Neutral Citation No. 2005 IEHC 408

THE HIGH COURT

[2002 No. 90 MCA]

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000, AND IN THE MATTER OF AN APPLICATION BY SOUTH DUBLIN COUNTY COUNCIL:

BETWEEN

SOUTH DUBLIN COUNTY COUNCIL

APPLICANT

AND

FALLOWVALE LIMITED AND WESTON LIMITED

RESPONDENTS

Judgment of Mr. Justice William M. McKechnie delivered on 28th day of April, 2005.

1. On 1st day of October, 2002 these proceedings were instituted under s. 160 of the Planning and Development Act, 2000 wherein South Dublin County Council sought certain prohibitary and mandatory orders against the respondents arising out of what is alleged to have been multiple infringements of the provisions of that Act. This in respect of what is known as Weston Aerdrome, Back Weston, Lucan in the County of Dublin. Both the facts and legal matters at issue are difficult and complex with minimal or no common ground between the parties. In all, at least eight affidavits were filed on behalf of the applicant and seven by or on behalf of the respondents. Each of these had lengthy exhibits. In addition, arising out of the principal affidavit of Mr. Abe Jacob, a notice of motion was issued on 19th December, 2002 by the respondents seeking an order striking out very many of the averments contained in it, on the grounds that the same were scandalous, unnecessary, invidious and prejudicial. Furthermore, several witnesses were cross examined on oath and both parties made comprehensive submissions.

2. The applicant, South Dublin County Council, is both the local authority and the planning authority for its functional area which is the administrative county of South Dublin. The first named respondent is a limited liability company which has as its principal shareholder and main director one Mr. James Mansfield of Keatings Park, Rathcoole, County Dublin. Mr. Mansfield is a well known and highly successful business man who has many enterprises operating within this jurisdiction. In mid 2002 Fallowvale Limited acquired the entire shareholding in the second named respondent, Weston Limited, which, since its incorporation, had been controlled and/or operated by one Captain P.W. Kennedy. Since in or about 1938 Captain Kennedy either personally or through a corporate vehicle effectively owned and operated Weston Aerodrome which for all relevant purposes is located within the administrative area of South Dublin County Council. It is apparently the busiest and largest private aerodrome in the State, with more than 60 residential aircraft and 8 residential helicopters. It has a staff of about 30/35 and caters for approximately 150,000 aircraft movements per annum. It facilitates *inter alia* helicopters and light aircraft. From an aviation point of view its regulatory authority is the Irish Aviation Authority established under the Irish Aviation Authority Act, 1993.

In late August 2002 the applicant became aware of certain works being carried out at the aerodrome. This led to the first of many visits, on 4th September of that year, by Mr. Jim McInerney who is a planning inspector with the Council. It was also he who swore the principal affidavits on behalf of the planning authority. As a result, the dispute in this case centres around those works or uses which since its acquisition by Fallowvale Ltd., have been carried out or carried on at the aerodrome by the respondents or either of them. It is asserted by the Council that such works/uses require planning permission which has not been obtained. On behalf of the respondents, it is claimed that such development is exempted from the requirements of the Planning and Development Act, 2000 under a variety of headings, including s. 4(1)(h) thereof and/or under Class 32 and Class 39 of the Planning and Development Regulations 2001 (S.I. No. 600/2001) "The Regulations". Hence these contested proceedings between the parties.

4. As part of the documentation served a great number of drawings and photographs were produced and used in evidence. Of particular significance to an understanding of the live issues are the drawings which have been identified as No. TD-02, TD-03, an extract from the Ordinance Survey map of the location (being that revised in 2002), a drawing submitted in an application for retention made in April 2000 as well as certain other maps drawn up in July 2002 in relation to a structure known as "The Bungalow". Several photographs were used and these included two aerial photographs, one taken in 1997 and the other in the year 2000. Other individual maps and photographs were also from time to time, adverted to and availed of.

5. At the outset of these proceedings there were several separate structures or uses in issue to which at a later date were added a further item, namely that which has been described as a "mound" of earth. In brief terms these alleged "developments" with the aid of drawing TD-02 can be described as and identified in the manner following:-

(i) The laying out of an area as a car park, coloured yellow on TD-02, and the completion of an extension to an existing car park coloured grey thereon.

(ii) The extension and/or alteration and/or modification of an existing bungalow coloured blue in respect of which the said drawing shows a first floor extension (coloured green), a new control tower above ridge height (coloured pink) and a new roof level viewing gallery (coloured turquoise),

(iii) The extension of a taxi way and the surfacing of this extended taxi way (shown hatched green on the said drawing),

(iv) The removal of old hangars, the construction of new hangars and/or the extension of existing hangars (shown coloured red, green and pink-partly hatched black on the said drawing),

(v) The erection of security fencing (depicted by a blue line on the said drawing)

(vi) The installation of a waste water treatment plant (again identified as such on the said drawing)

(vii) The construction of a fuel storage tank (again identified as such on the said drawing) and

(viii) The construction and use of a storage shed adjacent to existing hangars (shown coloured pink and identified as "New Stores" on the said drawing).

6. In considering the evidence and legal submissions in this case it would be helpful to bear in mind the relevant statutory provisions and the relevant articles of the Regulations. The only sections of the Planning and Development Act, 2000 which require outlining in this part of the judgment are sections 4 and 160 of the Act. Section 4 (1) reads as follows:-

"4(1) The following shall be exempted developments for the purpose of this Act …

(h) Development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures; …"

Section 160(1) is in the following terms:-

"160(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

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

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

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

7. In exercise of the powers vested in him the Minister for the Environment and Local Government made the Regulations above referred to, which by virtue of s. 4(2) of the Act of 2000 declares that certain classes of development are to be exempted development for the purposes of that Act. The following articles of such Regulations, which appear in Part 2, under the heading "Exempted Development" are of relevance to this case :-

"5(1) "Aerodrome" means any definite and limited area (including water) intended to be used, either wholly or in part, for or in connection with the lending or departure of aircraft:

"airport" means an area of land comprising an aerodrome and any buildings, roads and car parks connected to the aerodrome and used by the airport authority in connection with the operation thereof;

"airport operational building" means a building other than a hotel, required in connection with the movement or maintenance of aircraft, or with the embarking, disembarking, loading, discharge, or transport of passengers, livestock or goods at an airport.

"6(1) "Subject to Article 9, development of a class specified in column 1 of Part I of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part I opposite the mention of that class in the said column 1".

"9(1) Development of which Article 6 relates shall not be exempted development for the purposes of the Act –

(a) if the carrying out of such development would

(i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act, …

(viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use."

8. Part 1 of Schedule 2 contains Class 32 and Class 39 which are material. Class 32 reads as follows

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"**CLASS 32**

COLUMN 1 COLUMN 2

Description of Development Conditions and Limitations

The carrying out by any person to whom an aerodrome licence within the meaning of the Irish Aviation Authority (Aerodromes and Visual Ground Aids) Order, 1998 (No. 487 of 1998) has been granted, of development consisting of –

(a) The construction or erection of an extension of 1. Where the building has not an airport operational building within an airport. been extended previously, the floor area of any such extension shall not exceed 500 sq.m. or 15% of the existing floor area, whichever is the lesser.

2. Where the building has been extended previously, the floor area of any such extension, taken together with the floor area of any previous extension or extensions, shall not exceed 15% of the original floor area or 500 sq.m, whichever is the lesser.

3. The planning authority for the area shall be notified in writing not less than 4 weeks before such development takes place

(b) The construction, extension or alteration or removal of aprons, taxiways or airside roads used for the movement of aircraft and the distribution of vehicles and equipment on the airside, within an airport,

(c) The construction, erection or alteration of visual navigation aids on the grounds including taxiing guidance, signage, inset and elevated airfield lighting or apparatus necessary for the safe navigation of aircraft, within an airport.

(d) The construction, erection or alteration of security fencing and gates, security cameras and other measures connected with the security of airport infrastructure, within an airport or

(e) The erection or alteration of directional locational or warning signs on the ground, within an airport."

CLASS 39

Column 1 of Class 39 provides the following description of development:-

"The erection, placing or keeping on land of any lighthouse, beacon, buoy or other aid to navigation on water or in the air". Column 2 then contains the following conditions/limitations "any such lighthouse, beacon, buoy or other navigational aid shall not exceed 40 metres in height."

9. On 4th September, 2002 Mr. McInerney carried out the first inspection of the aerodrome which is relevant to these proceedings. This revealed that in his opinion certain works, which had commenced in the then recent past, were being continued at some pace. These included the construction of a security fence to an approximate height of 2.2 metres, the laying out of an area as a car park and the construction of an extension to a hard standing taxi way. In addition the following works were being carried out to the bungalow:-

(i) an extension was being created at first floor level to the western gable thereof,

(ii) a dormer extension was being constructed at first floor level along the northern roof slope with a flat roof over half the width of the bungalow and over the full length of the bungalow; this for use apparently as an observation area,

(iii) an octagonal control tower with a flat roof was being erected along the existing roof ridge level and,

(iv) at ground level the habitable area was being extended by the enclosure of a small covered area to the front and the conversion of a small area to the rear.

Mr. McInerney alleges that these works increased the floor space by more than 15% and that the purpose of such works was to facilitate a change of use from a residential dwelling house, which formally it had been, to a viewing area at first floor level.

Moreover he also claims that a structure which had been used as a hangar (being the area hatched black and coloured pink on drawing TD-02) had been demolished and that preparations were in place for the construction of a new enlarged hangar which incorporated but was much larger than the said hatched area.

When leaving the aerodrome on 4th September, he observed a motor vehicle bringing material on to the site which he felt would be used in the construction of this new hangar.

10. This witness' second inspection occurred on the day following namely the 5th September 2002. This showed that the structural steel work which had been brought on site the previous day, was being erected as columns and roof beams acting as a support structure for the new extended replacement hangar. The new structure had a diameter of approximately 20 metres by 31 metres and had a low mono pitch roof. In his opinion the whole floor area of the new structure was about 75% greater than the area covered by the previously existing but now demolished old structure.

This second inspection also showed that tarmacadam had been laid on the existing taxi way and that work had also commenced on tarmacing the newly extended car park north of the bungalow (coloured grey on the said drawing TD-02).

Work was also continuing in relation to the bungalow. Either on the first or on the second visit, Mr. McInerney saw that a hangar, shown coloured green on the said drawing, was still in existence: this despite the fact that it had been the subject matter of an application for retention which was refused by the council on 29th day of June, 2000. (Planning reference S 00A/0284).

11. On his third inspection, which happened on 12th September, 2002 this witness observed the presence of three new structures which had not previously being on site. The first is described as a "New Store" (coloured pink on the said drawing), which was divided into two compartments and which had a flat roof. It measures about 3.6 metres in depth, 11.3 metres in length and 2.4 metres in width. The second structure seen was a Titan Pollution Control waste water treatment system which was located at a point adjacent to the existing septic tank and which apparently was intended as a replacement therefor. Likewise this is shown on the said drawing and depicted as "WWTS". And thirdly, there was a fuel storage tank installed within bund walling adjoining to a smaller fuel storage tank. As with the other two this is also described in the said drawing as "New Tank".

12. On 26th September, 2002 Weston Ltd. wrote to Mr. O'Gorman and indicated its intention to relocate a "mound of earth" which had been on site for a number of years. The accompanying aerial photograph (exhibit JMCI-12) showed both its present and intended locations. The receipt of this letter gave rise to a further inspection which was carried out by Mr. McInerney on 2nd October 2002. He saw that this mound had been repositioned both to the northern and the western side of the aerodrome, as shown on exhibit JMCI-13. It appeared as a berm in a semicircular formation at an approximate height of 2 metres. On this western boundary there is reserved in favour of the Council a 25 metre wayleave so as to enable the construction of a 700 millimetre rising main from Leixlip to Peamount. Part of the excavated material was said to lay directly along this line.

13. In reply to this evidence several affidavits were filed on behalf of the respondents. A number were sworn by Mr. Mansfield and others by Mr. Kieran O'Connor, Mr. Conor Furey, Mr. Christopher Keane, Mr. Brian Meehan and by Mr. Kevin McCabe. On the factual side of the case, it is convenient, save where otherwise indicated, to summarise, in a collective way, the principal matters relied upon by Fallowvale Ltd. and Weston Ltd. as establishing their defence and/or their position to the claims now advanced against them by

the applicant council.

14. The evidential approach taken by the respondents in these proceedings was firstly to articulate the general position of the aerodrome as it was prior to August 2002 and to the considerable efforts made by the new ownership to greatly enhance vital structures, which when implemented, would considerably improve all aspects of safety, security and facilities at the airport. In addition, great emphasis was placed on their desire to urgently comply with all requests from the Irish Aviation Authority. This general theme runs right through each affidavit filed on their behalf. Having outlined this position the second focus of their evidence was then to deal with the particular complaints of the Council as outlined above.

15. The affidavits of both Mr. Kieran O'Connor and Mr. Christopher Keane provide good examples of the former as, of course, do the affidavits sworn by Mr. Mansfield himself. Mr. O'Connor is an airline pilot, a Class one flight instructor, an air traffic controller and is also the Managing Director of the largest flight school in the Republic which apparently owns and operates over 14 aircraft. He is located at Weston Aerodrome and has conducted business there for more than 25 years. Mr. Keane who is also an airline pilot, has had a plane at the aerodrome for over 20 years and like Mr. O'Connor is a licensed customer of Weston. Both set out in some detail how in more recent times the aerodrome had deteriorated into a general state of disrepair and neglect and indeed in some respects was in a dangerous condition. Some of the hangars were old and in urgent need of repair. Other buildings and facilities were dilapidated. The "mound" of earth above referred to, was too close to the flight strip at the eastern boundary and the former control tower, which had been removed for safety reasons, had not been replaced. Taxi ways and aprons required resurfacing. Security concerns were considerable. Toilet facilities, whilst present, were inadequate and some times unusable due to a defunct water treatment system. Overall, the aerodrome in multiple aspects required an urgent and major revamping. And so both Mr. O'Connor and Mr. Keane were delighted when they were consulted by the new directors who greatly impressed them by their commitment to improve safety and security, including visual and navigation aids, and by their willingness to urgently carry out repairs to essential buildings.

In addition Mr. O'Connor, and to a somewhat lesser extent Mr. Keane, suggests that the applicant authority, in its approach and manner of dealing with these proceedings, was ignoring important factors such as the safety and welfare of airport users. He records his frustration at the bureaucracy of red tape, at what he describes as "the politics" of the situation and at the allegations and counter allegations (not specified), which quite clearly he blames the Council for. Having referred to the International Civil Aviation Organisations' Chicago Convention to which Ireland is a signatory, he offers the unconditional and unqualified view that if the planning authority's requirements were to be met, at this aerodrome, " … Ireland would be in blatant breach of a number of the annexes to the Chicago Convention". He seeks a much more constructive approach on the part of the planning authority. As would follow from this stance, he fully supports the immediate carrying out of all the works envisaged.

16. By way of specific response it is alleged that the area (coloured yellow on TD-02) laid out as a car park, was always used as a hard area for helicopters landing and take off, for some planes and for the parking and distribution of other vehicles and equipment. It is said that there has been car parking in this general location for over 20 years and that there is no other available space for parking within the aerodrome. Reference was made to the decision of the council to grant planning permission (S99A/0879) on 8th August, 2000 for car parking on a strip of land (of approximately 1600 sq metres) parallel to the Celbridge Road and which is shown on exhibit "CF1". This was relied upon as establishing the principle of the council's acceptance of car parking in this general area. It is then said that the laying of tarmacadam in this area does not alter what in Mr. Mansfield's view it is, namely an airside road: though it should be noted that in Mr. Furey's opinion such surfacing was to provide apron space and taxi ways. Moreover it is emphasised that its layout and use as a car park is temporary and stems in part from a request made to Weston Ltd by An Garda Síochána, the Fire Authority and by Dr. Killeen, an Aviation Medical Examiner, that steps should be taken to stop people causing traffic problems on the Celbridge Road and to make sure that the access into the aerodrome should be unhindered at all times so that emergency vehicles can, if the need arises, speedily reach their destination.

17. With regard to the bungalow, an undated fax from Captain Kennedy was relied upon as evidentially establishing that for 20 years, one third approximately of its available floor space had been used in various ways for the benefit of the aerodrome. For example it provided space for the storage of documents and cash and the upper floor dormer rooms have been beneficial for security and for the maintenance of the good management at the airport, especially for keeping a good watch given its enhanced status as bestowed by the customs authority. In Mr. O'Connor's evidence he says that for upwards of 25 years the bungalow had been used in connection with the aerodrome, both as a navigational and visual aid for the safety security and navigation of the aerodrome, as well as also being used for office and administrative purposes. It is said that the control tower, which is constructed above the existing roof ridge level of the bungalow, came about because the location of the previously existing tower was considered a hazard by the I.A.A. This control tower was the hub or centre which co-ordinated the safety, security and navigation of the entire aerodrome and to operate without such a navigational aid would be to put the pilots, crew, customers and employees alike, at serious risk. In Mr. O'Connor's view he believes that the Council's request to have this control tower removed is totally irresponsible and contravenes not only the directions of the Irish Aviation Authority but also the regulations of the Chicago Convention above mentioned.

As a result of the works carried out by the respondents the original gross floor area has been increased from 259.9 sq metres to 281.1 sq metres which creates an addition of only 8.5 per cent. Moreover as with all such works the increase in the viewing area at first floor level was for safety, navigation and security reasons.

18. The relocation of the mound of earth above referred to, the creation of which followed the widening of a runway for which planning permission (92A/124L) was granted, took place only after Weston wrote to the Council on 26th September, 2002 and even then only after Mr. Mansfield also thought that he had the agreement of Mr. McInerney to so do. It was removed for safety reasons after many complaints including some from the I.A.A. as its previous location created a danger for both incoming and outgoing aircraft. It is claimed that trees will be planted at its new site and that this will operate both as a noise barrier and a screening device. This mounding, together with a new security fence and with security cameras will constitute a new security feature, for part of the aerodrome. In addition it is alleged that South Dublin County Council deposited some 155,000 cubic metres of soil, rubble and debris, up to 6 metres in height, when the new motorway was being constructed some time ago. It will cost Weston Ltd approximately €3 million to remove this material from the site. Furthermore, if the Council wish to construct the rising main referred to in para. 12 above, there should be minimal difficulty as the height of the mound in its relocated position does not exceed 2 metres. Finally Mr. O'Connor thinks it is preposterous for the planning authority to seek its reinstatement to its former position.

19. With regard to the hangars it is alleged that there were five such structures at Weston which in part, over the years, deteriorated into a dilapidated and dangerous state and condition and accordingly required urgent repair. A number of steel and wooden beams in the roofs had either rusted away or rotted and therefore remedial work was necessary. That, in fact, is what was carried out. No new hangar was constructed. All hangars were and remain integrated hangars.

20. Weston Aerodrome always had toilet facilities, though, like many other aspects of its existence, these fell into a state of semi

disrepair and certainly became inadequate for present day use. The waste water treatment system, above referred to, is not a new system but merely a system which has upgraded and repaired that which previously existed. In any event this was urgently required for basic hygiene and anti pollution compliance.

21. Over the years there have been numerous different fuel storage tanks at Weston, which from time to time were located in different areas. In accordance with the current best available practice it is now thought desirable that such tanks should not be underground as the same are very difficult to inspect, monitor or maintain. As a result these have contributed to many accidents worldwide. Accordingly, it is now highly desirable to have such tanks above ground as this is an important safety feature for pilots, crew, employees and other persons using this aerodrome. It is to be greatly regretted that whilst the new storage tank has been placed on concrete surrounds it has never been installed or connected due to the ongoing objection of the planning authority.

With regard to the "New Stores", it is alleged on behalf of the respondents that in addition to this structure there were five other storage sheds at the aerodrome. These, like other structures became dangerous and dilapidated over a period of time. It is claimed that the structure in question has simply been repaired and upgraded in the same location as has previously existed. The building in which the fire station is located has not been re-roofed because of council objections. This exposes the fire tender, which in certain circumstances, may render its use inoperable. So this situation cannot be allowed to continue. The replacement of a roof in this area is clearly, it is alleged, exempt under s. (4)(1)(h) of the Act of 2000.

22. The response to the above assertions has been made by Mr. McInerney in his second supplemental affidavit sworn on the 2nd day of December, 2004. With regard to the car park, he alleges that the area now surfaced was formerly in grass where a number of helipads were located. He points out that Mr. O'Connor could not be right when he states that "there is no other place to park a car or other vehicle at Weston". The aerial photographs and particularly that of 1997 clearly demonstrate that vehicles using this airport were parked on a grassed area on both sides of the access road as one approaches from the Celbridge Road. Even with this parking arrangement virtually the full width of the access road was still available for through traffic. In addition he suggests that even if the use of this area as a car park was intended to be temporary, nevertheless, even with such limited use the same would require planning permission. As the area is now fenced off with security fencing from the taxiway and runway it could not be described as an airside road. See the letter from Fallowvale Ltd to Mr. O'Gorman dated 4th September, 2002, wherein Mr. Mansfield says that the purpose of this fencing is effectively for security reasons. Furthermore, the laying out and tarmacing of an area measuring approximately 5,500 sq metres was fundamentally different to any practice which might previously have existed of permitting temporary parking in this general area. Moreover, the recent developments of which complaint is made were likewise entirely inconsistent with the planning permission which issued on 8th August, 2000 (planning reference S 99A/0879). This authorised the laying out of an area of approximately 1600 sq. metres as a car park which area was parallel to the Celbridge Road and is shown hatched grey in exhibit CF 1. In terms of both size and location, it is quite different from what has recently been developed on this part of the site.

23. Disregarding for a moment the comment that without his physical presence for cross examination, Captain Kennedy's letter is hearsay, it is alleged by Mr. McInerney that the suggestion of the bungalow or any part of it having been used for office or administration work, is entirely at variance with the fact that for 30 years or more there has existed a separate building for office purposes. This is shown coloured orange and hatched on TD-02 and thereon described as "existing office". Even however if Captain Kennedy's assertions are correct, the principal use of the bungalow was for residential purposes and any other activity carried on therein, either for office use or for observational purposes were secondary. Therefore, it was not used exclusively in connection with the aerodrome and consequently cannot be an "airport operational building" within the Regulation. Moreover, even if it was such a building, continuing reliance could not be placed on Class 32 of the Exempted Development provisions of the Regulations as the required notice of four weeks had not been given. This fact has been acknowledged by Weston Ltd. in its letter dated 31st October, 2002 to the Deputy Manager of the Council. Finally he also denied that the octagonal control tower is a visual navigation aid or that if it is such an aid it is constructed or erected on the ground. Therefore, in his opinion this tower is not within Class 32(c) of the Regulations.

24. In his affidavit evidence, which is referred to above, Mr. Furey claims that s. 4(1)(h) of the Act of 2000 applies to the hangars. He bases this on an assertion that the works consisted only of replacing a roof and repairing floors and did not interfere with the external walls which were not altered. He then however goes on to say in the same affidavit that "there was concurrent with this roof replacement the extension to the same integrated hangars … of 10.5%". Accordingly, Class 32(a) applied. Mr. McInerney claims that these statements are inconsistent and contradictory. He points out that the former hangar had only one wall that is the rear wall and only relied on the walling of existing structures to provide side walling as such. He says that the former hangar was demolished, new stanchions and roof beams were erected and a roof covering applied. The rear wall was raised and a new floor slab laid. The walling of existing structures still act as a side wallings. As a result, in his opinion, the existing hangar had been demolished and replaced in a significantly larger footprint. And as previously stated he offered the opinion that the floor area was extended by approximately 75%. In these circumstances he denies that s. 4(1)(h) has any application. Even if such an argument could be made, he asserts that with the mono pitch and altered gables of the new hangars the external appearance of such is inconsistent with the structures themselves and with neighbouring structures and accordingly on this basis claims that s. 4(1)(h) has no application. In addition he makes a number of further points. He alleges that the required notice period under Class 32 of the Regulations was not given, secondly that the hangars at Weston Aerodrome are not integrated and thirdly since Article 5 of the Regulations applies to a singular structure and not a complex of buildings, Mr. Furey's calculation of a mere 10.5% increase in floor area is wrongly based. Finally, he also asserts that Class 32(a) is not applicable on the basis that it applies to an extension only.

25. On this site there is also a hangar, coloured green on TD-02, which was the subject matter of an application for retention under planning reference S00A/0284. This application was made on 28th April, 2000 and refused by the Council on 8th August, 2000. Notwithstanding this fact the respondents seem to suggest that the same is not unauthorised and therefore does not have to be demolished. They claim that the same was constructed in 1987. This Mr. McInerney disputes on a number of grounds. Firstly, he refers to a letter dated 16th September, 1999 from the Irish Aviation Authority to Weston Ltd. wherein in respect of this hangar it is stated "It is noted that the hangar which penetrates the Transitional Surface for Runway 07 is to be removed within a few weeks, together with the trees and bushes penetrating the 07 Approach Surface. It is also noted that the ESB poles which penetrate the 07 approach may be removed by the ESB". Secondly, the plans submitted with the application for retention shows that the hangar in question was constructed on a smaller footprint than the previous hangar which had been removed; and thirdly, any comparison of the aerial photographs between 1997 and 2000 evidentially demonstrates that this hangar was not in existence in 1987.

26. The "New Store" of which complaint is made, comprises the existing rear and side walls, new reinforced concrete floor slab, new front and internal sub dividing concrete block walling and new roof. The buildings which previously existed at this location had been demolished and replaced by this structure. In addition, there is a fire tender parked in an open area fronting this "new stores" building. This is shown in an exhibited photograph and the area is identified in TD-02. The respondent wishes to roof this area so as to give protection to the fire tender. The applicant disputes its entitlement to do so without obtaining planning permission.

27. In the Council's opinion the new waste water treatment system is materially different from the septic tank which presently services this aerodrome. The new biotec sewerage treatment plant relies on electrical and mechanical power to break down foul effluent prior to its discharge of the treated material. This does not of course occur with a septic tank. Secondly, Mr. McInerney claims that what is presently serving this aerodrome is approximately the same size as a domestic septic tank whereas the new system has a capacity for 100 people. Accordingly this new system could not benefit from s. 4(1)(h) of the Act of 2000.

It is denied by the planning authority that the erection of a new fuel tank over ground is exempted under s. 4(1)(g) of the Act of 2000.

Mr. McInerney agrees that he had no objection in principle to the mound of earth being moved but claims that the western boundary was not identified to him as a possible location nor was the fact that the berms would be 2 metres (approximately) in height. Hence his continuing objection in this regard. He then refers to the fact that an undertaking was given to the High Court on 4th November, 2002 that the entire mound along the western boundary and not less than 25 metres of the mound along the northern boundary would be removed and that certain restoration works would be carried out.

28. In his final affidavit sworn on 19th December, 2002 Mr. Mansfield replies to Mr. McInerney. This deponent revisits many of the issues in contention between the parties and repeats and reaffirms his companys' position on them. He says that the new fuel tanks are what is required in order to comply with best practice and have been placed in concrete supports but have not been installed due to the Council's objections. He finds it very difficult to believe that an owner cannot replace a defective roof, particularly to house the fire engine which needs this protection as it is a vital safety feature in the operation of an aerodrome. He agrees that the original watch tower which was at least 15 years old was removed at the direction of the I.A.A. because it was too close to the runway. In any event it was inefficient and not adequate to reflect today's needs and requirements. It had to be replaced. Finally, it is important to reassert that the hangars in dispute were all integrated hangars.

29. He then dealt with the new car park and said that its use for the past 25 years had not been contradicted. It has some gravel and stones placed on it but over time grass grew in spots. In winter it became quite muddy and either unusable or at least unsatisfactory. There was also a problem for access vehicles if cars were parked on both sides of the entrance. Therefore, the laying out and the use of this area should be seen in this context and even with the fencing it was still in his opinion within Class 32(b) of the Exempted Development provisions of the Regulations. He admitted that there was and is a separate administrative structure but nonetheless the bungalow had also been used for accommodating users of the airport, including entertaining guests as well as for general business purposes being those solely related to the aerodrome. Moreover, it was vital as a safety and navigation structure. In many other respects he re-asserted the essence of his previous evidence.

30. In addition to the persons above mentioned who offered evidence on behalf of the respondent, there were also affidavits from Mr. Brian Meehan, a Planning Consultant and from one Kevin McCabe, a Director of Envirocare Pollution Control Ltd., which dealt with the sewerage treatment plant. Rather than outlining such evidence at this juncture, it will I think be more convenient to address the same in the context of the conclusions later arrived at.

31. For completeness I should mention that Mr. McInerney filed two further affidavits one dealing with the sewerage treatment plant, and a second by way of a further general response to Mr. Mansfield. Largely this latter affidavit restated the position of the local authority but in addition clarified the following matter:-

> (a) with regard to the respondent's allegations that the Council deposited large quantities of material within this aerodrome, Mr. McInerney asserts that any such deposited material resulted from contractors working under the supervision of Kildare County Council which in turn was acting on behalf of the NRA; this in the course of the construction of part of the M4 known as the Leixlip bypass,
>
> (b) the drawing included by Weston Ltd. in its letter dated 26th September, 2002 only displayed an intention to relocate the mound of earth at the northern boundary of the aerodrome and made no mention of any suggested repositioning on the western side. However, following an undertaking given to the court on 4th November, 2002 and the Council subsequently becoming satisfied that the terms thereof were complied with, this issue is now one of principle only
>
> (c) whilst it may very well be that there was a watch tower within this aerodrome for 15 years or thereabouts, this did not of itself render the constructed octagonal tower on the rooftop immune from the requirements of obtaining planning permission, and
>
> (d) he disputes strongly that the hangars in question are integrated hangars. In his opinion there are four separate hangars each with its own individual access and egress with none having any interconnection between them. Each is therefore a separate and self contained unit.

32. And finally, Mr. McInerney takes very strong objection to the remarks of Mr. O'Connor and Mr. Keane which suggests that bureaucracy and other extraneous concerns have played an intrusive part in this process. He claims that the Council has been constructive and accommodating from the outset and that it is highly conscious of safety, of security and of the facility itself namely the aerodrome. Nevertheless and notwithstanding such concerns, the planning code, when it applies, must be observed.

33. In addition to this method of producing evidence Mr. McInerney was also cross examined at considerable length on his affidavits. Relevant matters which arose therefrom are dealt with later in this judgment.

34. Counsel on behalf of the applicant authority made a number of submissions firstly of a general nature and secondly made detailed observations and comments on each matter of complaint which remains a live issue between the parties.

35. At the outset of this case South Dublin County Council sought orders in respect of several works which in its opinion were unauthorised. Such works included the extension and surfacing of a taxi way (hatched green on TD-02) and the construction of security fencing (depicted by a blue line on the same drawing). Having received verifiable evidence, however, that the first named respondent had acquired the entire shareholding in Weston Ltd. and thus became entitled to benefit from the aerodrome licence which existed in favour of that company, the planning authority acknowledged that these developments were exempted under the 2001 Regulations. Accordingly from its point of view these matters are no longer of concern to this Court save to justify, if necessary, the reasonableness of its position in initially incorporating such matters in these proceedings and also to strongly refute any attack on Mr. McInerney by reason of the manner in which these matters were dealt with in his affidavits. Secondly, the Council claims that the respondents cannot have any defence with regard to the hangar which is coloured green on TD-02. This hangar, it will be recalled was the subject matter of a retention application which the council rejected on 29th June, 2000 under S00A/0284. Thirdly, it asserts

that none of the works in respect of which complaint is made are exempt either under s. 4(1)(h) of the Planning and Development Act, 2000 or under the Exempted Development provisions of "The Regulations". Since the works and uses referred to constitute development, planning permission is required in respect of each matter and no such permission has either being applied for or granted. Hence its entitlement to the orders sought.

36. The aerodrome licence issued by the Irish Aviation Authority has one condition and one note which should be considered. Condition No. 17 reads "Changes in the physical characteristics of the Aerodrome, including the erection of new buildings or alterations to existing buildings or navigation aids shall not be made without the prior agreement of the Authority". Note 3 provides that "The Licensee is expected to meet and satisfy any current planning and development requirements in relation to the aerodrome, its building and structures". By reason of these provisions themselves it is also claimed that there is an obligation on the respondents to comply with all planning requirements in respect of any development carried out by them at the aerodrome.

37. In the Council's opinion it is incorrect for the respondents to believe that even if any of the development in question was carried out at the behest of the Irish Aviation Authority, and even if as a result or otherwise such structures and works enhanced safety and security or improved the facilities at the aerodrome, the same by reason only of these matters, is or would be exempt from due compliance with the planning legislation. It is submitted that merely because a developer may have obligations under one statutory code, this does not permit that developer to disregard obligations imposed under a different statutory code. *Curley v. Galway Corporation*, (Unreported High Court, Kelly J., 11th December, 1998), *Cablelink v. An Bord Pleanála* [1999] 1 I.R. 596, *Keane v. An Bord Pleanála* [1997] 1 I.R. 184 and *Carthy v. Fingal County Council* [1999] 3 I.R. 577 were all referred to in support of this proposition. In addition specific reference was made to Article 7 of the 2001 Regulations in which there is no mention of an aerodrome licence. This in the applicant's view, clearly demonstrates the ongoing requirement of an Aerodrome Licensee to comply with the planning laws insofar as any intended works or uses are captured thereunder.

38. Having opened s. 4(1)(h) of the Act of 2000 and Articles 5, 6, 9 and Class 32 of the 2001 Regulations, emphasis was laid on the role which Article 9(1)(a)(viii) of the Regulations has in this case. This Article shows the necessity of complying with the conditions and limitations set forth in Column 2 of Class 32 where reliance was placed on subparagraph (a) of that class. In the context of both s. 4 of the Act of 2000 and those Articles of the Regulations which grant exemption, it was the applicant's submission that those relying upon the same had to demonstrate exact compliance therewith. In other words, those provisions should be strictly construed with the respondents having the onus of proof in respect thereof. Several authorities were cited in respect of each of the above points. Examples included *Lambert v. Lewis* (Unreported High Court, Gannon J., 24 November 1982), *Dillon v. Irish Cement* (Unreported Supreme Court, 26 November, 1986, see 2.654 of O'Sullivan and Shepherd *Irish Planning Law and Practice* (Issue 7, Butterworths, 1991)), Dublin Corporation v. Moore [1984] I.L.R.M. 339, *Dublin Corporation v. Sullivan*, (Unreported High Court, Finlay P., 21 December, 1984) and *Fingal County Council v. Crean* (Unreported High Court, O'Caoimh J., 19 October, 2001). In addition, the following passage from *Lennon v. Kingdom Plant Hire Limited*, (Unreported High Court, Morris J., 13 December, 1991) was opened to the court as encapsulating the point at hand. Morris J., in the report of the case at para. 2.656 of *O'Sullivan and Sheppard* said "It is accepted by the respondents that they seek to rely upon an exemption and the onus of establishing that they fall within the exemption rests on them."

It is therefore submitted on behalf of the planning authority that in the circumstances of this case, the respondents must discharge the onus of establishing to the court's satisfaction that the matters complained of constitute exempted development either under s. 4 of the Act of 2000 or under those Article of the 2001 Regulations as are above identified.

39. Dealing with specific matters and starting with the bungalow, the applicant Council does not accept that it is either an "airport operational building" within Class 32(a) of the Regulations or that the construction of the octagonal control tower is a navigational aid within Class 32(c) thereof. It is claimed that the bungalow is not such a building having regard to its former use. Whilst it has been asserted that the bungalow was "the nerve centre of the airport" and accordingly was "an airport operational building", these assertions were not underpinned by any reliable evidence and accordingly, should not be so classified. Rather it is claimed that even if part of the bungalow was used for storing documents, or retaining moneys, or entertaining guests, or as a viewing area, the predominant use of the structure was undoubtedly for residential purposes and accordingly, in the absence of much more compelling evidence it should not be concluded that it was "required" in connection with the activities outlined in the definition of "an airport operational building" as contained in Article 5 of the Regulations. If this primary submission is correct then it is not open to the respondents to seek to rely upon s. 4(1)(h) having regard to the nature of the works carried out.

In the alternative it is also submitted that even if the bungalow is "an airport operational building", Weston Ltd. cannot rely on the exemption contained in Class 32(a). This by reason of its failure to comply with the conditions listed in Column 2 of that Class. These conditions undoubtedly apply to subparagraph (a). In at least two respects there has been an infringement thereof. Firstly, it is stated that the extension carried out has increased the floor area by more than 15% and secondly, that the respondents did not give the required four weeks notice prior to the commencement of such development. Therefore, on this basis alone, the exemption cannot apply.

In addition there is a further barrier to the respondents relying on Class 32. It is by reason of Article 9(1)(a)(viii) of the 2001 Regulations. Even if one accepts what Captain Kennedy says in his faxed letter, it would mean that any commercial use of this bungalow remains unauthorised as it has not been suggested that such use commenced prior to the 1st October, 1964. Therefore by virtue of this Article 9(1)(a)(viii), Article 6 is not applicable.

With regard to the octagonal tower it is claimed that this structure is not a "visual navigation aid" as provided for in Class 32(c) of the Regulations. Secondly, that in any event it is not a navigation aid "on the ground" which again, is a specific requirement of this subparagraph. For both of these reasons, the tower cannot be considered to be exempted development. Accordingly, in relation to all aspects of the bungalow, of which complaint is made, the same constitute development which are not exempt, and/or amount to a material change of use. Therefore, in the absence of a planning permission these matters are unauthorised.

40. The respondents' claim, that all of the hangars which exist within the aerodrome, are inter-connected and for that reason must be considered as a single "airport operational building", is denied by the applicant. On its behalf it is submitted that there are four individual hangars on site and these are shown in drawing TD-03. Given the definition of "an airport operational building" as contained in Article 5 of the Regulations, one must consider each hangar as a "building" for the purposes of Class 32(a). When this is done it is quite evident that the same cannot attract the exemption which is provided for in that same class, namely Class 32 (a).

The Council also alleges that Hangar No. 3, in its post development condition, should not be considered "an airport operational building" within Class 32(a). This is for a number of reasons. The exemption refers to a "construction, or erection of an extension" whereas the current hangar is a replacement for a previous structure. Secondly, even if this is incorrect it is claimed that the conditions and limitations contained in Column 2 of Class 32(a) have not been complied with. In this regard, the respondents failed to

give the required four weeks notice and in addition even if each hangar should be considered separately, then in accordance with Mr. McInerney's evidence, the floor area of the current structure is approximately 75% greater than the floor area of the previous structure. Accordingly, for these reasons Class 32(a) is not applicable. There is, however, another reason that brings Article 9(1)(a)(viii) of the Regulations into play. Even if the respondents contention is accepted, which is that the hangars are integrated and even if in their combined condition they form an "airport operational building", nevertheless, Hangar No. 2 is unauthorised as the respondents' application for retention was, under planning reference S00AA/0284 rejected on 29th June, 2000. Accordingly, the provisions of the said Article 9, preclude the respondents from relying on Class 32(a).

And finally, given the nature of the works carried out it is strongly said that s. 4(1)(h) could not apply.

41. As mentioned in the paragraph immediately proceeding, Hangar No. 2 was refused retention permission in 2000. Accordingly, following *The County Council of the County of Dublin v. Tallaght Block Company Limited* [1982] I.L.R.M. 534 this structure is unauthorised and therefore any factual argument with regard to its date of construction or use is irrelevant. In any event, the planning authority says that the respondents' claim, that this hangar was constructed in 1987 and thus immune from court enforcement proceedings, is palpably incorrect. The 1997 aerial photograph, when examined in comparison to the 2000 aerial photograph, shows in a manner beyond dispute, that the current hangar known as No. 2 is significantly smaller than the one which existed in 1997. In addition there is the letter from the Irish Aviation Authority, dated 16th September, 1999 and addressed to Captain Kennedy (referred to at para. 25 above) in which the I.A.A. notes that this hangar "will be removed within a few weeks". Accordingly, it is submitted that these facts demonstrate beyond question that this hangar was not in existence in 1987. Therefore for the reasons outlined, the same is unauthorised.

42. It is the respondents' case that repairs only have been carried out to the existing stores and as a result all such works are exempt under s. 4(1)(h) of the Act of 2000. On the other hand the planning authority asserts that certain buildings were demolished and that a new store was erected. The area where this removal occurred is, as previously stated, shown coloured pink on TD-02 and identified as "New Stores". The works in question have been detailed by Mr. McInerney and are summarised at para. 26 above. In such circumstances s. 4(1)(h) could not apply as these stores constitute a "new structure" and are not merely an existing structure which has been improved or altered.

43. It is submitted by the planning authority that the respondents cannot avail of s. 4(1)(h) as both the treatment system and the fuel tank constitute new structures rather than existing structures which have had works carried out on them. Insofar as it is asserted that such developments improve the facilities at the aerodrome the applicant relies upon the decision of *Dublin Corporation v. Maiden Poster Sites Limited* [1983] I.L.R.M. 48.

44. The Council, in respect of the new car park relies on the aerial photographic evidence of 1997 and 2000. It further submits that even if vehicles were occasionally parked on the grassed area, now laid out as the car park and or on the extended area coloured grey on TD-02, the present situation is significantly different from that which was there previously. In particular, the area coloured yellow consists of about 5,500 sq. metres and in scale, area and size, is materially different to what may have being the practice in the past. Moreover, the respondents could have if they so wished availed of the planning permission granted in 2000 for the construction of a 1,600 sq. metre car park and in any event that extant permission renders the existing development inconsistent with the use both specified and authorised therein. Further this car park could not be considered "an airside road" within Class 32(b) of the Regulation as the area is now fenced off from the airstrip following the erection by the respondent of the security fencing in August 2002.

45. The relocation of the mounds of earth to the northern and western boundary of the aerodrome constitute in the opinion of the planning authority development under s. 3 of the Act of 2000. The planning authority seriously questions the suggestion, made very late in the day, that the mounds as relocated were intended to constitute a security feature and in that way could attract exemption under Class 32(d). It is pointed out that the initial correspondence from Mr. Mansfield indicated that the mound would serve as a noise barrier and that trees would be planted in the future. Accordingly, relying upon *Lennon v. Kingdom Plant Hire Limited*, (Unreported, High Court Morris J. 13 December, 1991) the Council submits that the respondents are not entitled to claim the benefit of an exemption in circumstances where the development was clearly unauthorised when it was carried out.

46. In conclusion, therefore, the planning authority submits that with regard to the live issues remaining in this case the respondents have not discharged the legal onus of proof which is upon them and accordingly are not entitled to claim or benefit from any exemption in respect thereof. It therefore seeks the reliefs claimed.

47. Mr. Macken S.C. who appeared on behalf of the respondents, opened his submissions by referring to what he described as the "change of ownership" phenomena. This typically occurs where a new owner acquires a structure which has attached to it a pre-1963 planning use. If in such circumstances the new owner should attempt to carry out, even the most minor of alterations, the planning authority will seize upon the opportunity to dispute the pre-1963 user and will endeavour to use that change of ownership to impose or reimpose what it considers to be an acceptable "use regime" for the structure in question. This assertion of re-control occurs even where the planning authority has full knowledge of and has tolerated the existing use for many years. This, in counsel's opinion, imposes quite an unfair and onerous burden on the new owner and is a practice which in his view should be disavowed. He referred to the observations of Keane J, as he then was, in *Dublin Corporation v. McGowan* [1993] 1 I.R. 405 in this context.

48. In these type of circumstances the intervention is usually accompanied by what he described as a "common adversarial approach" to the owners' position. This exemplifies itself in the planning authority refusing, unreasonably, to accept or act upon such evidence as the new owner might be in a position to adduce. Unless the same is verified to the highest level of proof, proceedings are instituted and processed with great dispatch and utter strictness. An example of this type of approach can be seen in this case. The incident of South Dublin County Council refusing to accept the written confirmation of Messrs. Noel Smith & Partners, solicitors, of the fact that the first named defendant had acquired the entire shareholding of Weston Ltd. typifies what is spoken of. Such level of proof detail, is more appropriate to a conveyancing type transaction and certainly was not required in the circumstances just outlined.

In making these submissions counsel was not specifically referring to South Dublin County Council, save in the example given and was not suggesting any *mala fides* or impropriety on behalf of planning authorities generally. He was merely demonstrating a mentality and highlighting an approach which he says can in many circumstances lead to unreasonable demands, which by reason of circumstances including the passage of time, cannot be readily or reasonably satisfied.

In addition he felt that the approach of the planning authority in this case was far too legalistic and that in several respects it failed to show or apply common sense to the prevailing situation. He gave as two examples; firstly the applicant's approach to the waste water treatment system whose objection he felt was downright ludicrous as it meant that an owner could not replace a dilapidated

and decaying system of sewage disposal, unless he travelled through the entire gamut of making a full application for permission, and secondly, he referred to the Council's submission that the control tower was not a "visual navigational aid" as showing a much too restrictive approach to the Regulations which in his view demanded in technical terms a purposeful construction.

49. In the respondent's submission the onus of proof at all times is and remains on the applicant. This is evident from a close examination of a number of statutory provisions of the Act of 2000 as well as being supported by case law. Section 160 has, it is claimed, no presumptions either expressly or by implication built into it. In this way it is quite unlike a number of other provisions of the Act. For example, in proceedings for a criminal offence, s. 162(1) places the onus on a defendant of proving the existence of planning permission if such should previously have been granted. It is claimed that there is no scope under any known rule of construction to apply the provisions of s. 162, which clearly relate to criminal proceedings, to s.160 which quite evidently is concerned with civil proceedings. Secondly, reference was also made to s. 157(4)(c) of the Act where in the circumstances there outlined, a presumption is expressly provided for. Consequently, it is claimed that even by an examination of these statutory provisions themselves, it is clear that no presumptions exist, that the onus is not transferred to a respondent and that the normal evidential rule of "he who asserts must prove" should apply.

50. A number of cases were cited in support of this proposition. In *Dublin Corporation v. Sullivan*, (Unreported High Court, Finlay P. 21st December 1984), the following passage from the judgment of Finlay P., as he then was, appears at pp. 3-4. It reads:

> " Secondly, I am satisfied, since the applicants come seeking relief which would effect the ordinary property rights of the defendant and which potentially could cause him loss that in the absence of some express provision to the contrary which does not exist either in section 27 of the 1976 Act or otherwise in the planning code that the general position must be that it is upon the applicants there rests the onus of proving the case which they are making. Applying this principle to the facts of the instant case before me, it seems to me that the onus is on the applicants to establish facts from which the Court can raise a probable inference that the premises were used at and immediately before the 1st October 1964 as a single dwelling and that that use was subsequent to 1st October 1964 changed to a use as a multiple dwelling which still continues".

51. Strong reliance is also placed upon the decision of Morris P. in *Westport UDC v. Golden* [2002] 1 IRLM 439. In that case Westport UDC commenced proceedings against the respondents under s. 27 of the Local Government (Planning and Development) Act, 1976. One of the issues for the court consideration was where does the onus of proof rest when a claim is made that the development in question is exempt under s. 4(1)(g) of the Local Government (Planning and Development) Act, 1963. Morris P. at p. 446 dealt with this issue in the manner following: -

> "I approached this case on the basis that the onus is upon the applicant to establish to the court's satisfaction that one of the matters referred to in s. 27(1) of the 1976 Act has been or is occurring that is to say the onus in on the applicants to show that development of land, being development for which a permission is required under part 4 of the principle Act, has been carried out or is being carried out without such permission or that an unauthorised use is being made of the land.
>
> I do not accept that *Dillion v. Irish Cement Limited*, is authority for the proposition that where the respondent seeks to establish an immunity on the grounds that a development is an exempted development under s. 4 of the 1963 Act that he must bring himself within the exemption. *Dillion v. Irish Cement Limited* was a case in which Finlay CJ considered that in the particular circumstances of that case and by reason of the unique exemption claimed there was such an onus on the respondent. However in the present case none of these considerations apply".

Other passages of some length were also referred to.

52. This principle should apply, it was submitted, even though in a number of other cases a contrary view would appear to have been taken by the judges in question. It was claimed for example that *Lambert v. Lewis* (Unreported, High Court, Gannon J., 24th November, 1984) should be considered as having been decided on its own facts and that *Lennon v. Kingdom Plant Hire Limited*, (Unreported, High Court, Morris J. 13th December 1991) can be distinguished. In fact there are two features of separation with this latter case. Firstly, the respondent company conceded that the onus was upon it to establish the exemption sought which was available under the then Exempted Development Regulations and secondly, there was a serious factual issue in dispute namely whether the works carried out constituted land reclamation or were simply the extraction of material which involved, in an incidental way only, land reclamation. No such question of fact exists in the instant case and accordingly the authority of *Westport UDC v. Golden* applies. Therefore the onus of proof is on the planning authority to establish that the developments are unauthorised.

53. Mr. Macken S.C. pointed out the limitations inherent in complex and difficult proceedings when the originating document is a notice of motion as happened in this case. Whilst this procedure is provided for by statute nevertheless the end result is that the parties have been deprived of utilising the normal interlocutory procedures so that a much fuller and more satisfactory evidential platform could be presented to the court of trial. He regretted that a plenary process had not been involved in the present case and he referred to the decision in *Waterford County Council v. John A. Woods* [1999] 1 I.R. 556 as supporting the proposition that greater reliance should be placed on the traditional method of procedure even in planning cases.

54. The respondents' submissions continued by claiming that the developments complained of were entitled to exemption either by virtue of s. 4(1)(h) of the Act of 2000 and/or as a result of Class 32 and Class 39 of the Regulations and that, the onus of proving that such development was not entitled to exemption under either or both of these provisions, was clearly on the planning authority.

With regard to the bungalow, it was asserted that despite whatever works were carried out, the overall length of the structure remained the same and in broad terms its configuration had not changed save by minor alterations. If one looked at the elevation facing the Celbridge Road a section of the house formerly used as a sun lounge was roofed. There were minimal changes to the fenestration of some windows. The attic was converted much like any conversion in a typical bungalow. There was, it was claimed, cogent evidence that many rooms within the bungalow were used in connection with the business. One was described as a kitchen/canteen; another was utilised to entertain V.I.Ps. There were several toilets downstairs which were available for employees and those using the airport. The dormer section had an extensive airport viewing function and also a section of it was used to file and store documents. Such use was in no way inconsistent with the area shown "existing office" and hatched orange on TD-02. Given the voluminous documentation necessary for the proper running of an aerodrome, the utilisation of both areas was perfectly plausible. In addition the control tower was vital as offering a means by which aircraft taking off and landing could be assisted from the ground. Exemption in respect of the control tower was also available under Class 39 of the Regulations. In all, therefore, whilst there was some domestic use, it was abundantly clear from the evidence filed on behalf of the respondents that in a major and significant way this bungalow could be correctly described as being at the centre of and as being the hub for this aerodrome.

55. In respect of the hangars it was claimed that the County Council had misunderstood the respondents' position thereon. In particular the argument on the integrated nature of these structures. The structures in question are hangars numbered 3 and 4 on drawing TD-03 as well as the area immediately to the south of Hangar no. 4, which area includes a store and the unroofed building in which the fire engine is located. It is only to these buildings that the claim of integration applies and it is only this area which was used for the purpose of the appropriate percentage calculation. According to the evidence submitted on behalf of the respondents these areas were used for the storage and maintenance of airplanes and internal access could be gained from one building to the other. In the recent past a wall had been constructed to create two separate hangars but prior to that open access was available between them. There was however no question of seeking to incorporate any buildings to the north of Hangar no. 3 in this assessment.

56. Whilst dealing with these hangars it was submitted that Mr. McInerney misunderstood the nature of the works which were being carried out. It was said that such buildings are agricultural or industrial type buildings with high roofs which are supported on metal structures and which have a certain amount of masonry filling in the walls. Effectively, it is claimed that if one is going to replace a roof on a building such as these, that building will for a period of time look as if there is no structure on it other than side walls. This because one takes down the structure and puts up a new structure which forms the roof of the building in question and so effectively when Mr. McInerney says that a building had been demolished and reconstructed, in truth and in reality the existing building was simply being re-roofed and no more. Due to the nature of the building what in fact happened was the renewal and replacement of the roof but nothing else.

57. It is also claimed that the car park, which is coloured yellow on TD-02, was formerly a taxi way for a runway which historically ran north to south. Whilst that runway was no longer in existence, helicopters could still use the area in question. Therefore, whilst the car park was fenced off this fact on its own was not sufficient to determine whether it was or was not "airside" for the purposes of the Regulations. In the respondents' view the same remain airside for the purposes of this examination.

58. Finally whilst counsel's principal submission is that the development in question is exempted under the planning code, nevertheless, if a contrary finding should be made against his clients, this court should in the exercise of its discretion refuse to make the orders prayed for on behalf of the planning authority. In this context he referred the Court to *White and McInerney Construction Ltd*. [1995] 1 I.L.R.M. 374 and *Morris v. Garvey* [1983] I.R. 319.

59. As appears from para. 15 above, both Mr. O'Connor and Mr. Keane were highly critical of the planning authority in its approach to the redevelopment works carried out at Weston and also to the manner in which it instituted and pursued the within proceedings. The objections of these individuals were not based on planning grounds but rather on allegations that in its approach the Council was politically driven and was acting in a deliberately obstructive and bureaucratic way. They claim that safety features are being utterly ignored and that the Council, through its planning authority, is acting most unreasonably and grossly irresponsibly. In my opinion, these sworn remarks by the persons in question are wholly inappropriate and have not been supported or sustained by any evidence either reasonably, objectively or otherwise based. Of course one can understand and sympathise with genuinely held frustration but no officials of a public authority should be subject to such unsubstantiated opinion. These comments of Messrs. O'Connor and Keane were not germane to any issue in the case and were in their terms only a vaguely disguised effort at being abusive. I would therefore totally reject such remarks.

Mr. Mansfield was at least as forthright in his comments. At para. 20 of his second affidavit he unambiguously alleges that the attitude and actions of the Council are politically driven and/or are driven by some form of malice and personal attack on him. Likewise, however, no supporting evidence has been produced to justify in any way these said remarks.

60. On 19th December, 2002 the respondents issued a notice of motion seeking to have a variety of averments contained in the affidavit of Mr. Jacob, which he swore on 2nd December, 2002, struck out on the grounds specified at para. 1 above. After discussion between counsel and following the making of certain submissions, it was agreed between the parties that this motion could stand aside and that the court could deal with the substantive issues without reference to this affidavit. During such exchanges however it became clear; in general terms, that the County Council sought to introduce evidence of its previous dealings with Mr. Mansfield and/or his companies in the context of planning compliance. Several newspaper reports and magazine articles were exhibited. Whilst stressing that I have not read or considered any of this material, nevertheless the general tenure of their contents was evident from the above exchanges. I would again like to emphasise that I have had no regard whatsoever to this material and that I have proceeded to evaluate and decide this case entirely without reference to any planning matter in which Mr. Mansfield may formerly have been involved in. I believe that this approach is entirely correct and would say that in the most exceptional circumstances only should a planning authority consider it proper to even advance such material, let alone rely upon it, in the context of an application under s. 160 of the Act of 2000. Whilst the strict legal position on this matter was never debated and accordingly, no submissions were made thereon, I would still venture to suggest that on the issue of "breach or no breach" of the planning code, as distinct perhaps from any enforcement order ultimately made, this approach should not find favour with a moving party.

61. Before dealing with the evidence, submissions and findings, there are a number of other points which can be conveniently dealt with at this juncture:-

(i) The aerodrome licence

On 15th October, 2001 the Irish Aviation Authority, under the Irish Aviation Authority (Aerodromes and Visual Grounds Aids) Order 2000, (S.I. 334/2000) issued in favour of Weston Ltd. an aerodrome licence for the twelve month period commencing on 22nd October, 2001. As holder of this licence that company could avail of the Class 32 exemption subject to the proviso that any development of the type specified in para. (a) of Column 1 thereof, should comply with the conditions and limitations set out in Column 2 thereof. On the acquisition by Fallowvale Ltd. of Weston Ltd. the benefit of this licence would clearly in my view have become available to the new owners of the second named respondent.

(ii) Ownership

In the Council's originating letter dated 3rd September, 2002 reference was made to the aerodrome licence in the context of the planning regulations. On the day following the first named respondent indicated that on 9th August, 2002 it had bought Weston Ltd. and that Noel Smyth and Partners, Solicitors had acted on its behalf in that acquisition. The same letter enclosed a copy of the aerodrome Licence. On 9th September, 2002 Mr. Aidan O'Gorman, the Council's law agent, sought written evidence of this acquisition so that he could satisfy himself that Fallowvale Ltd. had in fact become the holder of this licence. On the day following Noel Smyth and Partners confirmed in a letter to Fallowvale Ltd. that its client was the fully paid up owner of the entire issued share capital

of Weston Ltd. a copy of which letter was sent to the applicant on the same day. Actual proof of this acquisition however was insisted upon by the Council. On both the 13th and 23rd September, 2002 Weston Ltd. advised that Noel Smyth and Partners would deal directly with Mr. O'Gorman in relation to this matter and would produce actual evidence of the purchase. Following the institution of these proceedings on 1st October, 2002, the solicitors for the respective parties met on 7th October whereat documentary evidence of the takeover was produced to Mr. O'Gorman. On 14th October the latter confirmed on behalf of the applicant that it now accepted the completion of the takeover herein mentioned. Accordingly, the licence applied to the new owners.

(iii) As can be seen the matter at issue was resolved following the meeting of the 7th October, 2002 and that position was verified by the council in its letter of 14th October, 2002. Mr. Mansfield however takes great exception to the fact that in his second affidavit of 21st October, 2002 Mr. McInerney makes no mention of the "concessions" as he describes them, which are contained in Mr. O'Gorman's said letter of 14th October. He says that this omission showed that the deponent was "disingenuous in the very least" and that his approach could be described as "highly unmeritorious".

(iv) I reject the allegation that the affidavits of Mr. McInerney were misleading, incomplete or were designed to, or had the effect of, conveying a false impression to this court. At the outside of the *inter partes* correspondence, in fact in the original letter, Mr. O'Gorman the Law Agent makes references to Class 32 of the Regulations and to the exemptions which might be available thereunder. In McInerney's first affidavit there are multiple references to this class and its potential relieving consequences. Therefore once proof of ownership was made available, it was abundantly clear to all that the new owners were entitled to whatever benefits legitimately flowed from this class of the Exempted provisions in the Development Regulations.

(v) Finally, whether the County Council acted reasonably in insisting upon what may be called "verifiable evidence" of the takeover, is a question which might have relevance if the proceedings were related solely to the security fence and to the extension and surfacing of the runway. Of course the areas in dispute cover much more than simply these two matters and therefore I don't see any necessity in having to make a finding on this particular point.

62. Some debate was had during the course of this case as to the attitude of the respondents to undertakings furnished to the planning authority. On the 13th September, 2002 Mr. Mansfield on behalf of Weston Ltd. wrote to the Council and gave an unequivocal commitment that all works would cease from that day on. Despite this and further similar commitments given later, it is alleged that additional works were carried out, such as the construction of the fuel storage tank and the waste water treatment system as well as the relocation of the mound of earth all of which are above referred to. Whilst it is important to emphasise that once undertakings have been furnished they must be strictly complied with, save by agreement to the contrary, nevertheless, I do not believe that any thing of significance turns on this complaint of the planning authority. Furthermore, I am satisfied that the respondents did comply with the undertaking which they gave to this court on 4th November, 2002 even if there was some time delay in so doing.

63. Finally, as part of these general observations could I say that the affidavit evidence was a mixture of fact, opinion, comment and allegation. It was therefore, quite difficult from time to time to differentiate between what was of evidential value and what ought to have been excluded from this category. Examples of what I am referring to are multiple and are to be found in virtually all of the affidavits. Whilst one can appreciate the difficulty in adhering strictly to what the rules of court require in terms of affidavit content, nevertheless there was I fear very little restraining effort, if any, put into the content of many of the individual affidavits filed in this matter.

64. From a reading of s. 160 of the Act of 2000, a part of which is quoted at para. 6 above, it is quite clear, in my view, that there is no express provision establishing or applying any evidential presumption in proceedings taken thereunder. The section, which is solely civil in nature, is in that particular respect quite different from s. 162 of the Act where, in subsection (1) thereof it is provided that "In any proceedings for an offence under this Act, the onus of proving the existence of a permission granted under Part III shall be on the defendant". Another example of this distinction is to be found in s. 157(4)(c) which carries the presumption, unless the contrary is shown, that proceedings within that section were commenced within the appropriate period as specified therein. Accordingly, as there is no such comparable provision within it, s. 160 cannot be said to have expressly covered the point in the same way as these other sections have done.

65. To overcome this difficulty it has been suggested by the planning authority that this court shall read into s. 160 a provision which would have the effect of placing the onus of proof on a respondent in circumstances, *inter alia*, where that party wished to claim an exemption under the planning code either through its statutory provisions or by virtue of the exempted provisions of the Regulations or indeed if the defence should rely upon a pre-1964 user. In my opinion, there is no known rule of interpretation which would permit this court to so construe the provisions of s. 160 of the Act. On the contrary, it seems to me that given the express omission of any such provision or of any similar or comparable presumption to that contained in other sections of the Act, it would be entirely inappropriate for this court to construe the section in the manner suggested. Accordingly, I do not believe that by any acceptable method of construction can a like provision or rule with similar effect be read into the section in question.

66. The onus of proof issue, which was keenly contested in this case, arises by virtue of the respondents' reliance on s. 4(1)(h) of the Act of 2000 and on Class 32 and Class 39 of the Regulations. It is no part of their argument on the facts of this case that any of the development in question has the benefit of a pre-1964 user. Therefore, the views which I express on this point are confined to the statutory provisions as identified and do not purport to cover circumstances, which by virtue of their existence prior to the 1st October, 1964, are in effect excluded in their entirety from the provisions of the Act of 2000

In *Lambert v. Lewis* (Unreported, High Court, Gannon J., 24th November, 1984) the issue before the court required in the judge's opinion "no more than an interpretation of the exemption regulations in S.I. No. 65 of 1977 …."

These regulations can be considered as predecessors to the 2001 Regulations and on the point at issue are indistinguishable from them. In that case, it was submitted to the court that the activities complained of fell within the class of "light industrial use" and that the premises in question had a history of such use prior to 1st October, 1964 or alternatively prior to 15th March, 1977 the date upon which these regulations came into force. Having found that the defendant's premises did not have the benefit of any such use on either of the dates mentioned and having concluded that the use complained of constituted a material change of use, the learned judge, at pp. 10-11 of the judgment continued:

"Because there is no existing permission granted under the Planning Acts to use the subject premises other than as an amenity contiguous or adjacent to the curtilage of a private residence in an area zoned for primarily residential use and because the occupier Mr. Lewis has made applications for permission for retention of use the onus lies on him to establish

the facts from which the court could reasonably infer that there has been no such material change of use. This he has failed to do.

From a further consideration of the judgment as to the manner in which the hearing proceeded, it is clear that the defendant assumed the responsibility of bringing the use of his premises within the exempted Regulations. Furthermore, in addition to the passage above quoted the learned trial judge at p. 14 of the judgment reaffirmed his opinion by saying "In my view any change of use from use for such purposes is an unauthorised use unless coming within the provisions for exempted development in either the 1963 Act or the Regulations of Statutory Instrument 65 of 1977. The onus of establishing exemption falls on the Respondents".

67. The decision of Finlay P., as he then was, in *Dublin Corporation v. Sullivan*, (Unreported, High Court, Finlay P., 21 December, 1984) supports in my view, the limited proposition which can be deduced from *Lambert v. Lewis*. In *Sullivan's* case it was admitted that a change of use from a single dwelling unit to a multiple dwelling unit had occurred after the material date. Both parties contended that the other party had the responsibility of establishing that this change of use had occurred after 1st October, 1964. Having expressly agreed with the views of Gannon J. in *Lambert v. Lewis*, the then President distinguished *Sullivan* from that case by saying at p. 3 that "… the unauthorised development relied upon by the applicants is an unauthorised change of use and the issue which arises is as to whether it is a prohibited unauthorised change of use not as to whether being a prohibited unauthorised change of use it is the subject matter of the statutory exemption". In those particular circumstances he was satisfied that the onus rested upon the applicants to prove that the suggested material change of use had occurred after 1st October, 1964. It is therefore clear that *Dublin Corporation v. Sullivan* was not dealing with an exemption claimed on foot of a statutory provision or on the basis of exempted developments under the Regulations, but rather was concerned solely with the date upon which the admitted change of use had occurred. I therefore do not feel that this decision is on the point at issue in this case, but in any event by the express wording of his judgment, Finlay P., as he then was, agreed with Lambert v. Lewis. See also the decision of O'Caoimh J. in *Fingal County Council v. Crean*, (Unreported, High Court, O'Caoimh, 19 October, 2001) in which the learned judge concluded that the onus of proof rested upon the respondents to satisfy the court that the exemption relied upon, being that contained in s. 4(1)(g) of the Act of 1963 applied to the circumstances of that case.

68. Further support for this position is to be found in the decision of the Supreme Court in *Philip Dillon v. Irish Cement Limited*, (Unreported, Supreme Court, 26 November, 1986: See para. 2.654 in O'Sullivan and Shepherd, Irish Planning Law and Practice) In that case the net issue was whether the activities of the respondent were exempted under the 1977 Regulations and in particular under Class 34 thereof. Finlay C.J. speaking for the court said:

> "I am not satisfied that this case comes within Class 34 as an exemption. I am satisfied that in construing the provisions of the Exemption regulations the appropriate approach for a Court is to look upon them as being Regulations which put certain users or proposed development of land into a special and in a sense privileged category. They permit the person who has that in mind to do so without being in the same position as everyone else who seeks to develop land, namely, subject to the opposition or views or interests of adjoining owners or persons concerned with the amenity and general development of the countryside. To that extent I am satisfied that these Regulations should by a court be strictly construed in the sense that for a developer to put himself within them he must be clearly and unambiguously within them in regard to what he proposes to do".

Whilst it might be suggested that this passage deals more with the method of interpretation rather than with on whom the onus rests, nevertheless I feel, that read as a whole and also by reason of the particular reference to the developer putting himself within the Regulations, the judgment is endorsing the principle stated in *Lambert v. Lewis*. In addition the court also explains at least in part, the justification for placing this obligation on a respondent when the Regulations are being invoked.

69. *Westport UDC v. Golden* [2002] 1 I.L.R.M. 439 is the case most heavily relied upon by the respondents and in their submission is the preferred line of authority on the point at issue. Nothing of particular relevance turns on the individual facts of that case. It is a passage from the judgment of Morris P., which appears at p. 446 of the report to which reference has been made. This reads as follows:

> "I approached this case on the basis that the onus is upon the applicant to establish to the courts satisfaction that one of the matters referred to in s. 27(1) of the 1976 Act has been or is occurring, that is to say that the onus is on the applicants to show that development of land, being development for which a permission is required under Part IV of the Principal Act, has been carried out or is being carried out without such permission or that an unauthorised use is being made of the land.
>
> I do not accept that *Dillon v. Irish Cement Ltd*. is authority for the proposition that where the respondent seeks to establish an immunity on the grounds that a development is an exempted development under s. 4 of the 1963 Act that he must bring himself within the exemption. *Dillon v. Irish Cement* was a case in which Finlay C.J. considered that in the particular circumstances of that case and by reason of the unique exemption claimed there was such an onus on the respondent. However in the present case none of these considerations apply."

The same judge also gave judgment in the earlier case *Lennon v. Kingdom Plant Hire Ltd*. (Unreported, High Court, Morris P., 13th December, 1991) where one of the issues was whether or not the works in question could be correctly categorised as land reclamation and thus exempt under the then exempting regulations. It would appear that the case proceeded on the basis that the onus of establishing the applicability of the exemption rested upon the respondents and accordingly on that ground can be clearly distinguished from *Westport UDC. v. Golden*. As a result of this concession there was of course no contrary submissions or debate on this point. It can, I think therefore, be accepted that the more concluded view of Morris P. is that as he outlined in the *Westport UDC v. Golden* decision.

70. In my opinion the stage presently reached is that there is clear preponderance of authority in favour of the proposition that when the development complained of is sought to be excused under cover of either s. 4 of the Act of 2000 or under the exempted developments provisions in the Regulations then the onus of establishing this point is upon he who asserts. In this context I cannot see any difference between the section and the Regulations. I also cannot accept that *Lambert v. Lewis* can be explained away as being a decision on its own facts and neither can the decision of the Supreme Court in *Dillon v. Irish Cement*. In reaching this conclusion, however, I am not in anyway suggesting that the onus of proof is not otherwise on the moving party. Such party must therefore satisfy the court by probable evidence of all the other proofs which may be essential to a successful application under s. 160 of the Act of 2000.

71. Running throughout the respondents' evidence and submissions are repeated assertions that they have an obligation to comply

with aviation standards and in particular with any and all directions from the I.A.A. Of that I am sure there cannot be any doubt. But implicit in these numerous references is the belief that as a result the provisions of the planning code can be disregarded or at least can be relegated to an insignificant position in the overall priority of things. This view, in my opinion, is not tenable. The law on this point is relatively clear-cut. It is that mere compliance with one statutory regime does not absolve the effected party from compliance with a different regime unless such is expressly provided for. In the context of planning legislation the case *Curley v. Galway Corporation* (Unreported, High Court, Kelly J. 11th December, 1998) is virtually directly on point. In that case the court found the respondent Corporation to be in breach of a planning permission governing the operation of a dump which was situated in the adjoining functional area of Galway County Council. On its behalf it was submitted that the court should exercise its discretion and refuse to make any order on the basis of further statutory obligations being imposed on the Corporation under a different code. Kelly J. reacted as follows at p. 9:-

> "Secondly, it is said to me that an order made today will give to very considerable difficulties for the Corporation in complying with its statutory obligations under, for example, the Waste Management legislation. In my view the Corporation has nobody but itself to blame if such difficulties are created. I cannot conceive of a situation where the court can, in order to enable Galway Corporation to comply with its statutory obligations under one piece of legislation, permitted to breach obligations imposed upon it by another piece of legislation. In particular the court cannot permit the fulfilment of a statutory obligation, for example, under the Waste Management Act by the commission of offences under the planning legislation". When one substitutes the aviation code in this case for the Waste Management Acts in *Curley*, the passage herein recited is directly on point."

See also *Keane v. An Bord Pleanála and Others* [1998] 1 ILRM 241 and *Cablelink v. An Bord Pleanála* [1999] 1 IR 596.

72. Another example is to be found in *Carthy v. Fingal County Council*, [1999] 3 IR 577 where the Supreme Court held that the existence of a valid planning permission to carry out a development did not of itself "authorise the plaintiffs to proceed with the development: their obligation to obtain building by law approval remained and their application had to be determined by the defendant in accordance with the circumstances then prevailing. In my opinion it was so determined by them". See the judgment of Keane J. at p. 601 of the report. Moreover the absence of any reference to Aviation Legislation in Article 7 of the 2001 Regulations confirmed the independence of that code from the planning legislation.

In my view therefore it is clear that there is a legal separation between both codes. If circumstances demand then either one must be complied with. Or indeed, as quite frequently occurs, both must be. There is no question of an entity having a choice or exercising a preference for one over the other. If an individual or undertaking conducts a business or activity which is regulated by statutory provisions, then from the outside that position is known to all. Excusing circumstances unless specifically allowed, are not a justification for believing that compliance with one code is a sufficient compliance with both codes. Therefore I have no hesitation in concluding that where by reason of its own actions the respondents have brought themselves within the planning legislation, they must comply with such provisions thereof as are applicable to their individual activity.

73. This obligation of compliance is totally independent from the terms of the aerodrome licence, certainly insofar as the planning authority is concerned and in that regard I would reject any submission to the contrary made on its behalf. I therefore do not believe that the plaintiff could invoke Note 3 of the Licence even if that paragraph was otherwise justiciable between the respondents and the Irish Aviation Authority.

74. Finally, in the present context could I refer to Mr. Macken's submission with regard to what he described as the "change of ownership syndrome". Whilst it is true to say, as he would acknowledge, that this submission did not lead to the making of any particular point in its own right, nevertheless even if substantially true and even if the generality of its application be heavily circumscribed, I would find the ethos underlying any such approach to be quite troublesome. Planning legislation is guided by the common good whose family include every individual who has contact with it. Its application I would have thought would be guided in the same way. In the broadest of senses I would not expect any undue adversarial or legalistic policy to underpin the relationship between planning authorities and members of the general public. The legislation is not intended as a vehicle to deny or deprive a citizen of a benefit or gain which by the spirit or letter of the law the Oireachtas has ordained should be his. All public legislation and those involved in its proper functioning and implementation must surely realise this. If it was otherwise a serious situation would indeed arise.

Having said that, however, I must immediately make it clear in the same breath that as a practitioner in this area I had no personal knowledge of this type of situation and furthermore, of more immediate importance, is my complete belief that neither South Dublin County Council or any of its officials have in any way acted in the manner under discussion. Being found in a position of having to vigorously assert and defend the integrity of the code is in no way to be equated with what I have just described.

I am absolutely satisfied that the planning authority in this case found themselves in the position last mentioned.

75. In outlining my conclusions on the individual matters of alleged development, it is important I feel to firstly deal with the submission made by the respondents as to how I should approach the evidence of certain persons who swore affidavits on their behalf. As will be recalled there was cross-examination in this case but only of Mr. McInerney. It was decided by the applicant council not to cross-examine any of the respondents' witnesses. Therefore, it is claimed that by reason of this deliberate foregoing of the opportunity in question I must accept the evidence of such witnesses and act thereon.

76. As a matter of principle I disagree that such a consequence is a necessary result of the decision not to cross-examine these witnesses. In my view, this court retains the right, indeed has the duty, of assessing such evidence in exactly the same way as it should evaluate the rest of the written evidence, being mindful of course of the choice made by the planning authority. In this regard, I feel that I should look at the contents of each of the affidavits sworn by the individuals in question but in addition should also consider what has been sworn to, in the context of the entirety of the evidence placed before the court. Only in this way can a proper assessment take place.

77. In this context I should immediately say that in evaluating the weight which I should place on the evidence of Mr. O'Connor and Mr. Keane I feel that I am perfectly entitled to have regard to what I have considered to be the inappropriate allegations made by them. In addition, both have significantly strayed beyond their area of expertise and have in many respects sworn to matters in the most general way. As an example could I take but one item. They have given no details as to how the hangars at the aerodrome were integrated and have not, a fact in common with all other respondent witnesses, made any mention of the works now alleged to have been carried out in 2002 which resulted in the construction of a wall between hangars numbers 3 and 4. In addition, they allege that in all five hangars were integrated, a proposition not even advocated in the closing submissions made on behalf of the respondents. Furthermore from an examination of their respective affidavits there is a deep and remarkable similarity in how each person expressed

his evidence. On the other hand of course I must and do have due regard to the 20 years or more during which they have conducted business at Weston.

In my view, therefore I am entitled to have regard to all such aspects when deciding on what is, and what is the value, of the evidential base in this case.

78. The evidence tendered by Mr. Mansfield cannot, I feel, be based on first hand experience save for events occurring in the period shortly prior to August, 2002. This simply because there is no suggestion that he had any specific knowledge of the aerodrome prior to that time. With regard however to the personal allegations made by him, (see para. 59 above) these can be more readily understood, thought not excused, because he is effectively a party to these proceedings. As with the other comparable allegations these are unsupportable by evidence.

79. Remaining with this context I should say with regard to Mr. McInerney that whilst it is undoubtedly true that he was not familiar with one hangar and had not been in or seen the inside of the entirety of the bungalow, nevertheless he had, from his three or four inspections per annum over a number of years, considerable knowledge of the aerodrome. Therefore, whilst I must be conscious of his limitations I must on the other hand have due regard to his personal knowledge of many facets of the aerodrome, acquired as it was over a lengthy period of time.

80. The position of Mr. Brian Meehan has not, I feel, been in any way altered by the fact that ultimately his offer of submitting to oral evidence was not acted upon. At para. 11 of his affidavit he says that he concurs with the views of Mr. O'Connor, Mr. Keane and Mr. Christopher Fury on what are or are not exempted developments. Mr. Fury is an engineer and I have already expressed my views on how I should approach the evidence of the other witnesses mentioned. Mr. Meehan is undoubtedly a planning consultant of the highest repute whose opinion this court must take into account. Ultimately however it is a matter for the trial judge to decide, on the findings of fact made by him and on the legitimate inferences to be drawn therefrom, on what is or is not, as a matter of law, exempted development.

81. There is no dispute in this case on the status of the security fence or on the extension and surfacing of the taxiway, which area is shown hatched green on TD 02. The same are quite clearly within Class 32 of the regulations and consequently are entitled to exemption.

82. The hangar, coloured green was, as previously stated, the subject matter of an unsuccessful application for retention back in the year 2000. Despite this fact the respondents still however assert that it is and so remains an exempted development. Both as a matter of fact and law I disagree with this submission. In its letter of 4th September, 2002, to Mr. O'Gorman, Fallowvale Ltd., under the hand of Mr. Mansfield, says that this hangar was built in 1980 or 1981, though in later correspondence this is changed to 1987. In addition the respondents and their solicitors have queried the need for the retention application in the first place.

83. It is abundantly clear from objective evidence that this hangar was built between 1997 and 2000 and in all probability sometime after September, 1999 and before April, 2000. There is a letter from the Irish Aviation Authority to Captain Kennedy dated 16th September, 1999, in which, when referring to this hangar, it is stated:-

> "2. It is noted that the hangar which penetrates the Transitional Surface for Runway 07 will be removed within a few weeks, together with the trees and bushes penetrating the 07 Approach Surface. It is also noted that the E.S.B. poles which penetrate the 07 Approach may be removed by the E.S.B."

It is therefore clear that the hangar must have been in existence as of September, 1999, and equally clear that its erection must have been completed prior to the application for its retention which was made in April, 2000. In addition this fact is also evident from a comparison of the aerial photograph taken in 1997 with that taken in year 2000. From an examination of both, it seems to be undeniably clear that the structure shown to exist in 1997 is quite different from the structure as shown in 2000. Furthermore, a similar result follows from an examination of the ordinance survey maps submitted by Fallowvale Ltd. with its letter to Mr. O'Gorman dated 10th September, 2002. All of this evidence shows quite clearly that the hangar coloured green was not the hangar which existed in 1997. Therefore it is not credible for the respondents to make the case that this hangar, coloured green, was built in 1980/1981 or 1987. I must therefore reject the factual basis of this submission.

84. Given this finding it must be that the works in question constitute a development within the meaning of s. 3 of the Act of 2000 and therefore requires the existence of a valid planning permission unless the same could be said to be exempted. In my opinion there is no such argument along these lines available to the respondents. In addition however reference should be made to the *County Council of the County of Dublin v. Tallaght Block Company Limited,* [1982] I.L.R.M. 534. At p. 14 of this judgment Hederman J. said "I further agree with the findings of Costello J. that "if an occupier of land carries out development …(and he) applies under s. 28 of the 1963 Act for permission to retain the unauthorised structure and is refused, then he cannot be held to argue in proceedings instituted against him under s. 27 of the 1976 Act that permission for the development was not required". This passage has a direct application to this item in dispute and accordingly it is not open to the respondents to argue that permission under the Act of 2000 is not required.

85. To the south east of the hangar last mentioned there are two further hangars on site today which are shown numbered 3 and 4 on drawing TD-03. These hangars are also identified on TD-02 with hangar number 3 being coloured pink and partially hatched black and hangar number 4 shown coloured orange which is immediately adjoining. There is very considerable competing evidence with regard to these hangars in a number of ways. As previously outlined the planning authority is of the view that the area coloured pink and hatched black on TD-02 represented an old hangar which was demolished and in its place was constructed a new hangar over an area which includes the site of the former hangar but extends much beyond. On the other hand, the respondents allege that the works were much more restricted and constituted only a re-roofing of the original hangar. In addition a dispute exists as to the percentage increase of any extension carried out and also whether or not *inter alia* these hangars are integrated.

In my view, what Mr. McInerney observed in September 2002 was in fact what he described namely the demolition of an old hangar and the construction of a replacement extended hangar. It is exceedingly difficult to believe that a man of his experience would be so confused about the ongoing works, which he observed at first hand, so that he was completely mistaken and totally misunderstood what was happening. It is impossible for me to accept the circumstances by which the respondents attempt to explain away his evidence. These suggestions are in part set out at para. 56 above. Furthermore, I do not believe that the evidence advanced by those witnesses who swore affidavits on behalf of the respondents, is sufficient or adequate to displace my acceptance of Mr. McInerney's opinion. I therefore do not accept the respondents' contentions in this regard.

In addition support for this conclusion is available from other resources. In the drawings submitted with the retention application,

hangars numbers 3 and 4, in the form in which they then existed, are clearly shown as having a "L shaped dimension" to them. This fact is confirmed by both aerial photographs. It is also, in my opinion, verified by the Ordinance Survey maps submitted by the respondents to the Council in September 2002. These facts, together with the Council's evidence satisfies me that an old hangar was replaced by a new hangar in an area which incorporated part of the old hangar but which was extended in size to a footprint much larger than that which previously existed. Accordingly, I believe that such works constitute a development which unless otherwise exempted must require a valid planning permission.

On this view of the evidence I cannot hold that s. 4(1)(h) of the Act of 2000 has any application to the hangar in question. In addition, however, reliance was also placed on Class 32 (a) of the Regulations. This class grants exemption for the "construction or erection of an extension" to an airport operational building. The structure, "airport operational building", is defined in Regulation 5 as

> "… a building other than a hotel, required in connection with the movement or maintenance of aircraft, or with the embarking, disembarking, loading, discharge or transport of passengers, livestock or goods at an airport."

It is therefore clear in principle that a hangar can come within the definition of an "airport operational building". However subparagraph (a) in my view must be interpreted as applying to "an extension" of a building which already exists. I cannot see how the wording in question could cover the demolition of a structure and its replacement by another structure which in this case was much larger than the pre-existing one. Consequently, I do not believe that Class 32 (a) is available for this reason.

86. There are of course other reasons why in my view Class 32(a) cannot be invoked by the respondents. These relate to the conditions and limitations which appear in Column 2 of that Class (see para. 8 above). One refers to size and the other refers to the period of notification. In this case there is no doubt and it has been admitted in correspondence from the respondents (see letters dated the 30th August and 31st October, 2002) that they have not complied with the requirement of giving four weeks notice. If such forewarning had been given, the planning authority would have had an opportunity of making its own assessment on the applicability of the exemption contained in Column 1. This, however, was not available as the required period was never given. In addition to this, there is also some considerable difficulty with regard to the size limitation. It is the respondents' case that certain structures must be aggregated for the purposes of this calculation. It is therefore suggested that what I have described as hangars 3 and 4, together with the buildings to the South East should be considered for this purpose. It is said, that there was internal access between these. With this submission, however, I have considerable reservations. If there was a clear-cut view that these buildings should be considered as integrated then it would have been a straightforward exercise to commit that position to affidavit. Secondly, it is quite surprising that there is no mention in the affidavits of what was later suggested as being works which included the construction of a wall between hangars 3 and 4 in September 2002. It therefore seems to me that the failure, if it be that, of Mr. McInerney to spot fresh masonry in this alleged newly constructed dividing wall does not necessarily end the matter.

87. The question of what must be taken into account for the purposes of this integration is also quite problematic. The evidence of Mr. Keane talks about "five integrated hangars" as does the evidence of Mr. O'Connor. Such a number must, of necessity, include the hangar coloured green on TD-02 which was the subject matter of the unsuccessful application for attention and which I have previously found to be unauthorised. On that basis this entire submission falls by virtue of Articles 6 and 9 of the Regulations. It also collapses because there is, unquestionably, a physical gap immediately to the north of hangar number 4 and accordingly that structure could not be integrated with its adjacent neighbour. Sometime later in the case the qualifying buildings were restricted to hangars 3 and 4 and to the unroofed building above mentioned as well as to a small area in the immediate locality. Even with this clarification or concession I have doubts. It seems to me that there may well be a physical gap between hangar number 4 and the unroofed building where the fire engine stands. The existence of such a separation appears from the "Block layout plan" contained in the drawings submitted with the retention application thought it should be said that the "Block plan" part of the drawing does not support this. Evidence was also given that such a gap was evident on the aerial photograph taken in 2000 with Mr. McInerney denying that his interpretation in this regard was incorrect. As a result, however, of a combination of these circumstances I am not satisfied that the respondents have discharged the onus, which is upon them, of identifying with probable certainty what buildings ought to be considered for integration purposes and secondly, I am also not satisfied that those which were identified were in fact physically integrated. If that be correct it follows that the percentage increase, as given by Mr. Furey, had for this purpose an erroneous base.

A slightly separate issue arose regarding the respondents' wishes to re-roof the building in which the fire station is housed. There is no dispute but that on some occasion there was a roof on this structure which eventually became entirely defective and fell into a state of disrepair. The Council's objection was that until such time aa series of drawings had been produced, it was not in a position to consent to this building being re-roofed. I have considerable sympathy for the respondents when they say that it is ridiculous for a land owner not to be able to re-roof a structure in circumstances where the old roof, the existence of which is not in doubt, has simply deteriorated. On the other hand, the Council's hesitation stems at least in part from some conversation in which it is claimed that Mr. Mansfield indicated that the respondents wished at some point in time, to change the roof type of the adjoining structures. It seems to me that if the respondents wish to replace an old roof with a similar type new roof then *prima facie* that must come within s. 4(1)(h) of the Act of 2000. Whilst I do understand the concept of the "street scape" as referred to, nevertheless, I believe that a frank exchange of information, falling short of submitting full and detailed plans, may be sufficient to resolve this matter. Therefore I do not propose to make any finding on this particular point.

88. The best evidence available as to the former use of the bungalow must be that of Captain Kennedy, even if it is only contained in an undated fax and even if he did not appear as a witness in this case. It will be recalled that in this document, written sometime after the completion of the takeover above referred to, Captain Kennedy stated that for the "past 20 years" up to approximately one third of the available space had been used in a variety of ways which was beneficial to the operation of the aerodrome. As can therefore be immediately seen there is no suggestion that this type of business user had a longer life than approximately 20 years and accordingly even if one accepts this evidence with all its imperfections, there cannot be any exemption on the pre-October 64 basis or otherwise under the exempted development Regulations. Therefore for the purposes of this application under s. 160 of the Act the use which is now alleged for this structure in relation to the business and commercial activities of the aerodrome is clearly a materially change of use and constitutes in my view a development which is amenable to the provisions of that section.

89. In addition, from my consideration of the evidence as a whole, a picture is displayed that this structure was principally the dwelling house of Captain Kennedy and that accordingly this use was its dominant one. Any other activity carried on therein or therefrom was in my view incidental to that. However useful in utility terms the bungalow may be as part of, or for the aerodrome, this fact alone, as against the evidential background, cannot in my view attract any provision of the exempted regulations. Even, however, if the bungalow should be an "airport operational building" within Regulation 5 of the 2001 Regulations, and even if the manner in which Mr. Furey carried out his calculations was correct, nevertheless the period of notice, which is mandatory under paragraph 3, of column 2 of Class 32, was not satisfied. Moreover the exemptions provided under this Class are only available subject to the restrictions imposed by Article 9 of the Regulations. Given my finding as to the unauthorised use of the bungalow, it has to

follow that there is also a violation of Article 9(1)(a)(viii) of the Regulations.

Finally, from an examination of the photographs and on the basis of the works carried out, in respect of which I accept the evidence of Mr. McInerney, I am satisfied that the provisions of s. 4(1)(h) of the Act of 2000 do not apply. In my opinion such works were not restricted only to the interior of the structure but rather also affected materially the external appearance of it so as to render that appearance inconsistent with the character of the structure.

90. Finally, there has also been constructed on the roof of this bungalow a new "control tower". This is intended to replace an old control tower which had previously being removed from its position because it penetrated "the traditional surface for runway 07" (see the letter dated 16th September 1999 from the Irish Aviation Authority). With regard to this tower it has been suggested that the same might attract exemption not only under Class 32 but also under Class 39 of the Regulations. This latter class speaks of "a lighthouse, beacon, buoy or other aid to navigation on water or in the air". I do not accept that the control tower could be described as falling within any of the structures mentioned in this class. Indeed I am firmly of the view that what is described in this class has no application to a control tower located within an aerodrome. If Class 39 was intended to extend its exemption to the structure in question at an aerodrome, then the same would in my view have been incorporated into Class 32 which evidentially it was not. I am therefore satisfied that no reliance can be placed on Class 39.

91. Class 32(c) refers to "visual navigation aids on the ground …" with what then follows being examples of what is intended to be included. From the wording used I have considerable doubts if the control tower is a "visual navigation aid" as that term should be understood within the context of this Class. In my view it is a term of special knowledge and whilst Mr. Keane and Mr. O'Connor said that it was, no real explanation for their relief in this regard has been put forward. However despite the misgivings which I have, I do not believe that I should make any finding in this regard as the type of evidence required was not in my view available. I would therefore await a future case before definitely deciding on the question as to whether this type of control tower is or is not a visual navigation aid within Class 32(c) of the Regulation.

92. However, even if it was such a visual navigation aid I do not believe that it can be said to be "on the ground" which is a necessary pre-condition for its inclusion within this class. As is common case, the control tower in this case rests on the ridge of the bungalow's roof. It could not, in my view, have been intended that this exemption should be available irrespective of the type of structure upon which the control tower sits. Whilst it might be arguable that the exemption could still apply even in the presence of another structure which was used solely or principally to support the control tower, that of course, is not the position in this case. The bungalow in its own right has a principal and dominant use which is independent of this tower. Therefore, I can only conclude that such a structure constitutes a development which is not exempted and which is subject to the requirement of obtaining a valid planning permission.

In conclusion, I do not believe that in respect of the bungalow or the control tower there is any exemption available under s. 4 of the Act or under either Class 32 or Class 39 of the Regulations.

92. In my opinion there is no credible evidence that the area now laid out as a car park was so used for that purpose over many years. Generalised averments in this regard are insufficient. The nature of the surface is a *contra indicator* in this regard. As is the evidence available from the aerial photographs taken in 1997 and 2000. These photographs show several cars parked on the side of the access road as one enters the aerodrome. This evidence cannot in my view be explained away by simply suggesting that the photographs were snapshots frozen in a point of time. Furthermore, the claim that the altered use of this area is intended only for a limited period does not of course obviate the necessity of obtaining planning permission if that otherwise is required. Nor do the respondents wish to comply with requests from third parties, however desirable this might be.

93. In addition, there is in existence an extant planning permission for a car park on part of the lands coloured yellow on TD-02 which part runs parallel to the Celbridge Road. See exhibits CF1. As a result of this permission the development of a car park on the areas, respectively coloured yellow and grey on the said drawing, would not be authorised as the same would contravene Article 9 of the Regulations. Moreover the erection of a security fence, which is shown depicted by a blue line on TD-02, means that in my opinion, it could no longer be correctly described as an "airside road" within Class 32(b) of the Regulations. Whilst it is somewhat surprising to hear that helicopters still use this area given the fact that the public are invited to park their cars thereon, this suggestion does not alter my view. In conclusion therefore, the area coloured yellow and the area coloured grey on TD-02 are not exempt within any of the provisions of either the Act or the Regulations and accordingly in my view both require a planning permission given that the works in question clearly come within the term "development" as defined in s. 3 of the Act of 2000.

94. With regard to the alleged development described as "New Stores" the respondents claim that by reason of the limited nature of the works carried out, the same is entitled to exemption under s. 4(1)(h) of the Act of 2000. This submission is one which I do not accept. The reason is that in my view the evidence of the applicant council ably demonstrates that the structure presently so described on TD-02 is a new structure and that a previously existing structure had been demolished. I therefore do not accept the factual basis upon which the respondents make this argument. Accordingly it must follow that the provisions of s. 4(1)(h) have no application to this development.

95. This conclusion is one which I also reach with regard to the fuel storage tank. On behalf of the respondents it is forcibly argued that the former practice of having such tanks underground is no longer acceptable within the industry for a variety of reasons including one of safety. Instead it is now the universal practice to have such tanks located at ground level. Accordingly, by attempting to site this tank at such a level they are simply implementing the same requirements as others do in this area of activity. Whilst I can readily understand, even commend this attitude, nevertheless unless one can find a lawful basis for rendering inapplicable the planning legislation then its provisions must apply. Evidently in my opinion the essential elements of s. 4(1)(h) of the Act of 2000 cannot be met and accordingly in the absence of any other exempting provision, planning permission is required for what is proposed. I therefore have to reject the submissions made in this regard on behalf of the respondents.

96. A considerable volume of evidence was produced with regard to the "waste water treatment system". Much of what was said by the principal witnesses on behalf of both the applicant council and the respondents was uncertain and somewhat vague, given the lack of precise information as to what constituted the old system of foul disposal. It was therefore rather surprising that the respondents did not file an affidavit from the company which they engaged to inspect the old facilities and to make recommendations with regard to its upgrading. Eventually however that omission was rectified and Mr. Kevin McCabe, a Director of Envirocare Pollution Control Ltd swore an affidavit on the 19th February, 2003. That deponent, and others of that firm, carried out an inspection of these facilities at the aerodrome in August 2002 and as a result was in a position to give first hand evidence as to what existed prior to the carrying out of any works by the respondents. This evidence in my view must be preferred over the evidence adduced by Mr. McInerney on behalf of the council. Accordingly I am satisfied that an important section of the old system continues to be used and that the entirety of the new system can be considered to be sited in virtually the exact same place as where the old system was.

Whilst Mr. McInerney continues to be critical of the lack of information about this new system, I do not believe that these concerns are sufficient to remove the structure from the provisions of s. 4(1)(h) and accordingly I believe that the same is entitled to exemption under this said section.

97. The last matter with which I must deal is the "mound of earth" above referred to. It will be recalled that pursuant to an undertaking given to this Court the respondents removed so much of this earth as may have inhibited the operation of the applicant's wayleave. However, there remains a question of principle as to whether the relocation of this mound comes within Class 32(d) of the Regulations and thus in that way is exempt from planning requirements. In my opinion I cannot see how the relocation of this mound can be correctly said to be within the security measures mentioned in para. (d) of Class 32. The correspondence in this regard from the respondents is unsatisfactory and cannot of itself be determinative of this issue. Given the volume of earth in question and the height to which it has been stacked, I do not believe that the respondents have discharged the onus of proof, which is upon them, to satisfy the court that the same can avail of this class or of the provisions of s. 4(1)(h) of the Act of 2000. Therefore this relocation in my view constitutes a development which is unauthorised unless a valid planning permission exists in respect thereof.

98. Finally could I make two further points. Firstly could I say that I considerably regret that s. 5 Act of 2000 was not availed of in the circumstances prevailing. It seems to me that the provisions of this section offer an economic, efficient and expeditious manner in which any party can get a determinative view on what may or may not constitute development for the purposes of the Act of 2000. Whilst I appreciate that the section cannot be forced upon any party it appears to me that expensive litigation could have been avoided if that route had been chosen. Why the respondents did not do so is of course a matter for them. However I regret the lack of such a referral.

Secondly, notwithstanding these proceedings and despite the conclusions reached in this judgment, I would like to draw both parties attention to the 1998 South Dublin County Development Plan which clearly demonstrates a recognition by the County Council of the importance of this aerodrome, not only within the immediate confines of its location but indeed much further afield. Moreover the Plan, as one would expect, also expressly recognises the importance of its safe and continued operation. I therefore hope that between the parties to this litigation the objectives of the planning code and the aviation code can be harmoniously achieved.

99. In conclusion given the findings above made I will receive further submissions from the parties as to what precise orders may be appropriate in the circumstances outlined.