

THE HIGH COURT

Record No. 2011/261 MCA

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

BETWEEN

MICHAEL BYRNE, SUSAN BYRNE, GARY BYRNE, SHARON BYRNE, ALEXANDER DOWNES, CHLOE BLAKE, DAISY DOWNES (suing by her mother and next friend Chloe Blake), JOSEPH DOWNES (suing by his mother and next friend Chloe Blake), JOSEPH DEAKINS, JUNE DEAKINS, STEPHEN FARRELL, JENNY KELLY, OISIN FARRELL (suing by his mother and next friend Jenny Kelly), AOIFE FARRELL (suing by her mother and next friend Jenny Kelly), JULIE McCANN, MARY O'NEILL, ADRIENNE O'SULLIVAN, GARRETT O'SULLIVAN AND BRIDIE SHEEHAN

Applicants

AND

DUBLIN PORT COMPANY AND MARINE TERMINALS LIMITED

Respondents

Judgment of Ms. Justice Iseult O'Malley delivered the 20th June. 2013**Introduction**

1. The issue in this application is, primarily, whether or not discovery is available in proceedings pursuant to s. 160 of the Planning and Development Act, 2000. In the substantive proceedings, the applicants seek declarations that certain aspects of the second named respondent's activities have intensified to such an extent as to constitute a material change in use requiring planning permission and that particular constructions erected by them, which facilitate that intensification, constitute unauthorised development. Consequently they seek an order requiring the respondents to reinstate the structures concerned to their condition prior to the commencement of the development.

2. Discovery is sought in furtherance of those claims. The respondents contend that discovery is not available on the basis that it is inconsistent with the nature of the summary proceedings provided for by the section. In the alternative they argue that the discovery sought is excessive.

Background

3. The applicants all live on Pigeon House Road in Ringsend, Dublin 4. Their homes are very close to a site leased by the second named respondent ("MTL") from the first named respondent. MTL's business is the handling of "Lift-on/Lift off" trade, which involves the unloading of containers from shipping using the Port and the stacking of the containers on the site to await loading on another ship or collection by hauliers. The unloading is done by means of ship to shore gantry cranes and there are a number of rail-mounted gantry cranes to move the containers around the site. According to MTL, approximately 34% of all containerised traffic through Dublin passes through this terminal.

4. The applicants assert that since in or around 2007 the business carried out at the site, particularly at night, has intensified to the point of causing substantial concern and nuisance. This intensification, they say, was facilitated by the erection of three extra gantries with integrated lighting in 2002, the increase in height of one of them from 20 metres to 27 metres in 2007-2008 and the addition of an extra storey to the Control Room building in 2007-2008. The extra capacity for dealing with containers at the site has meant an increase in night time working with resulting increases in noise, light and vehicular traffic in the area.

5. The notice of motion seeking relief under s. 160 was issued on the 17th August, 2011. The application is grounded on the affidavit of a chartered planning consultant, who sets out the planning history of the site, refers to articles in trade magazines about the development of its facilities, exhibits aerial photographs taken at different dates from 1995 to 2004 and sets out the complaints of the applicants. He also exhibits an environmental consultant's report entitled "Environmental Noise Nuisance Assessment" which concludes that the MTL site activities have "a very significant detrimental impact on the local ambient noise climate during the night time period".

6. The affidavit refers to an application made in February, 2011 by one of the applicants seeking a declaration under s.5 of the Planning and Development Act, 2000 from Dublin City Council (in its capacity as planning authority) as to whether the development that had occurred at the site was exempted development or not. A declaration was issued on the 9th March, 2011 which found that the erection of the three gantries was development and was not exempted development. On the question of intensification, the planning authority said that the documentation submitted was insufficient and that it could not therefore issue a determination.

7. The applicants have also issued plenary proceedings claiming damages for nuisance. An application to remit the instant proceedings for plenary hearing and to consolidate the two cases was refused by Hedigan J. on the 26th March, 2012. However, an order was made that the two matters are to be listed together and heard by the same judge.

8. MTL says that it was not put on notice of the application to the planning authority, was completely unaware of it and had no opportunity to engage in the process leading to the determination.

9. In the affidavits sworn on behalf of MTL it is contended that the extensions to the gantry crane and to the Control Room are exempted developments for the purposes of the planning legislation. The case is then made that they have facilitated a more efficient use, not intensification of use. This increased efficiency has in fact, it is said, significantly reduced the noise generated at the site. It is asserted that there has always been night-time working at the terminal, as at any container terminal, but it is denied that there has been an increase in night-time operations since 2007. It is also argued that there has been an overall decrease in the number of containers handled since 2007 and figures are given for the annual throughput to support this.

10. MTL also contends the proceedings are out of time, if the applicants allege that unauthorised works took place in 2007.

11. There is also criticism of the application on the basis that much of the grounding affidavit is hearsay.

The application for discovery

12. The applicants have sought discovery under 15 headings and given reasons as follows:

Category 1: All import vessel manifests for all vessels entering Dublin Port from the year 2000 to present

Reason: It is the Applicants' case that the development of the site as created for an intensification of use at the site by an increase in night time use, traffic and noise. [sic] The Respondents have refuted this claim and stated that there has not been an intensification of use of the site and specifically denies increased activity at night times, increase in noise levels by the handling and rehandling of containers and an increase in traffic. The import vessel manifests will provide complete vessel details, including the time of vessel arrival at Dublin Port and details of time vessel was worked. The import vessel manifests will also provide total number of containers being discharged, container details proving relevant weight and cargo type i.e. general, refrigerated or hazardous material being discharged at the port. This will provide the Applicants with information in the possession of the Second Named Respondent which will confirm the exact time and length of time spent discharging the vessel and the contents of the containers and the weight of the containers being stacked. As the Respondents have put in issue the intensification of the use at the terminal the Applicants assert that it is clearly necessary and relevant for the fair and expeditious disposal of the proceedings for Discovery to be made of the documentation categorised above.

Category 2: All Export Vessel manifests for all vessels departing from Dublin Port from the year 2 000 to present

Reason: It is the Applicants' case that the development of the site as created for an intensification of use at the site [sic] by an increase in night time use, traffic and noise. The Respondents have refuted this claim and stated that there has not been an intensification of use of the site and specifically denies increased activity at night times, increase in noise levels by the handling and re handling of containers and an increase in traffic. The export vessel manifests should provide complete vessel details, including the time of arrival and departure of vessels at Port terminal. The export vessel manifest will also provide the time a vessel was worked which would provide the Applicants with details of the time it took for operational loading of vessels. The export vessel manifests will also provide the total number of containers being loaded with relevant weight and highlight any additional operational time required by special handling cargo. As the Respondents have put in issue the intensification of the use at the terminal the Applicants assert that it is clearly necessary and relevant for the fair and expeditious disposal of the proceedings for Discovery to be made of the documentation categorised above.

Category 3: All custom manifests for all import and export traffic through Dublin Port from the year 2000 to present

Reason: The Customs manifests are necessary and relevant as they will support and provide confirmation of details provided in the import and export vessel manifests. This will include confirmation of the time of vessel docking and discharge and/or loading, time of departure of vessel with total number of containers being handled. The customs manifest are relevant and necessary as the Respondents have put in issue the fact that operations has increased at the terminal since the development of the site and the Applicants assert that it is [sic] will provide for the fair and expeditious disposal of the proceedings for Discovery to be made of the documentation categorised above.

Category 4: All Operational Reports prepared by the Second Named Respondent of all operations at the terminal from the year 2000 to present

Reason: It is the Applicants' case that the intensification of use at the site has increased the operations at the site at night. The Respondents have stated that there has been no significant change in traffic movements to justify a contention that there is a material change in use. The Respondents have also refuted that there has been an increase in use of the site. The Operational Reports will provide detail of the exact time of the arrival and departure of a vessel from the terminals, the timeframe and detail of when the vessel was worked. The Reports will also provide confirmations of the total staff numbers onsite to facilitate the operation and the hours staff were on site. The Reports will also provide totals for operation of the general activity detailing number of containers worked, and reworked on site dependant on their stored location or handling requirements. This information is necessary as it will confirm the development and intensification of the terminal by there handling of the container. It should also provide detailed confirmation of all IT reporting and demurrage on site which will further be relevant to confirm the re handling and operation intensification that has occurred with the development of the site and the introduction of RMG's. As the Second Named Respondent has put in issue the intensification of the traffic and operation at the terminal the Applicants assert that is it clearly necessary for the fair and expeditious disposal of the proceedings for Discovery to be made of the documentation categorised above.

Category 5: All Trade Reports prepared by the Second Named Respondent from the year 2000 to present

Reason: It is the Applicants' case that the unauthorised development of the site by the erection of cranes and control room has increased the intensification of the use of the terminal. The Second Named Respondent has denied that there has been an intensification of the use of the site and that business has decreased significantly. The trade reports prepared by the Second Named Respondent will provide detail and confirmation of their trade filings confirming operational and trade handled at the port. This information is necessary and relevant in that it will confirm and support the intensification of the terminal since they developed the site with the introduction of new Rail Mounted Gentries. The reports will also provide support and confirmation of volumes handles and re handled on the site. This information is relevant and necessary in that it will show the intensification of the site by the increased operation capability and storage capacity that was achieved by the development of the site. The reports will also provide cost and profit reporting which will provide evidence of the benefits achieved by the development of the terminal. As the Second Named Respondent has put in issue the intensification of the use of the terminal the Applicants assert that is it clearly necessary for the fair and expeditious disposal of the proceedings for Discovery to be made of the documentation categorised above.

Category 6: All Monthly Gate Activity Report, including all traffic moving in or out of terminal, from the year 2000 to present

Reason: It is the Applicants' case that the intensification of use at the site has increased the operations at the site at night. The Respondents have stated that there has been no significant change in traffic movements to justify a contention that there is a material change in use. The Respondents have also refuted that there has been an increase in use of the site. The monthly gate activity reports will give confirmation of total throughput from terminal. It will provide all IT and demurrage reporting. The Reports will confirm and support operational development and intensification of site by confirming storage and associated handling onsite. As the Second Named Respondent has put in issue the intensification of the traffic and operation at the terminal the Applicants assert that is it clearly necessary for the fair and expeditious disposal of the proceedings for Discovery to be made of the documentation categorised above.

Category 7: All trade and operational reports submitted to Dublin Port from the year 2000 to present

Reason: It is the Applicants' case that the unauthorised development of the site by the erection of cranes and control room has increased the intensification of the use of the terminal. The Second Named Respondent has denied that there has been an

intensification of the use of the site and that business has decreased significantly. These reports will provide confirmation of complete terminal operations inclusive of operational hours, indicating time and day of operations. This information is necessary and relevant in that it will confirm and support the intensification of the terminal since they developed the site with the introduction of new Rail Mounted Gantries. The reports will also provide support and confirmation of volumes handled and rehandled on the site. This information is relevant and necessary in that it will show the intensification of the site by the increased operational capability and storage capacity that was achieved by the development of the site. The reports will also provide cost and profit reporting which will provide evidence of the benefits achieved by the development of the terminal. As the Second Named Respondent has put in issue the intensification of the use of the terminal the Applicants assert that it is clearly necessary for the fair and expeditious disposal of the proceedings for Discovery to be made of the documentation categorised above.

Category 8: All Quarterly Reports prepared by the Second Named Respondent from the year 2000 to present

Reason: It is the Applicants' case that the unauthorised development of the site by the erection of cranes and control room has increased the intensification of the use of the terminal. The Second Named Respondent has attempted to refute this argument by showing that the business of the container terminal facility has decreased but has not provided any information on the handling of the containers. The Quarterly Reports prepared by the Second Named Respondent will confirm the quarterly trade details. The reports will support and confirm the monthly trade and operation reporting. The reports will also confirm the total volume, weight, cargo type and subsequent handling and importantly rehandling of such required. The Reports will provide details of the amount of handling and re handling of containers on the dock as well as operational movements and vessel operations. This is relevant and necessary as it will confirm the intensification of the operation that has occurred with the development of the site and with the introduction of Rail Mounted Gantries. The Reports will also give a head count and staff details along with cost and profit which will further be relevant to prove the benefits and cost saving achieved by the Second Named Respondent when they developed the site and furthermore their operational capability by their development of the terminal. As the Second Named Respondent has put in issue the intensification of the use of the terminal the Applicants assert that it is clearly necessary for the fair and expeditious disposal of the proceedings for Discovery to be made of the documentation categorised above.

Category 9: All Annual Report filings prepared by the Second Named Respondent for its parent company Peel Ports and Trade filings for both import and export cargo from the year 2000 to present

Reason: The Applicants assert that the unauthorised development of the site by the erection of cranes and control room has increased the intensification of the use of the terminal. The Second Named Respondent has attempted to refute this argument by showing that the business of the container terminal facility has decreased but has not provided any information on the re handling of the containers. The Annual Report Filings will confirm the total annual trade details as reported to the Second Named Respondent's parent company. The reports will confirm the total volume, weight, cargo type and subsequent handling and importantly rehandling of such required. The Reports will provide details of the amount of handling and re handling of containers on the dock as well as operational movements and vessel operations. This is relevant and necessary as it will confirm the intensification of the operation that has occurred with the development of the site and with the introduction of Rail Mounted Gantries. The Reports will also give a head count and staff details along with cost and profit which will further be relevant to prove the benefits and cost saving achieved by the Second Named Respondent when they developed the site and furthermore their operational capability by their development of the terminal. As the Second Named Respondent has put in issue the intensification of the use of the terminal the Applicants assert that it is clearly necessary for the fair and expeditious disposal of the proceedings for Discovery to be made of the documentation categorised above.

Category 10: All monthly staffing rosters and reports of all management and staff from year 2000 to present

Reason: It is the Applicants' case that there has been increased night time activity, particularly at weekends since 2007 and that previously it was exceptional to work at night time it is now the usual practice at the site [sic]. The Second Named Respondent has refuted the fact that night time work has increased in recent years and states that night time work was always an important aspect of the container terminal facility. As the Second Named Respondent has put in issue the fact that night time working has increased and has stated that there was always night time work on the site it is the Applicants belief that staffing rosters and reports will provide detailed confirmation of total staff on site at the terminal, including the increase of staff working at night, as well as confirmation of operational date and time frame they are operational. [sic]. This will directly support and confirm our claim that the intensification of the site has occurred. Therefore, the Applicants assert that it is clearly necessary for the fair and expeditious disposal of the proceedings for Discovery to be made of the documentation categorised above.

Category 11: All noise monitoring reports from the year 2000 to present

Reason: It is the Applicants' case that noise sources at the site including the running of engines, operation of large cranes and banging of steel containers as part of the stacking system has increased due to the intensification of use of the site by the increased capacity of the site and the increased rehandling of containers. The Applicants have a complaints log of noise and have carried out a noise nuisance assessment which stated that the noise complaints are justified. The First and Second Named respondents have put in issue the fact that the noise levels have increased and have in fact stated the level of noise at the site has decreased. The Respondents have also accused the Applicants of taking a snapshot of noise levels. The Respondents have referred to a report of Aecom Limited to rebut the case of the Applicant in relation to the increase in noise. However, this report notes that the port operated 6-7 nights a week in 2007 and that the noise level outside the properties would be considered as loud. The Respondents' Report also notes the noise level is in accordance with typical port operations. As the Respondents have put in issue the fact that noise levels have increased and in fact state that they have decreased this category of documents will confirm the fact that the noise levels have increased which will further confirm the intensification of the terminal operation. The documents will confirm the fact that noise levels have increased. Therefore, the Applicants assert that it is clearly necessary for the fair and expeditious disposal of the proceedings for Discovery to be made of the documentation categorised above.

Category 12: All proposed planning reports, written advices and relevant documentation issued to the First Named Respondent in relation to the planning and proposed development of the site with new cranes from the year 2000 to present

Reason: It is the Applicants' case that rail mounted gantry cranes were being built on the site from 2001 to 2003. This information is evident through news paper articles published between August 2001 and December 2003 on the development in the facilities at the site and also an aerial photograph from 2004 which illustrates the new gantry cranes. This category of documentation is necessary and relevant in that it will enable the Applicants to advance their case that the site was developed to such a considerable extent and that the purpose of the development of the site with new cranes was to enable the stacking of containers on a greater area of the site and up to three high and to allow for the intensification of use of the site. The documentation will further support the Applicants' claim that the additional gantry cranes is development rather than exempted development under the Planning and Development Act 2000. The documentation will also allow the Applicant to prove that the west-most located gantry increased in height from approximately 20 metres to 27 metres over the winter of 2007-2008 for the purpose of being able to stack containers three-high rather than two-high which would constitute "works" under the 2000 Act. It will furthermore advance the Applicants claim that the development of the site with new cranes facilitated night time working as lighting systems are integrated into the gantry cranes and

that the Respondents were aware if the increased night time working that would be possible with the development of the site.

Category 13: All Development proposals, reports and documentation issued from the Second Named Respondent to the parent company indicating development and justification of new crane purchase

Reason: It is the Applicants' case that rail mounted gantry cranes were being built on the site from 2001 to 2003. This information is evident through news paper article published between August 2001 and December 2003 on the development in the facilities at the site and also an aerial photograph from 2004 which illustrates the new gantry cranes. This category of documentation is necessary and relevant in that it will enable the Applicants to advance their case that the site was developed to such a considerable extent and that the purpose of the development of the site with new cranes was to enable the stacking of containers up to three high and to allow for the intensification of the use of the site. The cost of the introduction of rail mounted cranes would have to be justified to the Second Named Respondent's parent company and this category of documentation will further prove that the introduction of the cranes was to enable the Second Named Respondent to increase work on the site. The documentation will also allow the Applicant to prove that the west-most located gantry increased in height from approximately 20 metres to 27 metres over the winter of 2007-2008 for the purpose of being able to stack containers three-high rather than two-high which would constitute "works" under the 2000 Act. As the Second Named Respondent has put in issue the level of height increase of the west-most located crane and the purpose of the additional gantry cranes and stated that the purpose was to carry out the operation more efficiently rather than intensifying the use of the operation, the Applicants assert that it is clearly necessary and relevant for the fair and expeditious disposal of the proceedings for Discovery to be made of the documentation categorised above.

Category 14: All Purchase Orders and Sales receipts for cranes from the year 2000 to present

Reason: It is the Applicants' case that additional cranes were erected on the site and that this is documented in magazine articles and aerial photographs. It is also the Applicant's case that the west-most located gantry increased in height from approximately 20 metres to 27 metres over the winter of 2007-2008 for the purpose of being able to stack containers three-high rather than its previous capability of two-high. This category of documentation will prove the date of purchase of the cranes and also will prove that additional material was bought before the winter of 2007-2008 in order to be able to increase the height of the west-most located gantry. As the Second Named Respondent has put in issue the level of height increase of the west-most located crane the documentation will prove the cranes actually bought by the Second Named Respondent, Applicants asserts that it is clearly necessary and relevant for the fair and expeditious disposal of the proceedings for Discovery to be made of the documentation categorised above [sic].

Category 15: All Development proposals and documentation in relation to landscaping carried out since 2000 on Pigeon House Road by the Second Named Respondent (Dublin City Planning Ref# 2960-01)

Reason: It is the Applicants' case that landscaping carried out in or about 2002 by the erection of a control room and the additional gantry cranes by the Second Named Respondent involves "works" under the Planning and Development Act 2000 and that the aerial photographs clearly illustrate the development of the site. The Second Named Respondent denies that the landscaping has materially altered the external appearance of their premises. As the Second Named Respondent has put in issue the fact that the external appearance of their premises was materially altered, the Applicants assert that the development proposals and documentation in relation to landscaping will show that the external appearance of the premises was materially altered and the Applicants assert that it is clearly necessary and relevant for the fair and expeditious disposal of the proceedings for Discovery to be made of the documentation categorised above.

The legislative provisions

14. Section 160 of the Planning and Development Act provides as follows:

(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or cease to do, as the case may be, anything that the court considers necessary and specifies in the order to ensure, as appropriate, the following:

(a) that the unauthorised development is not carried out or continued;

(b) in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;

(c) that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject.

(2) In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or feature.

(3) [a] An application to the High Court or the Circuit Court for an order under this section shall be by motion and the Court when considering the matter may make such interim or interlocutory order (if any) as it considers appropriate.

(b) omitted.

(4) [a] omitted

(b) Any relevant rules of Court made in respect of section 27 (inserted by section 19 of the Act of 1992) of the Act of 1976 shall apply to this section and shall be construed to that effect.

(5) omitted.

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(6) (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 development, of the appropriate period as extended under section 42.

(b)omitted.

(7)omitted.

15. Section 27 of the Local Government (Planning and Development) Act, 1976, as inserted by section 19 of the Local Government (Planning and Development) Act, 1992 provided as follows:

(1) Where-

(a) development of/and, being development for which a permission is required under Part IV of the Principal Act, is being carried out without such a permission, or

(b) an unauthorised use is being made of land, the High Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order prohibit the continuance of the development or unauthorised use.

(2) Where any development authorised by a permission granted under Part IV of the Principal Act has been commenced but has not been, or is not being, carried out in conformity with the permission because of non compliance with the requirements of a condition attached to the permission or for any other reason, the High Court may, on the application of a planning authority or any other person, whether or not that person has an interest in the land, by order require any person specified in the order to do or not to do, or to cease to do, as the case may be, anything which the Court considers necessary to ensure that the development is carried out in conformity with the permission and specifies in the order.

(3) An application to the High Court for an order under this section shall be by motion and the Court when considering the matter may make such interim or interlocutory order (if any) as it considers appropriate. The order by which an application under this section is determined may contain such terms and conditions (if any) as to the payment of costs as the Court considers appropriate.

16. The rules in relation to s. 27 are contained in O. 103 of the Rules of the Superior Courts. Rule 2 stipulates that an application for an order under the section shall be by motion on notice. There is provision for service of the notice of motion and any affidavits; the making of interim and interlocutory orders in the nature of injunction or for the detention, preservation or inspection where necessary and the procedure to be followed where the identity of the person carrying out the development is unknown and related matters. Rule 6(a) provides that

Subject to the right of the court to give such directions in that behalf as it considers appropriate or convenient, evidence at the hearing of a motion under rule 2 shall be by affidavit.

17. There is no specific reference to discovery.

18. Order 31 r. 12, which sets out the general principles in relation to discovery, reads in relevant part as follows:

(1) Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein.

(2) Omitted

(3) An order shall not be made under this rule if and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

Submissions

16. On behalf of the applicants Mr. Simons SC submits that discovery is appropriate. There is a factual issue between the parties as to whether there has been an intensification of activity at the terminal. The applicants' case for intensification is based on established facts relating to the replacement of the gantries and the extension of the building. He says that a great deal of the information relevant to the issue is readily available to the respondent but not to the applicants. Many of the documents are known to exist, because they must have been created to comply with various regulatory requirements, and there is therefore no element of "fishing" involved.

17. The objection that the evidence is before the court is largely hearsay is said to be ill-founded in that substantive evidence is not normally presented in a discovery application. Affidavits will, the court is told, be sworn by the applicants at a later stage.

18. It is said that discovery has on occasion been made in applications of this kind and that no authority or provision of the rules of court precludes it. In that regard Mr. Simons seeks to distinguish the authorities relied upon by the respondent as being, in the main, not directly relevant to the issue. He relies on a passage from the judgment of Peart J. in *Limerick County Council v. Tobin* (unrep., 15th August, 2005). This concerned an application for an interlocutory order under s. 160 relating to the respondent's gravel-extraction business. The respondent claimed that the user of the land pre-dated October 1964. Part of the argument made by the respondent was that the applicant should have proceeded by way of plenary summons, rather than a motion under the section, since there were issues of fact to be determined and oral evidence would be required.

19. In ruling against that argument, Peart J. agreed with the respondent that there was an issue of fact in the case but went on to say:-

"But in my view it is clear that where a planning authority, or other person, considers that an unauthorised development or use is taking place, there would in many cases be an urgency in the situation which s.160 is designed to meet, so that the Court can be accessed speedily and conveniently. In the case of the concerned citizen, he or she may run into locus standi difficulties if proceedings were to be commenced outside the statutory framework since that section specifically recognises the entitlement to invoke it, even where he or she has no interest in the land in question.

Of course even in plenary proceedings, relief by way of interim injunction is available, and at short notice, but in planning matters the legislature has specifically provided the procedure under s.160, and it is reasonable that the planning authority in such circumstances would avail of that in the first instance. If, upon the interlocutory hearing, it appears that a Defence put forward by the respondent is one where oral evidence, and even pleadings and discovery are necessary or desirable, there does not seem to be any reason why the Court cannot order such directions as to pleadings and mode of trial as may be appropriate, and certainly there could in my view be no question that the planning authority could be non-suited as it were, having commenced its application by the method provided for in s.160, merely because the respondent raises a matter by way of defence which for its determination requires either pleadings or oral evidence."

20. Mr. Simons further submits that the court must take judicial notice of the Aarhus Convention and the requirement that there be available a procedure for enforcement proceedings in this area of law which is fair, equitable and not prohibitively expensive. The court should also bear in mind that the applicants are asserting rights in relation to their family homes and thus are entitled to the protection of Article 8 of the European Convention on Human Rights.

21. Mr. McDonald SC for the respondent argues, in the first instance, that discovery is not available in a summary proceeding of this sort. He relies on observations made in the judgment of Murphy J. in *Waterford County Council v. John A. Wood Ltd.* [1999] 1 I.R. 556, citing *Dublin County Council v. Kirby* (1985) I.L.R.M. 325, *Dublin Corporation v. McGowan* [1993] 1 I.R. 405 and *Mahon v. Butler* [1997] 3 I.R. 369.

22. In the *John A. Wood* case, the issue was whether permission was required to extend the working of a seam of limestone into lands close to, but not part of, the lands on which the original quarry was sited. Having ruled on this question, Murphy J., giving the judgment of the Supreme Court, said:-

"Finally, I should add that it is clear- perhaps with the benefit of hindsight -that the proceedings herein should not have been instituted under s.27 of the Act of 1976. As Gannon J. pointed out in Dublin County Council v. Kirby [1985] I.L.R.M. 325, that section was intended as a fire brigade section to deal with an urgent situation requiring immediate action to stop clear breaches of the Act.

The views expressed by Gannon J. were confirmed by Keane J. in Dublin Corporation v. McGowan [1993] 1 I.R. 405 and applied by this Court in Mahon v. Butler [1997] 3 I.R. 369. This observation is not intended as any criticism of the applicant or its legal advisors. Indeed they did explore the possibility of invoking other remedies. I merely draw attention to the fact that it is now clear that the matters in issue between the parties involved novel questions of law and complex questions of fact which could not be dealt with readily in summary proceedings. Indeed McGuinness J. recognised that special difficulties arose in the case and sought to overcome them by facilitating the parties in furnishing additional evidence before her. These difficulties should be borne in mind when similar applications are contemplated."

23. It is, I think, helpful to look at the facts of the cases referred to by Murphy J. and the reasons for the comments made.

24. *Mahon v. Butler* concerned an attempt by local residents to prevent the holding of two concerts in Lansdowne Road stadium. The concerts were to be held on the 30th and 31st August, 1997. Dublin Corporation issued a warning notice in respect of the unauthorised nature of the events. The respondents then obtained leave to challenge the notice by way of judicial review. The Corporation agreed to take no action on foot of the notice pending the outcome of those proceedings.

25. The residents then issued a plenary summons seeking, *inter alia*, an order under s.27 of the Act of 1976 on the 19th July. Their application for an injunction was heard on the 24th and 25th July and an order made in their favour on the 29th July. The Supreme Court heard the appeal on the 30th and 31st July. The appeal was allowed on a number of grounds.

26. In the judgment of the Court, Denham J. observed as follows:-

"It must be pointed out that the order under appeal in this case, if upheld, would determine in a final, peremptory and irreversible fashion a bona fide dispute between the parties as to whether the holding of the concerts at the end of August requires planning permission. This would be done without the usual machinery of pleadings, discovery and particulars and without any opportunity for the parties to adduce oral evidence. There are, of course, cases where the parties agree to treat the hearing of an interlocutory injunction as the trial of the action: this is not one of them.

27. Denham J. then noted the possibility that the residents would apply for a s.27 order before the concerts were due to be held. Warning against such a course of action, she said that the court had a discretion under s.27. Among the factors which would carry weight in the exercise of the discretion was the existence of the judicial review proceedings, which were to proceed by plenary hearing and were more suited to the complexity of the facts and law involved.

28. In *Dublin Corporation v. McGowan*, the respondent had bought a premises which had been converted into seven bedsits, believing in good faith that there was no planning permission affecting it. In fact there was a permission limiting the number of residential units to three. When he began works on the building to upgrade the bedsits, the planning authority sought *inter alia* an order under s. 27(2) to require him to take all necessary steps to comply with the permission granted.

29. Keane J. considered this to be an inappropriate use of the section. He held that the point of sub-s.2 was to ensure that an unfinished development was completed in accordance with permission. In this context Keane J. said that he agreed with the view of Gannon J. expressed in *Dublin County Council v. Kirby*, to the effect that the section was being operated in ways not intended and that it was meant to be a "fire brigade" section to deal with an urgent situation requiring immediate action to stop clear breaches of the Act. *Kirby* was a case where the respondent was allegedly in the process of demolishing a building without permission and the planning authority sought detailed interlocutory orders in relation to reinstatement. The refusal of Gannon J. to grant such orders was

based on general principles of unwillingness to make mandatory orders at an interlocutory stage where the rights of the parties had not been fully and fairly considered.

Discussion and conclusions on the issue of jurisdiction

30. In my view neither the decision in *John A. Wood* nor the cases cited in it purport to lay down a rule that s.160 cannot be used where there are contested factual matters. Such a rule would, indeed, lead to a situation where, as Peart J. said, applicants could in effect be non-suited, and therefore shut out of a swift and convenient procedure, simply on the basis of a denial of their assertions. Order 103 specifically provides that the court may, where appropriate, direct that the matter be dealt with on oral evidence. Nor do the authorities support the proposition that the normal aids to the resolution of conflicts of fact, such as discovery, cannot be utilised.

31. It is clear that some cases, by their nature, may not be suited to the procedure but this will relate to the factual and legal issues arising rather than the fact that s. 160 is invoked. So, for example, *John A. Wood* raised "novel questions of law and complex questions of fact".

32. The statement of Denham J. in *Mahon v. Butler*, that the order granted in the High Court would have determined the dispute in a "final, peremptory and irreversible fashion" without the "machinery of pleadings, discovery and particulars" or the opportunity for oral evidence was, in the context of the case and the very truncated time it took, a statement of fact. I do not think that it should also be interpreted as laying down a rule that none of that "machinery" can ever be utilised in such cases.

33. Both *Kirby* and *McGowan* were decided under the somewhat different, less detailed provisions of s.27 of the Act of 1976 rather than s.160 of the Act of 2000. The notable feature of each is the reluctance to make a mandatory order without full enquiry and proper consideration of the rights of all parties, with which I do not disagree.

34. It is clear that in *Tobin*, Peart J. considered that there was no reason why the court should not, where it thinks appropriate, give directions as to pleadings, discovery and evidence. There is certainly nothing in either the Act or the rules of court to the contrary.

35. There is certainly a general principle that the summary procedure may not suit cases which raise complex legal or factual issues. I do not think that it would be particularly helpful to attempt to further define this principle. Obviously, an area of law that was once novel becomes more familiar over time. Sets of factual circumstances may become more or less common and practitioners become habituated to marshalling those facts in order to meet the proofs required. For example, I am not certain that a case such as *Kirby* would now be decided in the same way.

36. Equally, procedures such as discovery would appear to be inappropriate where the applicant is seeking to deal urgently with a situation where activity is taking place which might in the immediate short term have irreversible effects.

37. It seems to me, therefore, that there is no hard and fast rule applicable to determine the availability of discovery in s.160 proceedings. The appropriateness of an order must depend on the circumstances of each case.

38. In the instant case, both parties are agreed that there is nothing particularly unusual or complex about the issues, whether of fact or law. The fact that the application for remittal to plenary hearing was refused supports that view. The applicants are not looking for a mandatory order without a full opportunity for the respondent to make its case. There is no immediate urgency in that it is not alleged that anything that the respondents may be doing will have irreversible effects. I agree with Mr. Simons SC that there is a factual dispute; that the applicants can point to a factual underpinning for their claim and that it is likely that there is in the possession of the respondents documents relevant to the case. I therefore consider that discovery could assist in the resolution of the conflict of evidence. I further consider that there is, in the circumstances, no reason not to make an order of discovery.

The documents sought in the motion

39. The extent of the documentation sought is vast and I have no hesitation in agreeing with Mr. McDonald that much of it is unjustifiable. Indeed, if the respondent was, somehow, in a position to produce all the documents sought this case would become hopelessly bogged down.

40. Some of the material listed is simply irrelevant. For example, this respondent does not control the port of Dublin and cannot be expected to produce documents relating to every ship that has passed through it since the year 2000. Even if it could, it is hard to see what relevance the manifests, or indeed the demurrage, for all those vessels could have to the issues between the parties.

41. Other categories undoubtedly involve commercial sensitivity and while that does not necessarily mean they are privileged, they should not be the subject of an order without good reason.

42. I will therefore confine the order to the following:

1. Operational reports as described in Category 4 but limited to the years 2005 to 2013.
2. Monthly gate reports as described in Category 6, limited to the years 2005 to 2013.
3. Monthly staffing rosters (not including staff reports etc) limited to the years 2005 to 2013.
4. Noise monitoring reports as described in Category 11.
5. Documents relating to the respondent's proposals to its parent company in respect of the purchase of the rail-mounted gantry cranes on the site.
6. The purchase documentation in relation to cranes limited to the years 2000 to 2009.