek judicial review. The essence of their case is that the enforcement notice was based upon an inaccurate factual analysis of the development at a point before it was complete. They point to the enforcement notice describing the development as seeming more an actual race or exercise track and having metal railings in keeping therewith. The enforcement notice seemed based upon the conclusion the track had a hard rather than a soft surface. Finally the letter showed the local authority feared the development might give rise to traffic problems which was not grounded then upon any information available to the respondents.

5.4 It seems to me that this case falls to be decided upon the availability of a special statutory scheme to resolve disputes such as lie at the heart of this case. Firstly, however, I think it is appropriate to consider some of the factual matters relied upon by the applicant. It is well established that decisions reviewed by the courts must be looked at in their totality and in the context in which they are made. The view of the respondents expressed in their letter of the 4th June, 2009 that the development looked more like a race track or exercise track seems fully justified. The respondents were observing that in their view what was exempted development in the context of this development should be something that conformed to an enclosed paddock. Whether that is or is not correct or conclusive as to whether it is or is not an exempted development, is a matter for the planning authorities to conclude and not for the courts. Suffice it to note that from the photos provided it looks very much more like an exercise track than an enclosed paddock. The reference to metal railings when in fact they were plastic is trivial.

5.5 The Inspector seems on the evidence to have thought that tarmacadam was the final surface of this track. I accept this is wrong. The evidence shows that there was a final surface yet to be applied at the time when the Inspector reported.

5.6 Moreover within the context in which the respondents came to their decision to issue an enforcement notice, was the fact that the applicant's development was in direct contravention of Condition 4 of an existing planning permission for this site. This condition was imposed to control traffic movement in and out of the site in question. Their duty in this type of situation is to ensure no danger

to traffic arises from developments such as herein. The argument over whether the test was "could" or "would" pose a risk seems somewhat unreal. The respondent must ensure that any potential hazard to traffic is obviated and the time to do that is before accidents happen. Whilst an entirely remote possibility of such problems if relied upon *per se* might be open to challenge, that is far from being the case here. Clearly it was at least strongly possible more traffic would be generated. Further, it was undoubtedly the case that an existing condition specifically directed towards traffic control was being breached. To ask the Court to ignore that fact because it is a fact that came to light after the warning letters is to ask the Court to view the decision out of context. This the Court cannot do. On the factual side of things therefore it appears only the objection based upon the mistake concerning the final surface can stand. It is clear this was only one of a number of grounds for the enforcement notice to issue. The real thrust of the rationale of the local authority was the nature of the development and the surface issue was but one of the elements raising doubt in the respondent's view of the development.

5.7 The section 5 application: as noted above this case in my view falls to be decided primarily on the applicant's failure to utilise a remedy provided to deal with this exact situation. No satisfactory explanation has been forthcoming to explain the failure to do so. The judgment of Costello J. in *O'Connor v. Kerry County Council* [1988] I.L.R.M. 660 is particularly apt to this case:-

> "It seems to me that if the only issue which the Court is asked to decide is whether or not a development which has occurred is an exempted development, the Court in the exercise of its discretion should refuse an application for an order of *certiorari*. It seems to me that there is specifically provided for in section 5 of the 1963 Act, as amended, a procedure by which an issue of this sort can be determined by a body that is much more qualified to determine it than the Court. There is provision under the section by which if any question arises as to whether or not any particular development is an exempted development, the matter must be referred to and decided by the Planning Board. If a person on whom an enforcement notice is served objects to the notice on the grounds that the development is exempted development, it seems to me that he has a remedy in that he may apply to the Planning Board to determine the question. When matters of a technical nature are involved, as arises here, it is not appropriate that the Court should be asked to determine whether or not the development that is in issue is exempted or not. This is not in my view the proper function for an application for *certiorari*."

I gratefully adopt this statement of the law. Furthermore, it is also well established that where an alternative remedy exists, save for exceptional circumstances or where the decision made is clearly outside the relevant body's jurisdiction, that alternative should be utilised.

5.8 It seems to me that the reasons offered against utilisation of a section 5 remedy are unsatisfactory. The fact that this procedure does not provide for setting aside an enforcement notice or staying enforcement proceedings does not mean that a prosecution will be continued notwithstanding an application being made to clarify the exempt or non-exempt status of the development. The respondent's counsel herein stated quite correctly and properly in my view that, there being statutory provision (section 154)(ii)) for withdrawal of an enforcement notice, the failure of the local authority to do so following a section 5 determination in favour of the applicant would amount to maladministration. The continuance of any prosecution based on an enforcement notice whilst the very basis of that enforcement notice was before the authorities under a section 5 application would on that same logic in my view amount to maladministration save for exceptional circumstances. No such circumstances exist here. The applicant in a written submission handed in during the oral argument also argued that the work on site was already in train at the time of service of the first letter in March. Had they stopped then to apply under section 5 and subsequently had there been an appeal to Bord Pleanála, they would have had to discharge their contractor and would have missed all their deadlines for the year including readiness for the flat racing season. Owners might have withdrawn their horses and the business might have collapsed. They argued further that they were "lulled" into thinking all was well because they heard nothing from the 1st of April when their submission was made until the 4th of June when the second warning letter was served. By this time the works were complete and the gallops were in use.

5.9 In the first place the respondents could not have been aware of any development until it commenced. Thus the presence on site of a contractor, in the absence of a planning application, is always likely to be the first occasion that the local authority becomes aware of a development and can move to warn. The first letter put the applicant on notice there were serious concerns on the part of those charged with enforcing the planning code. It may well be that damage would flow from the applicant's having to stop work while the exempt status of the development was clarified. Responsibility for this must rest however with those who sought to change the status quo as opposed to those duty bound to raise concern. As for proceeding with the work while the local authority considered their submission of 1st April, again responsibility for any damage thus sustained must rest with those who took the chance the authorities would determine the development was exempt. The second letter was issued nine weeks after the submission. It was not wise to assume a positive decision. The applicant admits the work carried on despite this risk and it is not unreasonable for the court to conclude the applicants wished to present the local authority with a *fait accompli*. I would consider that the obvious course of having the planning authority ultimately decide whether the applicant or the respondent were correct as to whether the development was exempt was the best and most appropriate course to follow. It appears to me it is a procedure specifically designed for the exact situation that emerged here. For these reasons I must refuse the reliefs sought.