Neutral Citation [2015] IEHC 667

THE HIGH COURT

[Record No.2014/187 CA]
[Record No.2015/42 CA]
[Record No.2015/44 CA]

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED) AND IN THE MATTER OF ORDER 56 OF THE RULES OF THE CIRCUIT COURT

BETWEEN

THE COUNTY COUNCIL OF THE COUNTY OF WICKLOW

APPELLANT

AND

STAN O'REILLY, STAN O'REILLY RECYCLING HOLDINGS LIMITED AND STAN O'REILLY RECYCLING LIMITED

RESPONDENTS

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 29th day of October 2015.

Introduction

1. The first named respondent (hereafter referred to as "the respondent", as the companies named in the title have no relevant role in the proceedings), was in 2006 granted a waste facility permit in respect of a site near Rathnew in Co. Wicklow. This permit was replaced in 2009 by a waste facility permit issued under the relevant regulations.

2. On the 28th July, 2014, the appellant ("the Council") was granted an order in the Circuit Court pursuant to the terms of s. 160(1) of the Planning and Development Act 2000, as amended, ("the Planning Act") restraining the respondent from carrying on the operation of a waste recovery business on the site.

3. In deciding the case as he did, the learned Circuit Court judge held that the Council's application was made within the relevant statutory period and that there had been an unauthorised, material change of use at the site. However, he refused to make an order under s. 160 (2) of the Planning Act directing the respondent to remove all waste, and all equipment associated with the business, from the site. This was on the basis that the Council had revoked the respondent's waste permit during the currency of the court proceedings, and had thereby, in the view of the court, deprived it of the power to direct an orderly winding down of the business. The Council now appeals against that aspect of the decision. By leave of the court, the respondent has been permitted to appeal against the order made under s. 160(1). Both parties have appealed the subsequent decision of the Circuit Court to award to the Council 50% of its costs against the respondents.

4. The issues in the case are:-

- Whether, having regard to the history of the site, there was an unauthorised, material change of use.
- Whether the use of the site is an industrial process and therefore exempt.
- Whether the enforcement proceedings were instituted within the relevant time limit, having regard to the evidence of the respondent's operations at the site. As an alternative argument the respondent argues that the appellant Council is disentitled to relief by reason of delay.
- Whether the revocation by the Council of the respondent's waste permit during the currency of the Circuit Court proceedings was an impermissible and unconstitutional interference with that court's process.
- Whether, if the foregoing issues are determined in favour of the Council, an order ought to be made under s.160(2) of the Planning Act.

5. To a large extent, the issues involve consideration of the interaction between the planning code and the waste management code.

Summary of the background facts

6. On the 17th July, 2006, the Council granted a permit, under the Waste Management Acts, 1996 to 2005, ("the Waste Management Act") to the respondent to operate a waste management facility on the land.

7. Later on that month a complaint was made to the Council alleging unauthorised development on the site. An investigation began and there was some correspondence between the parties during 2006 and 2007. No further steps were taken at that time.

8. In 2009, the respondent applied for a declaration, under the procedure provided by s.5 of the Planning Act, that what was termed the "recycling activity" was an exempted development within the meaning of the Act. The Council, in its capacity as planning authority, determined that the activity constituted a material change of use from the previous established activity on the site and was therefore not an exempted development. This decision was not appealed or challenged by the respondent.

9. After a review in 2009, a further waste facility permit was granted to the respondent for the same site. However, no planning application (whether for retention or otherwise) has ever been made by the respondent for the business carried on by him from the site.

10. The planning investigation was resumed by the Council in 2011. A warning letter was sent to the respondent in March, 2011 in relation to what was regarded by the Council as unauthorised development of the site under the terms of s.152 of the Planning Act.

11. On the 16th June, 2011, an enforcement notice was served. No further steps were taken by the Council on foot of that notice.

12. In June, 2013 the County Council issued proceedings in the Circuit Court pursuant to s.160 of the Planning Act, seeking injunctive relief against the respondents.

13. On the 7th March, 2014, the Council revoked the waste facility permit for the site and required all activity related to the business to cease. The respondent was granted leave to seek judicial review in relation to this decision on the 17th April, 2014.

14. The s.160 proceedings were fully contested and came on for hearing on the 19th and 20th June, and the 21st July, 2014. The decision of the Circuit Court was given on the 28th July, 2014.

15. The judicial review proceedings, considered further below, were heard on the 29th October, 2014, and were ultimately determined in favour of the Council in a judgment delivered on the 14th November, 2014.

The "change of use" issue
Relevant statutory definitions

16. Section 3(1) of the Planning and Development Act, 2000 provides as follows:

> *"In this Act, "development" means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land."*

17. Section 3(2) provides *inter alia* that where land becomes used for the purpose of the "deposit" of old metal, builders' waste, rubbish or debris the use of the land shall be taken as having materially changed.

18. By virtue of s. 2 of the Act, "use", in relation to land, does not include the use of the land by the carrying out of any works thereon. The word "works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.

19. By virtue of regulations made under s.4 of the Act (the Planning and Development Regulations 2001) an "industrial process" means any process which is carried on in the course of trade or business, other than agriculture, and which is

> *(a) for or incidental to the making of any article or part of an article, or*
>
> *(b) for or incidental to the altering, repairing, ornamenting, finishing, cleaning, adapting for sale, breaking up or demolition of any article, including the getting, dressing or treatment of minerals.*

20. For the purposes of this provision

> *"article" includes-*
>
> *(i) a vehicle, aircraft, ship or vessel, or*
>
> *(ii) a sound recording, film, broadcast, cable programme, publication and computer program or other original database;*

21. An "industrial undertaker" means a person by whom an industrial process is carried on and "industrial undertaking" is to be construed accordingly.

22. Under the regulations, a development on land occupied by an industrial undertaker for the purpose of an industrial process is exempt where it consists of the installation or erection by way of addition or replacement of plant and machinery, or structures of the nature of plant or machinery. The same exemption applies to works for the provision within the curtilage of an industrial building of a hard surface to be used in relation to the industrial process carried on within the building. In both cases, the development is not to materially alter the external appearance of the premises. The height of any plant or machinery, or any structure of that nature, must not exceed 15 metres above ground level or the height of the items being replaced, whichever is the greater.

23. The regulations also provide an exemption for the storage within the curtilage of an industrial building, in connection with the industrial process carried on therein, of

> *"raw materials, products, packing materials or fuel, or the deposit of waste arising from the industrial process"*

provided such materials are not visible from any public road contiguous or adjacent to the curtilage.

Evidence relating to previous use of the site

24. According to Ms. Rosemarie Dennison, an administrative officer in the Council, the land is owned by members of a family called Stafford, who purchased it from Wicklow Corn Company Limited. Seven planning permissions have been granted in respect of the site since 1978. These have variously covered the storage and distribution of oil and petrol, the storage of agricultural grain (to be transported and processed elsewhere) and the storage, bagging and distribution of coal. The oil and grain businesses were operated on the site at the same time, by different companies. (The dual occupation of the lands has continued. In this judgment references to "the site" or "the premises" mean the portion of the lands occupied by the respondent).

25. Ms. Dennison avers that, at the time that her affidavit was sworn, there was an oil and solid fuel business being run from the lands by a company called Campus Oil/Stafford Fuels. It is averred that this business has no planning permission and that it is the subject of separate enforcement proceedings.

26. The respondent deposes that he grew up in Wicklow Town and was aware of the activities on the site from an early age. He recalls that a large facility was operated there, involving the bringing in and out of *"huge amounts of grain, coal, briquettes, oil, logs and packaging".* This material would be broken up into smaller units on the site and then sold on. Products were also sold directly to members of the public at the site. He says that he also recalls that for a number of years, in the late 1970s or early1980s, a skip hire business operated there. His memory is of "*extremely heavy traffic*" in and out of the facility, with considerable movement of heavy goods vehicles.

27. An affidavit has been sworn on behalf of the respondent by Ms. Ann Mulcrone, a chartered town planner with considerable experience in planning matters. From a review of the Council's records she says that the industrial use of the site "*was and is*" more extensive than as summarised by Ms. Dennison.

28. She refers to the respondent's business as having been developed "*on the footprint of a similar operation carried out by Glanbia, which was an established use and existed for many decades at this location"*.

29. This view is disputed by the Council, which says that Glanbia operated *"a conventional hardware-agricultural retail outlet"*.

30. Ms. Mulcrone says that the Wicklow Corn Company had a planning permission for substantial grain silos, indicating a significant

scale of operation, with ancillary grain drying equipment. She infers from this that there was processing of grain on the site.

31. When dried, the grain would have been bagged for distribution to large users of grain. This could have given rise to dust and other air pollution, and the spillage of grain would have been inevitable. It would also have given rise to significant traffic movements on and off the site.

32. The corn company also had permission for vehicle servicing, indicating that a large fleet of vehicles were associated with this use.

33. The handling and bagging of coal was an activity that could give rise to dust and air pollution, and potential contamination of the surface water system.

34. Ms. Mulcrone is of the view that there was an established industrial use, and that the overall industrial use was not subject to planning control or conditions.

35. On behalf of the Council, Mr. Tim Walsh agrees that a number of different businesses were carried out on the lands in the past. However, he says that the Council is unaware of any skip hire business being operated there, and says further that if there had been such a business it could not have involved the bringing of waste in skips onto the site in question. Activity of that nature would, he says, have been investigated by the Council.

36. Mr. Walsh avers that any waste generated by the corn and oil businesses could only be described as minor compared to the volume being dealt with by the respondent. He also says that, whatever the manner in which those companies dealt with their waste, they were not engaged in waste processing.

Evidence relating to the respondent's use of the site

37. The respondent says that he has been engaged in the recycling business, trading as C&D Recycling, from 2004 onwards. This business operated from a smaller site in a different part of the county. When Glanbia moved out of the site in question, he saw an opportunity to move to larger, more suitable premises. He entered into an oral agreement with the owners for a tenancy. This was not formalised by way of a lease until July, 2006 but he says that by that time "*the business was already up and running*". He avers that he had, with the agreement of the landlord, moved onto the site in May of that year to commence preparatory works.

38. The preparatory works are said to have involved levelling and re-surfacing areas, conducting general excavation work and laying concrete bases for machinery. This is described as having entailed "*considerable work*" on the part of the respondent and his employees.

39. The respondent says that he and the owners of the land were satisfied that the previous uses of the site, involving as they did the bringing in of materials, the breaking down of those materials and their redistribution for sale to third parties was so similar to his own operations that there would be no question of needing planning permission. He did however apply for a waste permit, having held one for his previous operations.

40. Notwithstanding the fact that he obtained a waste facility permit, the respondent stresses that in his view the site was not in fact used by him as a "*waste facility*", on the basis that everything brought there had a value and could be sold. In his first affidavit (sworn in November, 2013) he says:

> *"I say and believe and have always maintained that this is not a waste facility but is a facility where materials brought onto the site are processed and sold on for value and no items now are landfilled or disposed of to a landfill or to an incinerator and therefore [it] could not in those circumstances amount to a waste facility for the purposes of the Planning Acts."*

41. He says that this is the type of activity that was previously carried on at the site by the oil and corn businesses, in that they brought materials onto the site, broke them down and redistributed them for sale. He only applied for a waste permit because the Council insisted that he should and he had no difficulty in complying with its wishes. No issue was raised about the planning status of the business in the application process.

42. It is also contended by the respondent that the definition of the term "waste" has relevance only in the context of the waste management legislation, and that it is not appropriate to a planning case where the only issue is the question of material change of use. His point here is that all he is doing is bringing materials onto the site with a view to processing, packaging and selling on for a profit.

43. Ms. Mulcrone supports the respondent's case on this issue, averring that it is her understanding that material which has a value cannot be characterised as waste.

44. The respondent contends that all the material brought onto the site is inert without any attraction for vermin and no capacity to give rise to odours. There is no long-term storage of materials since the entire operation is predicated on them being on the site for as short a time as possible.

45. The respondent's use of the site is described by Ms. Mulcrone as follows:

> *"I say that I understand the nature of the use of the site by C&D Recycling comprises an industrial process whereby C&D Recycling collects a range of materials including paper, timber, metals and plastics. The material is segregated into its constituent elements, plastic, paper, blocks, soil, timber, metals and each appropriately treated. The material is then either baled as in the case of cardboard, shred in the case of timber and crushed in the case of concrete.*
>
> *I say that all material is recycled in authorised facilities, the timber is sent to palette [sic] companies to make new palettes, and farmers use the shredded wood as bedding for cattle; it is also used as cover for landfill and is used in the manufacture of woodchip board and MDF. The blocks and concrete are crushed, recycled and used for road fill, the baled cardboard is sent to Smurfit and the metal is sent to Hammond Lane for recycling. The final end product after the sorting, segregating, shredding and crushing comprises refuse derived fuel which is sold to waste [sic] to energy plants and is sent to Germany."*

46. Ms. Mulcrone takes issue with the assertion by Mr. Walsh that the site is being used for the "*deposit*" of waste within the meaning

of the Act, since all of the material is broken up, washed, cleaned or otherwise processed and sold to third parties.

47. Ms. Mulcrone asserts that the plant and machinery used in the business are industrial in nature. Since their height does not exceed 15 metres and they are mainly housed indoors, the industrial process in question is exempt. They are not dissimilar to the conveyors and machinery that would have been used for the bagging of coal and grain.

48. Mr. Andrew Lawless, senior executive engineer with the Council, has described the respondent's operations in the following terms:

> *"[The business] involves the taking in of waste in the form of skips. Sometimes, a waste collector will specify what waste can and cannot go into a skip, but I am not aware of any restrictions placed by Mr. O'Reilly on the waste which he is prepared to take in. This gives rise to the possibility (and in fact reality in the present case) that some of the waste which he accepts will indeed be suitable for recycling or soil recovery, but some will only be suitable for disposal or recovery via incineration.*
>
> *At the site, the following items of waste are normally taken out for recycling or soil recovery, namely:*
>
> *i. cardboard*
>
> *ii. large pieces of plastic (hard and soft);*
>
> *iii. metals;*
>
> *iv. soil, stones and concrete;*
>
> *v. textiles; and*
>
> *vi. timber.*
>
> *Because the quality can be quite variable, soft plastic wrapping and textiles are very often not suitable for recycling and are sent instead for recovery via incineration.*
>
> *Other items taken out would typically include large batteries, tyres and glass packaging. Large batteries would be hazardous and should be sent to the appropriate facility for treatment. Tyres are typically sent to specialist facilities that crush the tyres into a crumb. I am aware that glass packaging was often removed and brought to one of the County Council's bottle banks.*
>
> *Waste electrical items should have been removed and sent for appropriate treatment separating out the various components but there is little information regarding what has happened with respect to this type of waste.*
>
> *The remaining waste is stored around the site before being shredded and placed in a stockpile in the yard. Such waste could include:*
>
> *i. municipal waste, including household waste and street sweepings;*
>
> *ii. mattresses;*
>
> *iii. paper too small to pick out;*
>
> *iv. pieces of plastic too small to pick out; and*
>
> *v. other waste, such as garden waste, paint cans, small batteries.*
>
> *The first named respondent has advised the County Council in the past that the ultimate location for this stock pile is various waste transfer stations in the Dublin area including Thornton's Recycling Limited, where it will be screened again for metals before it will be exported for Refuse Derived Fuel…"*

49. By reference to the documentation required to be submitted by the respondent to the Council, Mr. Lawless states that a significant amount of the waste taken in by the respondent at the site was ultimately taken for recovery or disposal by other commercial operations such as Thornton's or Panda, at a cost rather than profit to the respondent. However, he says that

> *"[An] alternative to paying for the disposal of waste elsewhere is to simply stockpile it on the site, and the size of the stock pile greatly increased in 2013 and 2014."*

50. At an inspection on the 6th September, 2013, Mr. Lawless estimated that the quantity of waste on the site that was destined for landfill or for recovery as refuse derived fuel was around 2,000 tonnes. Putting matters in a different way, he estimated that between May and November, 2013 the external stock pile in the yard increased from 1,587 to 2,476 metres squared.

51. Mr. Lawless avers that the increase in the stockpile led to increased problems of odours and dust.

52. The respondent has in part blamed the Council for the issues raised by Mr. Lawless, and in part declined to deal with them in his affidavits on the basis of the then pending criminal prosecutions.

53. Mr. Walsh has exhibited a number of decisions of An Bord Pleanála tending to demonstrate the view of that body that the use of industrial lands for the operation of waste recovery/recycling facilities does not come within the definition of "*industrial process*". It constitutes a material change of use and is therefore non-exempted development.

The waste permit
Relevant statutory provisions

54. The Waste Management Act defines waste in s.4(1)(a) as being

> *"any substance or object belonging to a category of waste specified in the First Schedule or for the time being included in the European Waste Catalogue which the holder discards or intends to or is required to discard, and anything which is discarded or otherwise dealt with as if it were waste shall be presumed to be waste until the contrary is proved".*

55. The relevant item in the First Schedule appears to be No. 14 – "*Products for which the holder has no further use*". It should be noted that at No. 16 there is a "catchall" provision – "*Any materials, substances or products which are not otherwise specified in this Schedule*".

56. Waste recovery is defined as:

> *"any activity carried on for the purpose of reclaiming, recycling or re-using, in whole or in part, the waste and any activities related to such reclamation, recycling or reuse"*

including any activities specified in the Fourth Schedule.

57. The activities specified in the Fourth Schedule include the recycling or reclamation of metals and metal compounds, or of other inorganic materials. Recycling is the subjection of waste to any process or treatment to make it re-usable in whole or in part.

58. The Act imposes various duties on local authorities in relation to waste management. There is also provision for the involvement of the private sector.

59. The initial waste facility permit was applied for in June, 2006. In making his application, the respondent informed the Council that it was his intention to commence activities "*as soon as approved*". The permit was issued on the 17th July, 2006.

60. The waste permit in force at the material time was granted in 2009. This permit was issued pursuant to the provisions of the Waste Management Acts 1996 to 2008 and the Waste Management (Facility Permit and Registration) (Amendment) Regulations (S.I. 86/2008). By reference to the third and fourth schedules of the regulations, the activities covered by the permit were:

- The reception, storage and recovery of scrap metal.
- The recovery of inert waste arising from construction and demolition activity including concrete, bricks, tiles, and other similar material subject to specified limits.
- The recovery of waste, other than hazardous waste, subject to specified limits.
- The recycling or reclamation of organic substances which are not used as solvents.
- The recycling or reclamation of metal compounds.
- The recycling or reclamation of other inorganic materials.
- The storage of waste intended for submission to any activity already referred to.

61. A long list of conditions was attached to the permit under various headings. The first condition reads as follows:

> *"This facility permit is for the purpose of waste activity authorisation under the Waste Management (Facility Permit and Registration) Regulations S.I. No 821 of 2007as amended by the Waste Management (Facility Permit and Registration) (Amendment) Regulations S.I. No. 86 of 2008 only,* ***and nothing in this permit shall be construed as negating the permit holders statutory obligations, or requirements under any other enactments or regulations."*** (Emphasis in the original.)

62. Condition 2.6 provides as follows:

> *"The permit holder shall be legally responsible for all aspects of the operation and maintenance of the site. Nothing in the granting of this permit reduces the legal liabilities of the permit holder, nor relieves the permit holder of his statutory obligations under any enactment whatsoever."*

63. Clause 9.6 provides that following the termination of permit related activities the holder shall, to the satisfaction of the Council, render safe and remove any waste materials and any temporary buildings and equipment from the site.

64. On the 18th June, 2013, the respondent was served with a notice under s.55 of the Waste Management Act, requiring him to take specified steps to reduce the volume of waste on the premises.

65. On the 2nd January, 2014, the Council served notice that it intended to review the permit on the basis that, according to the notice, there was reason to believe that there had been *"a material change in the nature, focus and extent of the waste related activity"* to an extent that rendered the conditions attached to the existing permit inappropriate. The respondent was required to furnish specified information and documentation for the purpose of the review. He was also required to make a submission in writing, and warned that if no submission was made the permit would be revoked.

66. On the 28th January, 2014, two summonses were issued by the District Court, by virtue of which the respondent was charged with two offences of failing to comply with the notice served in June, 2013. Further summonses issued on the 16th April, 2014, charging him with failing to comply with a requirement of s.14 of the Waste Management Act, dealing with waste in a manner likely to cause pollution, dealing with waste at a facility which was not in accordance with a licence, collecting waste which was not in accordance with a permit and abandoning or engaging in unauthorised management of waste. The court has been told that the respondent ultimately pleaded guilty to these charges.

67. On the 7th March, 2014, the permit was revoked. I do not propose to enter into the substance of the intervening correspondence, since it was dealt with in the respondent's application for judicial review. It is apparent that those proceedings were focussed on the procedural matters relating to the revocation decision.

68. The Circuit Court planning proceedings are mentioned in the papers before the President but there is no suggestion in the affidavits or statement of grounds that the existence of those proceedings was a ground for quashing the decision to revoke.

69. The learned President dismissed the claim in its entirety. According to court records, following delivery of his judgment, the proceedings were struck out on consent. However, this court has been told that the respondent intends to appeal.

Enforcement action under the Planning Act

70. According to the Council, a complaint in relation to the land was received in July, 2006. The complaint concerned an alleged change in use commencing in the week of the 16th July. An inspection was carried out by Mr. Paul Brophy, a technician in the Planning Enforcement Section of the Council, on the 1st August, 2006. Mr. Brophy says that the respondent showed him around the premises and he observed that metal, plastics, wood, paints, rubber etc were being sorted, bagged and distributed to customers. The respondent informed him that he was using the same machines as previous occupants of the site had utilised for the bagging of bulk material (i.e. coal). Mr. Brophy told the respondent that his personal view was that the operations appeared similar to those of the previous user, but that he would have to check whether there had in fact been a change of use requiring planning permission. He says that having checked the regulations, he formed a view that there had indeed been a change of use, which was not exempted development, and recommended that a warning letter be sent.

71. A letter was sent on the 14th August, 2006, stating that it had been represented to the planning authority that unauthorised development had been carried out and inviting the respondent to make submissions. On the 12th September, 2006, the respondent's architect replied in the following terms:

> *"The activities being carried out by C & D Recycling are carried out under licence issued by Wicklow County Council. These activities comprise of the collection, sorting, processing and recycling of construction and demolition materials. In the opinion of our client the activities carried out by his company are Industrial as defined in the Planning Acts and Regulations. The site is shared with other companies, principally Clarke Oils, Wicklow Hire and Wicklow Corn Company. These companies have been involved on this site for some time in Industrial activities which are similarly defined in the Planning Acts and Regulations."*

72. This letter was acknowledged by the Council, without further comment.

73. In September, 2006 the respondent's architect lodged an application for planning permission in respect of a recycling operation at a site in Newtownmountkennedy. This application was withdrawn a few weeks later.

74. Mr. Brophy visited the site again on the 8th March, 2007. He avers that he noticed a significant increase in the quantity of waste, including C & D waste, on the site. In this regard he was referring to construction and demolition waste. Mr. Brophy took photographs of the site on this occasion. He returned on the 13th March and was shown around the site by a man named Trevor.

> *"A large shed was used for baling plastics and cardboard and to the rear was a machine for shredding and mulching wooden pallets. In the space behind the roadside boundary was a conveyor belt with people sorting out the recyclables. There was much less C and D waste on the site on this occasion…He showed me a new machine for crushing rubble for use in roads inside the compound."*

75. On Mr. Brophy's recommendation a further warning letter was sent on the 29th March, 2007. Referring to the points made in the architect's letter, it was stated that there was no provision in the planning legislation for exempted development consisting of a change of use within an industrial building, and that the current usage of the premises was unauthorised and required action to be taken to bring it into compliance with the planning code.

76. It was noted that this letter was being issued because the previous warning letter had expired, and that an enforcement notice could be issued within twelve weeks.

77. The respondent's architect replied on the 11th May, 2007, to the effect that the activities at the site, being the collection, sorting and recycling of construction and demolition materials, came within the definition of "*industrial process*" contained in the regulations dealing with exempted development. It was further contended that

> *"The change of use from storage, sale and processing of solid and liquid fuels to the activities of our client has taken place in a 'light industrial building' and as such is consistent with Class 4 listed in Schedule 2, Part 4 of the Regulations. The change of use is therefore Exempted Development."*

78. However, the letter also stated that the architect had been instructed to prepare an application for retention, should the planning authority so require.

79. This correspondence was acknowledged in due course. On the 2nd July, 2007, the Planning Enforcement section wrote to say that the Council still considered the development to be unauthorised and that a more detailed response would be issued, in accordance with s.153 of the Act, within three weeks.

80. No such response was in fact issued, and nothing further happened in respect of the enforcement process until the middle of 2010. This is ascribed by the Council to lack of resources and personnel. In the meantime, two applications for planning permission in respect of the Newtownmountkennedy site were granted by the Council, but rejected by An Bord Pleanála on appeal by third parties.

81. On the 3rd March, 2009, a firm of consulting engineers wrote on behalf of the applicant with the expressed purpose of clarifying the planning status of the facility so that the waste permit could be renewed. The business was described in the following terms:

> *"C & D Recycling currently operate as a waste collection facility which collects the materials for recycling via the use of skips. The materials collected are then separated at the facility and stored prior to transportation to various waste disposal facilities depending on the type of material. These materials generally consist [of] timber, rubble/concrete, rubber, metals and plastics. The main purpose of the facility is to basically collect the materials for recycling, separate them and package them for distribution. We do note however that no domestic waste is collected by C & D Recycling."*

82. The letter goes on to say that the site was being used in the same manner as it was when it was a coal depot, and requests the planning authority to confirm that the usage of the site fell within its permitted use and that there were no planning issues with it. Although it does not in terms refer to s.5 of the Planning Act an appropriate fee for an exemption certificate application appears to have been paid.

83. The application was assessed by an executive planner who noted that there was no record of permission in relation to coal storage and distribution on the site, although a coal depot had been operational there up to 2006. (The affidavit of Ms. Dennison does suggest that the coal business had planning permission).There was a reference to the fact that the existing permission on the site, granted in 1996, was for a grain store, plants and silos. The conclusion drawn from this was that a recycling facility would be a material change of use, with issues such as any run-off from the materials, odour nuisance and traffic movements to be considered.

84. This conclusion was adopted by the Director of Services in determining that the proposed change of use was considered to be a material change of use and was not therefore considered exempt development. The decision was given on the 5th June, 2009.

85. The respondent did not appeal this decision. However he contends, in the current proceedings, that the decision was "*fundamentally incorrect*" in that the materials being brought onto the site could not properly be described as "*waste*". He says that it demonstrates the fact that the Council has been confusing the law under the Waste Management Act with the law under the Planning Act. Further, he says that the assessment does not deal with the question of exempted development.

86. On the 13th August, 2010, the respondent was advised that the Council had decided to recommence investigations into "*the alleged unauthorised use of the site*".

> *"Such unauthorised use is considered to be by the material change of use of this site to accommodate the operation of a depot by C&D Recycling which includes the sorting of organic waste thereon."*

87. The letter also notified the respondent that an inspection would be carried out later that month or during September.

88. The inspection was not in fact carried out until the 3rd January, 2011, when Mr. Tim Walsh, Senior Executive Planner, attended at the site. Mr. Walsh says that before that date he had familiarised himself with the case and had been aware of the respondent's attempts to get planning permission for the alternative site at Newtownmountkennedy.

89. Having inspected the site, Mr. Walsh recommended that a warning letter be sent. This was done by Ms. Dennison on the 11th March, 2011. The letter (which appears to be the first to deal with the matter in detail), sets out the view of the Council that:

> • The establishment of the commercial waste recovery facility had resulted in the establishment of a new planning unit, physically separate from, and different in terms of character to, the solid fuel business carried out on the other part of the site.
>
> • Having regard to the definitions of "waste", "waste recovery" and "deposit" in the Waste Management Act, the current waste recovery use did not constitute an industrial process as defined in the regulations. The existing permissions on the site pertained to industrial processes and the storage of grain, oil/petrol and associated uses and structures. The scope of those permissions did not cover the existing waste recovery activities.
>
> • The waste recovery process involved the reception, storage and recovery of a wide range of organic and inorganic waste materials, which, in terms of character and external impacts, differed materially from the previous industrial usage relating to the storage of grain, the storage and bagging of coal and the storage and distribution of petrol. These impacts gave rise to considerations material to the proper planning and sustainable development of the area.

These considerations were, in summary, specified as relating to:

> i. "Significant visual impacts", in that the stockpiles of waste were highly visible from the roadway;
>
> ii. the deposits of unsorted waste material in the open yard, with a capacity to attract vermin, unlike the storage of coal;
>
> iii. the generation of odour nuisance and surface water run-off to a greater degree than would have been the case with coal and grain;
>
> iv. the intensification of use of the site, resulting from the establishment of a new planning unit and giving rise to an increase in the usage of the yard; and
>
> v. the bringing on site of new machinery (a track digger, mobile crane and mobile stone crusher) and new structures (a trammel and a portocabin), demonstrating how the method of operations on the site had materially changed.

90. It was pointed out that the fact that the operation had the benefit of authorisation under the waste management legislation did not negate the requirements of the planning legislation, as stipulated in Condition 1.1 of the waste permit.

91. The respondent was reminded that the Council had already determined, under the s.5 procedure, that the development was not an exempted development.

92. In summary, it was said, the permitted users of the site had been replaced by a substantially new and different type of non-industrial development that amounted to a material change of use.

93. The respondent sent an acknowledgement on the 11th April, 2011, followed by a letter on the 13th April. This did not take issue with Ms. Dennison's letter, but simply said that he was in the process of finalising an alternative site for the business, which he envisaged would take three to four months. He ended by saying:

> *"Your patience in this matter is much appreciated."*

94. Mr. Walsh carried out a further inspection on the 10th June, 2011. He avers that he met with the respondent and had a cordial conversation with him. The respondent told him that he did not wish to stay at the Rathnew site. He was hopeful that a fresh application for Newtownmountkennedy would be successful and said that he simply needed time to get the permission and relocate his

business. Mr. Walsh says that the respondent asked him to explain "*the 7 year enforcement time rule*" and offered to enter into a legal agreement to vacate the site before that time expired. It is averred that the respondent acknowledged that he had commenced his recycling operation in the summer of 2006.

95. The respondent has not contradicted Mr. Walsh's account of this conversation.

96. Mr. Walsh also avers that he considered the site to be unsafe. The business was operating at a high degree of intensity but in a haphazard fashion. There was no on-site traffic management. The operations taking place were described as the storage of processed and unprocessed waste, the movement of trucks and a loading machine and the operation of the trammel, all within a limited space. He has exhibited a number of photographs taken on this occasion. A long-armed digger was scooping up waste into a mound.

97. The trammel is described as being initially loaded by a front loader into an intermediary crusher type machine, before it is fed via a conveyor belt into the trammel.

98. By letter dated the 16th June, 2011, an enforcement notice pursuant to s.152 of the Planning Act was served on the respondent. In the covering letter Ms. Dennison referred to the unsuccessful planning applications in respect of the Newtownmountkennedy lands. She continued:

> *"The planning authority accepts that you have made attempts to address the unauthorised status of the said current waste recycling operation, by means of the submission of the said planning applications. However in light of the fact that it is now nearly five years since the initial Warning Letter under this file was issued to C&D Recycling, the planning authority considers that it has provided you with ample time to deal with the on-going unauthorised use of the subject site."*

99. The letter concluded by informing the respondent that it was open to him to seek a meeting to discuss matters if he considered that it was warranted.

100. The attached enforcement notice required the respondent, within twelve weeks, to cease in full the use of the lands as a waste recovery operation facility by taking the following steps:

> *"i) the removal of all plant machinery skips, porto-cabins and the waste sorting facility (the trammel) from the site.*
>
> *ii) the removal of all waste material, both recovered and un-recovered, from the site.*
>
> *iii) the cessation of all administrative operations on this site and the removal of all associated office equipment from the subject administration unit."*

101. A meeting did take place in June, 2011. The respondent asked for more time, and there appears to have been a discussion about whether or not an application for planning could be given priority. It is however clear from the notes of the meeting that no commitment was given on behalf of the Council.

102. On the 26th September, 2011, (which was more than 12 weeks after the service of the enforcement notice), a firm of consulting engineers wrote to the Council on behalf of the respondent. It was stated that the respondent had reviewed the issue of relocation and had decided to seek planning permission in respect of the site in question. Ms. Dennison responded that while this proposal was welcomed, the Council intended to continue with enforcement action. She encouraged the respondent to ensure that a "*comprehensive valid planning application*" was submitted in the near future.

103. Mr. Walsh visited the site again on the 19th October, 2011. He considered that the enforcement notice had not been complied with, in that the business was "*very much in operation*". He noted a large lorry being loaded with a material that resembled wood pulp, creating plumes of black dust visible from the road. (This is visible in a photograph.) There were three front loaders in operation as well as a long-armed digger and a medium sized digger. The trammel was in full operation. There were two mobile crushing machines present, loaded with assorted materials such as wooden planks. Mr. Walsh again felt that the business was being operated in a disorganised and unsafe manner. He noted that while there was another commercial operation on the site, the waste recovery business was the most intensive with a number of its vehicles spread throughout the site. About thirty skips were parked in the front yard.

104. It should be noted that the respondent denies that the business is run in an unsafe fashion and says that health and safety consultants are employed.

105. On the 27th October, 2011. the Director of Services, Planning and Development ordered that proceedings be taken on behalf of the Council for non-compliance with the enforcement notice. Shortly thereafter the Council's solicitors wrote to the respondent to inform him that they had instructions to issue proceedings. This was responded to by a fax dated the 14th November (but apparently not sent until the 22nd) from the respondent's engineers in the following terms:

> *"We firstly apologise on behalf of our client for the slow response to resolve the alleged unauthorised development at Rathnew, however we are currently in the process of preparing a retention application for the facility as advised to the council on the 26th September last. The delay in submission of the retention application has occurred due to our client's negotiations with his landlord where our client is in the process of preparing a new lease for a smaller yard which will greatly down scale the recycling facility. As part of any valid planning application our client will require permission from the property owner Staffords to submit this application. We hope to have all this resolved shortly which will enable us to submit a valid application in which we have the documents ready.*
>
> *We would ask that under these circumstances that you may perhaps withhold from seeking counsel to prepare papers for proceedings…*
>
> *We thank you in advance for your time and we confirm on behalf of our client that we will endeavour to resolve this issue immediately."*

106. In reply, the Council's solicitors referred to the provisions of s.162(3) – an enforcement action is not to be stayed or withdrawn by reason of an application for, or grant of, retention permission.

107. On the 28th November, 2011, the Council's solicitors confirmed that they had instructions to proceed.

108. However, nothing appears to have happened until 2013. Because of the lapse of time, Mr. Walsh carried out a further inspection on the 12th April, 2013. He observed that the business was still in operation. A wall had been erected around the yard, with dimensions of about 45 metres in length and 1.5 metres in height. Mr. Walsh considers this to be a non-exempt development in that it exceeds 1.2 metres in height.

109. Proceedings were issued by way of notice of motion dated the 7th June, 2013.

110. Mr. Walsh avers that in his opinion the activity on the site constituted unauthorised development. In particular he refers to s. 3(2)(b)(iii) of the Planning Act, which provides that the use of land shall be taken to have materially changed if it is used for the deposit of old metal, mining or industrial waste.

111. Mr. Walsh says however that even in the absence of this provision he would be of the view that there had been a material change of use, on the basis that the business now being carried on gives rise to fresh considerations that are material in the context of proper planning and sustainable development. In this regard he refers to the letter of the 11th March, 2011.

112. He says that the waste recovery user does not constitute an industrial process, since it does not involve the turning of raw materials into a new object or article. Further, he says that there is a significant difference between bringing materials such as coal or grain onto a site and bagging it, and bringing unsorted miscellaneous waste items (and organic waste such as soil) onto a site for the purpose of sifting and sorting it prior to sale or further transfer.

113. Mr. Walsh exhibits a number of decisions made by An Bord Pleanála in which it was determined that a proposed use of industrial land for the purpose of waste recycling/recovery facilities constitutes a material change of use.

114. Ms. Mulcrone has addressed each of the "*fresh considerations*" set out by Mr. Walsh and concluded as follows:

> *i. There is a long established mixed industrial use established on the subject site wherein two companies have operated separate commercial entities.*
>
> *ii. Any increase in visual impact is due to the Council having removed boundary hedgerows and trees.*
>
> *iii. Grain would be an attraction for vermin and the storage of recycled materials, which do not comprise organic materials, is less likely to attract vermin.*
>
> *iv. There are no obnoxious odours associated with the recycling use, while during wet weather grain, coal turf and diesel would all have distinct odours. In that context any stale odours associated with recycled material in wet weather is not materially different from the previous use.*
>
> *v. The handling and bagging of coal is an activity that could give rise to dust and air pollution. Such dust could provide contaminate the surface water system. The handling of the grain would give rise to dust and other air pollution. Spillages could form ponding or enter the surface water drainage system.*
>
> *vi. The plant and machinery ancillary to the recycling operation comprises industrial plant and machinery associated with the industrial use on land occupied and so used. The plant and machinery are not dissimilar to conveyors and bagging machinery for coal and grain and therefore do not materially alter the industrial appearance of the premises;*

115. Ms. Mulcrone therefore holds the view that there is no significant difference between the established use and the use the subject of these proceedings. She says that the site is being used for an industrial process.

Whether the proceedings are statute barred or should be dismissed by reason of delay
(i) The date of commencement

116. As described above, the first named respondent says that he commenced preparatory works on the site in May, 2006 before entering into the lease on the 10th July and obtaining the waste permit on the 17th July. Insofar as the Council argues that such preparatory works could not be considered to be "use" within the meaning of the Planning Act, the respondent says that this is "*an entirely inappropriate distinction*" and "*something that has now long since been overtaken*" in terms of planning practice. He says that "*any works relating to or connected with*" the allegedly unauthorised development must be seen as amounting to the commencement of such development. Since a complaint was received by the Council about his activities in July 2006, the Council cannot maintain that preparatory works had not been carried out prior to that.

117. The Council points to the fact, noted above, that the respondent stated in his application that he would commence activities once approval was given, with the implication that he would not start before then. It does indeed argue that the Act distinguishes between "works" and "use", and provides in s. 2 that "use" does not include the carrying out of works. Further, it argues that the date of commencement of those works is a matter peculiarly within the knowledge of the respondent, and says that he has failed to provide any evidence from, for example, the owners of the site or from any persons who carried out the work.

(ii) The statutory time limit

118. The respondent argues that the proceedings are statute barred on the basis that the user in question commenced at the beginning of May, 2006 while the proceedings were not issued until the 12th June, 2013. The Council maintains its position that the relevant user did not commence until July of 2006, but in any event says that the particular provisions of the statute enable it to maintain the proceedings.

119. Section 160(6) of the Planning and Development Act 2000, as amended, provides in full as follows:

> *(a) An application to the High Court or Circuit Court for an order under this section shall not be made –*
>
> > *(i) in respect of a development where no permission has been granted, after the expiration of a period of 7 years from the date of the commencement of the development, or*

(ii) in respect of a development for which permission has been granted under Part III, after the expiration of a period of 7 years beginning on the expiration, as respects the permission authorising the development, of the appropriate period (within the meaning of section 40) or, as the case may be, of the appropriate period as extended under section 42.

(b) Notwithstanding paragraph (a), an application for an order under this section may be made at any time in respect of any condition to which the development is subject concerning the ongoing use of the land.

120. Since there was no grant of planning permission in respect of the respondent's use of the site, the relevant subsection is s.160(6)(i).

121. Section 251 of the Act deals with the calculations of time periods and originally provided as follows:

"(1) Where calculating any appropriate time period or other time limit referred to in this Act or in any regulations made under this Act, the period between the 24th day of December and the first day of January, both days inclusive, shall be disregarded.

(2) Subsection (1) shall not apply to any time period specified in Part II of this Act."

122. The section was amended in 2010 by the deletion of the exception in relation to Part II.

123. The appellant submits that on the basis of this provision, the period of seven years must be extended by the addition of 63 days. If that is correct then, even if it is accepted that the user commenced in May, 2006, the proceedings were issued in time. Reliance is placed on the decision of Hedigan J. in *Browne v. Kerry County Council* [2009] IEHC 552.

124. The respondent contends that this argument is unstateable. He says that the decision in *Browne* must be considered as applicable only to the time limits in respect of planning functions and cannot apply to court proceedings.

125. In *Browne* the applicant sought a declaration that the respondent County Council had determined a particular application outside of the two-year period set by the relevant provision of the Act.

126. Having held that the time limit in question was mandatory rather than directory, Hedigan J. said that the question for the court was

"…whether section 251 of the 2000 Act may be applied in such a fashion as to effectively extend the two year time period by 9 days in respect of each year, giving rise to a total extension of 18 days. The provisions of section 251 are plain and unambiguous. It is expressly provided that the period between the 24th of December and the 1st of January each year, both days inclusive, shall be disregarded in the calculation of time limits. The applicant has contended that to apply this provision to time limits of more than one year would result in patent absurdity; for example, a time limit which was nominally 12 years on the face of the statute would in fact be calculated at the considerably lengthier period of 12 years and 108 days. He thus argues that the provision can only logically be applied to time limits of less than one year. However, I am unable to agree with this submission. There is no basis within the wording of the 2000 Act or otherwise for the imposition of such a specific limitation on the effect of section 251 by this Court. The provision is undoubtedly capable of effecting a quite serious extension of more lengthy time limits, and such extension will no doubt be of significance in many cases such as the present one. This effect could be described as curious, and its merit might well be open to debate, but it cannot in my view be construed as "absurd" within the meaning of the 2005 Act."

127. This latter reference was to s. 5 of the Interpretation Act 2005, which provides as follows:

"In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction): -

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of: -

(i) in the case of an Act to which paragraph (a) of the definition of Act in section 2(1) relates, the Oireachtas, or

(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

(iii) Delay and acquiescence

128. The respondent submits that the proceedings should be dismissed because of inordinate, inexcusable and "inexplicable" delay in bringing them. The lengthy periods of time when nothing was happening are highlighted and it is argued that no adequate excuse has been presented. The court has a discretion, established in such cases as *Morris v Garvey* [1983] I.R. 319 and *Leen v Aer Rianta* [2003] 4 I.R. 394, to refuse injunctive relief under s.160 in appropriate cases.

129. The Council relies upon the following passage from the judgment of Henchy J. in *Morris v Garvey* at p. 327:

"When sub-s. 2 of s. 27 is invoked, the High Court becomes the guardian and supervisor of the carrying out of the permitted development according to its limitations. In carrying out that function, the court 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 suchlike extenuating or excusing factors) before the court should refrain from making whatever order (including an order of attachment for contempt in default of compliance) as is "necessary to ensure that the development is carried out in conformity with the

permission." An order which merely restrains 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 partially completed structure which would be offensive to the eye as well as having the effect of devaluing neighbouring property."

130. The Council says that no exceptional circumstances, such as those identified in this passage, have been established by the respondent.

131. The following comments by McKechnie J., in *Leen v Aer Rianta* at p. 410, may also be noted:

> *"Finally, on the generality of the discretion point it seems to me that, subsequent to* Morris v Garvey *[1983] I.R. 319, the courts have tended to individualise each case and decide it accordingly, rather than to inquire as to whether the resulting circumstances fell within any of the illustrations mentioned in that judgment. For example, in some cases where there was no question of bad faith or lack of candour, injunctions issued, whereas in others relief was refused, even though the facts did not comfortably sit with the exceptions identified by Henchy J. in* Morris v. Garvey ."

Whether there was an unconstitutional invasion of the judicial domain

132. The argument made here relates to the fact that there was an existing set of proceedings before the Circuit Court when the Council decided on the 7th March, 2014, to revoke the respondent's waste permit. The respondent argues that the decision amounted to a unilateral determination by the applicant of the very issues that the proceedings under s.160 of the Planning Act sought to have determined. This, he says, was an impermissible intervention in the judicial process by one of the parties to that process. It was done without any reference to the court or to him, in circumstances where he had a *bona fide* defence to the s.160 proceedings and had filed affidavits setting out that defence. The revocation rendered the first relief sought by the Council (the order to cease an unauthorised development) moot, and the second (the order to remove material and equipment) unworkable.

133. The respondent further submits that the second relief sought by the Council, namely the removal of waste and equipment from the site, was, by virtue of the action taken, rendered incapable of being complied with.

134. It is contended that these actions represent an impermissible and unconstitutional intervention in the judicial domain, in breach of Article 34.1 of the Constitution. The respondent relies in this regard on the decision of the Supreme Court in *Buckley v Attorney General* [1950] I.R. 67 (the "*Sinn Féin Funds Case*").

135. In *Buckley*, the trustees of the funds of the Sinn Fein Organisation had lodged the funds in the High Court and had instituted proceedings seeking orders as to their proper disposal. While the action was pending the Oireachtas passed the Sinn Fein Funds Act, 1947. This provided that all further proceedings in the matter were stayed, and that the High Court should, upon an *ex parte* application being made by the Attorney General, dismiss the action and direct the disposal of the funds in a manner specified in the Act. The High Court judge to whom the Attorney General's application was made refused to make the order sought. His decision was upheld by the Supreme Court, which found the Act to be repugnant to the Constitution primarily on the basis of the interference with property rights. At p.84 of the report the Court continued as follows:

> "There is another ground on which, in our view, the Act contravenes the Constitution. We have already referred to the distribution of powers effected by Art. 6. The effect of that article and of Arts. 34 to 37, inclusive, is to vest in the Courts the exclusive right to determine justiciable controversies between citizens or between a citizen or citizens, as the case may be, and the State. In bringing these proceedings the plaintiffs were exercising a constitutional right and they were, and are, entitled to have the matter in dispute determined by the judicial organ of the State. The substantial effect of the Act is that the dispute is determined by the Oireachtas and the Court is required and directed by the Oireachtas to dismiss the plaintiffs' claim without any hearing and without forming any opinion as to the rights of the respective parties to the dispute. In our opinion this is clearly repugnant to the provisions of the Constitution, as being an unwarrantable interference by the Oireachtas with the operations of the Courts in a purely judicial domain."

136. In *The State (Divito) v Arklow Urban District Council and Byrne* [1986] I.L.R.M. 123 the applicant had obtained a certificate from the District Court under the Gaming and Lotteries Act 1956, for the purpose of converting part of his premises into an amusement hall. Such a certificate could be given only if, *inter alia*, the relevant local authority had passed a resolution adopting Part III of that Act. In this case such a resolution was in force. However, the local authority successfully appealed the grant of the certificate on grounds related to the applicant's premises. The applicant then altered his premises with a view to making a fresh application to the District Court and published a statutory notice of his intentions. The local authority then decided to re-adopt Part III in a more limited manner so as to exclude the part of the town where the applicant's premises were located.

137. The applicant sought an order of *certiorari* based in part on what he claimed was an unconstitutional interference with his right to make the application to the District Court. Rejecting this argument Henchy J. said at p126:

> *"I readily accept that a non-judicial intervention in the adjudicative process of a lis before any of the courts established under the Constitution constitutes an unconstitutional invasion of what is an exclusively judicial domain: see Buckley & Ors v. Attorney General & Ors [1950] I.R. 67; The State (McEldowney) v Kelliher [1985] ILRM 10; Costello v Director of Public Prosecutions [1984] ILRM 413. But in this case there was no lis before the District Court when the council intervened. There was no pending proceeding of which the District Court was seised. All that happened was that the applicant had served and published a statutory notice of intention to make an application for a certificate in the District Court on a specified date. The District Court had not acquired jurisdiction to make any order in the matter. It could not acquire jurisdiction to make such an order until the applicant moved his application. And before that happened, the council's resolution removed the reach of the Act to the premises. I am satisfied that the passing of that resolution did not constitute an unconstitutional invasion of the judicial process."*

138. The Council points to the fact that it was found by the President of the High Court to be entitled to revoke the waste permit, under the Waste Management regime, which is a different regime to the planning regime. The planning status of the site was not at issue in the revocation of the waste permit, nor was it at issue in the judicial review proceedings, and such revocation was not intended by the Council either to determine the s. 160 proceedings unilaterally or to limit or fetter the Court's ability to deal with such proceedings. Nor did it have the effect of so doing.

139. It is submitted that the Circuit Court judge was still in a position to make a finding that there had been an unauthorised development by way of a material change of use. Similarly, the question of an order under s. 160(2) was properly before him and he made a determination on it.

Whether there was an unauthorised development
140. Counsel for the respondent says that his primary argument is that the respondent was engaged in an industrial use, which was exempt. He also argues that it was not materially different to that of previous occupants. The industrial process involved bringing material onto the land as source material. It was not "waste" for planning purposes and it was not "deposited" within the meaning of the Act, but was processed and removed again. However, it is submitted that for the purposes of this argument it does not matter whether it was waste or not.

141. It is also submitted that the site was not "used" for the "deposit" of waste within the meaning of the Planning Act. The activity concerned was recycling.

142. Counsel refers to the applicable test as set out by Lynch J. in *Galway County Council v Lackagh Rock Ltd* [1985] 1 I.R. 120 at p 127:

> *"To test whether or not the uses are materially different, it seems to me, that what should be looked at are the matters which the planning authority would take into account in the event of a planning application being made either for the use on the appointed day or for the present use. If these matters are materially different, then the nature of the use must equally be materially different. Since no evidence has been adduced to indicate that the applicant would have taken any different matters into consideration in determining an application for planning permission made now rather than on the appointed day, I accept the respondent's contention that there has been no material change of use."*

143. Reliance is placed upon Ms. Mulcrone's analysis of the considerations identified in the letter of the 11th March (summarised at paragraph 114 above) as demonstrating that, given the history of the site, these are not new issues. In planning terms there was no material difference in the nature of the activity. That being so, the respondent was entitled to intensify the activity up to a point where it would become materially different.

144. It is submitted, by reference to *Fingal County Council v Keelings* [2005] IESC 55 that no estoppel arises from the fact that the respondent applied for a waste permit in circumstances where he believed that he did not require one.

145. Counsel contends that the s. 5 declaration is not binding on the court, because, it is said, proceedings under s.160 involve a fresh investigation by the court.

Whether an order should be made under s.160(2)
146. The respondent submits that no order should be made under this provision, on the basis, firstly, that it would be unworkable or unenforceable and, secondly, that it would be more appropriate for the Council to seek a remedy under the Waste Management regime.

147. It is argued that operations effectively ceased on 7th March, 2014, when the Council revoked the waste facility permit for the site. Since this date C&D Recycling has no longer been operating and it is claimed that it no longer has the resources in terms of man power or machinery to deal with the removal of any material. If sufficient warning had been given there could have been an opportunity to wind down the business and deal with the material, but the Council's intervention prevented such an opportunity.

148. The respondent says that he had only had a leasehold interest in the site, which was owned by the Stafford family. The tenancy agreement has come to an end. The respondent has no legal right to enter on the property and therefore will be unable to comply with any order requiring him to do that. As the Stafford family were never joined to the proceedings any order requiring the respondent to clear the site would be physically impossible and unenforceable since he would have to trespass on the land.

149. In these circumstances the respondent invokes the discretion of the court to refuse relief.

150. The argument as to the appropriate statutory remedy is made on the basis that the Waste Management Act provides, in ss. 55 and 58, a "tailor-made" procedure whereby a court may order the removal of waste. It is not a planning issue and cannot be dealt with under the planning regime.

151. The Council submits that an order should be made under s.160(2) of the Act. The waste business operated at the site in question was an unauthorised development, and accordingly all waste material brought on to the site at any point in time should never have been there in the first place.

152. It is contended that the respondent must have known that he was engaging in unauthorised development, given his failure to appeal the determination made in 2009, his attempts to secure an alternative site and the correspondence set out above.

153. The Council refers to *Wicklow County Council v Forest Fencing Limited t/a Abwood Homes* [2007] IEHC 242 , where Charleton J. said, in relation to the exercise of his discretion:

> *"45. It is urged on me that I should not grant injunctive relief against this developer by reason of factors which include the longstanding nature of the business conducted on the site, the effect that it will have on the livelihood of the respondents/appellants, the destruction of the employment of the several employees engaged by them, and the overall circumstances within which the development came about. I have looked at every argument in relation to this development, out of deference to the work of counsel but, more particularly, because I have to now exercise a discretionary power.*
>
> *[...]*
>
> *49. The balance of authority is in favour of the Court exercising its discretion to make a declaration that planning permission has been granted where the Court has found as a fact that there is a default permission in favour of a developer. The Court is there to uphold the law. Its discretion should not be used to change the law or to its operation. A similar principle, to that outlined in the separate judgments of O'Leary J. and Clarke J., should apply in the opposite circumstances, such as here, where the Court has found that there is no default permission: where the developer has, on the contrary, developed the site entirely in accordance with his own wishes and with little or no reference even to the plans in respect of which he once sought permission. The discretion of the Court, in this context, is very limited. The balancing of that discretion must start with the duty of the court to uphold the principle of proper planning for developments under clear statutory rules. Then, the Court should ask what might allow the consideration of the exercise of its discretion in favour of not granting injunctive relief.*

50. To fail to grant injunctive relief in these circumstances, on these facts, would be to cause a situation to occur where the Court is effectively taking the place of the planning authority. The Court should not do that. This is a major development, for which there is no planning permission. It is in material contravention of the County Wicklow Development Plan. It is built entirely to suit the developer and with almost no reference to legal constraint. I am obliged to decide in favour of the injunctive relief sought."

154. The Council submits that the effect of the decision in the Circuit Court is to allow the respondent to "walk away" from the site, leaving the waste he deposited thereon, notwithstanding the adverse findings made against him in relation to unauthorised user (in the Circuit Court) and the lawful revocation of his waste permit (in the High Court). Otherwise the site will have to be cleaned up at the public expense, since what is effectively a waste dump cannot be left there. It is also in the public interest that the planning laws be adhered to.

155. It is not accepted that the respondent cannot now lawfully collect the waste and take it to a properly designated site on foot of a court order, having regard to s.163 of the Planning Act. That provides that no planning permission is necessary to engage in development required by an order made under s.160.

156. It is also noted that the respondent has yet to surrender his permit.

Discussion and conclusions

157. Dealing with the issues in order, the first question is whether the proceedings were out of time or should be dismissed by reason of the Council's delay in instituting them.

158. The issue of the correct interpretation of s. 251 of the Planning and Development Act, 2000 was dealt with comprehensively by Hedigan J. in *Browne*. That being so, I am precluded by the principles established in *Irish Trust Bank v Central Bank of Ireland* [1976-7] I.L.R.M. 50, *Kadri v Governor of Wheatfield Prison* [2012] IESC 27 and *In Re Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189, from adopting a different view unless one of the exceptional considerations identified in those cases applies. I cannot see that there is any identifiable error in Hedigan J's analysis. It is true that his conclusion, as he acknowledged himself, leads to a curious result in that the planning year is nine days longer than the norm. It seems to me that what the draughtsman may have intended was to ensure that a relevant period did not expire during a holiday period. However, that is not the effect of the language used.

159. There are two further considerations. One is that the section was amended after the judgement in *Browne* but not in a way that had any impact on that judgment. The other is that in the instant case the court is dealing with a Circuit appeal, which cannot be appealed further by either party. It would be highly undesirable that there should be two conflicting High Court judgments on an issue of significant importance in the planning code. That would not, of course, be a determining factor if I felt that the decision in Browne was wrong by reference to the established criteria. I do not.

160. In these circumstances the proceedings were brought within the statutory time if the respondent's use commenced at a time not more than seven (calendar) years and 63 days before the 7th June, 2013. Even on the respondent's version, therefore, they were in time.

161. The question then rises as to whether relief should be refused because of delay on the part of the Council.

162. It is certainly the case that there was significant delay between the initial investigation and the proceedings. However there is nothing else in the case that might sway a court to exercise its discretion in the respondent's favour. There is nothing that could be construed as acquiescence on the part of the Council, or as causing any form of hardship to the respondent, arising from the delay. Having regard to the correspondence, and in particular to the efforts made by the respondent to obtain planning permission for a different site and his stated intention to apply in respect of this site, it seems to me clear that the delay was at least to some extent attributable to a wish to accommodate him. This is not a proper matter of complaint.

163. I consider the argument made in relation to the alleged invasion of the judicial domain to be unsustainable. In the first place, I am not at all sure that the respondent is entitled to raise any issue as to the legality of the waste permit revocation in these proceedings in circumstances where that issue was not raised in the judicial review proceedings. In effect, the respondent is seeking to bring about a situation where one High Court judge has held, on the arguments put before him, that the revocation was lawful while another holds it to be unlawful based on fresh arguments. Apart from anything else this appears to be a breach of the rule in *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313.

164. In any event I am satisfied that there is no substance to the point. The Council did not, as in *Buckley*, adopt a measure that sought as a matter of law to compel a judge hearing the case to a particular conclusion. Nor did it remove the subject matter of the dispute between the parties from the jurisdiction of the court. The Circuit Court remained seised, as it was from the start, of a dispute raising issues under the planning code. The respondent contested the proceedings and made submissions on the issues. The Circuit Judge dealt with that dispute and made orders according to his findings. This court, on appeal, is in the same position.

165. The next question – whether there was an unauthorised development – raises an issue as to the jurisdiction of the Court.

166. Section 5 of the Planning Act provides in full as follows:

"5.—(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.

(2) (a) Subject to paragraph (b), a planning authority shall issue the declaration on the question that has arisen and the main reasons and considerations on which its decision is based to the person who made the request under subsection (1), and, where appropriate, the owner and occupier of the land in question, within 4 weeks of the receipt of the request.

(b) A planning authority may require any person who made a request under subsection (1) to submit further information with regard to the request in order to enable the authority to issue the declaration on the question and, where further information is received under this paragraph, the planning authority shall issue the declaration within 3 weeks of the date of the receipt of the further information.

(c) A planning authority may also request persons in addition to those referred to in paragraph (b) to submit information in order to enable the authority to issue the declaration on the question.

(3) (a) Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.

(b) Without prejudice to subsection (2), in the event that no declaration is issued by the planning authority, any person who made a request under subsection (1) may, on payment to the Board of such fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under subsection (2).

(4) Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.

(5) The details of any declaration issued by a planning authority or of a decision by the Board on a referral under this section shall be entered in the register.

(6) (a) The Board shall keep a record of any decision made by it on a referral under this section and the main reasons and considerations on which its decision is based and shall make it available for purchase and inspection.

(b) The Board may charge a specified fee, not exceeding the cost of making the copy, for the purchase of a copy of the record referred to in paragraph (a).

(c) The Board shall, from time to time and at least once a year, forward to each planning authority a copy of the record referred to in paragraph (a).

(d) A copy of the said record shall, at the request of a member of a planning authority, be given to that member by the manager of the planning authority concerned.

(7) A planning authority, before making a declaration under this section, shall consider the record forwarded to it in accordance with subsection (6)(c).”

167. The Act does not spell out the effect and status of a s.5 declaration, although it is obviously intended that the decision be a matter of public record.

168. Section 5 was considered by the Supreme Court in *Grianan An Aileach Interpretative Centre v Donegal County Council (No.2)* [2004] 2 I.R. 625. In that case the applicant sought and obtained a declaration in the High Court that certain proposed activities came within the range of activities covered by the planning permission held by it. The local authority appealed, arguing that the High Court had no jurisdiction to grant such a declaration. The Supreme Court held that, having regard to the availability of the s. 5 procedure, the High Court should not have adjudicated upon the proper construction of the planning permission.

169. Giving the judgement of the Court, Keane C.J. said at paragraph 26:

“In the present case, the issue that has arisen between the plaintiff and the defendant is as to whether the proposed uses are authorised by the planning permission. I am satisfied, however, that, although the issue has arisen in that particular form, it necessarily requires the tribunal which determines it to come to a conclusion as to whether what is being proposed would constitute a material change in the use of the premises. If it would not, then the question as to whether the particular uses were authorised by the permission simply would not arise. In the present case, the defendant at all times has been contending, in effect, that the proposed uses would constitute a material change in use which is not authorised by the present planning permission. Equally, for its part, the plaintiff has been contending that the uses are authorised by the existing planning permission but has not contended that, if that were not the case, it would in any event be entitled to carry them out as not constituting a material change of use. It would seem to follow that the question as to whether planning permission is required in this case necessarily involves the determination of the question as to whether the proposed uses would constitute a "development", i.e., a question which the planning authority and An Bord Pleanála are empowered to determine under s. 5 of the Act of 2000.”

170. At paragraph 32 he went on:

“Thus, in the present case, if the jurisdiction of the planning authority or An Bord Pleanála under s. 5 were invoked and they were invited to determine whether the uses in controversy were within the uses contemplated by the planning permission or constituted a material change of use for which a new planning permission would be required, either of those bodies might find itself in a position where it could not exercise its statutory jurisdiction without finding itself in conflict with a determination by the High Court. No doubt a person carrying out a development which he claims is not a material change of use is not obliged to refer the question to the planning authority or An Bord Pleanála and may resist enforcement proceedings subsequently brought against him by the planning authority on the ground that permission was not required. In that event, if the enforcement proceedings are brought in the High Court, that court may undoubtedly find itself having to determine whether there has been a material change of use or whether a development is sanctioned by an existing planning permission, as happened in O'Connor v. Kerry County Council [1988] I.L.R.M. 660. But for the High Court to determine an issue of that nature, as though it were the planning authority or An Bord Pleanála, in proceedings such as the present would seem to me to create the danger of overlapping and unworkable jurisdictions referred to by Henchy J.”

171. On the facts of the case, the Court considered that the question whether the proposed uses were authorised by the planning permission necessarily required the tribunal determining the answer to decide whether or not the proposal amounted to a material change, and thus a “development”. The jurisdiction to determine that issue had been conferred by the legislature on the planning authority and An Bord Pleanála. The High Court could not act as a form of planning tribunal.

172. The judgment does not suggest that the High Court cannot, in any circumstances, enter upon the question of whether a particular activity constitutes a development requiring permission or is exempted. It expressly envisages that this issue might have to

be determined in enforcement proceedings.

173. The case was, as is apparent from the brief summary of facts, one where no application had been made under s. 5. There was, accordingly, no discussion of what might happen where a s.5 declaration was refused.

174. In *Wicklow County Council v. Fortune* [2013] IEHC 397, Hogan J. dealt with the issue whether the High Court had, in s.160 enforcement proceedings, jurisdiction to determine whether a particular development was exempted development in circumstances where a s. 5 declaration had been applied for and refused. After close consideration of *Grianan An Aileach* he held that the Supreme Court's decision must be taken impliedly to preclude the High Court from making such a determination where a s.5 application for a certificate of exemption had been refused and the refusal had not been quashed in judicial review proceedings. Since the s. 5 decision is part of the formal planning history of a site and is entered on a public register, a declaration to contrary effect by the High Court would mean that there could be in existence two contradictory official determinations of the same question, leading to confusion and uncertainty. Hogan J. therefore concluded that it was not open to him to find that the development was exempt.

175. The instant case raises precisely the same issue. The respondent did not appeal the refusal of the declaration and did not take any step to quash it. In the circumstances I agree with the reasoning of Hogan J. and can therefore not accede to the argument that no planning permission was required for the respondent's business. It follows that, in my view, the learned Circuit Court judge was correct to find that there had been an unauthorised development.

176. Finally, there is the question of remedy.

177. I do not accept the argument made by the respondent that it is now out of his power to remove the material and equipment from the site. I accept that he is not the owner, but there is no evidence to support the proposition that he would not be able to enter upon the lands except as a trespasser. The views of the owners have not been put before the court, but I find it hard to imagine that they would prefer to keep it in its current condition rather than cooperate with remediation. The suggestion that the respondent cannot afford to carry out the removal is unsupported by evidence as to his means and current occupation.

178. I therefore propose to make an order under s.160(2). However, given the lapse of time since the proceedings began, I propose to invite the parties to present to the Court a realistic timetable for the necessary works with a view to incorporating such a timetable into the order.