APPROVED **[2021] IEHC 450**

THE HIGH COURT

2021 No. 61 MCA

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

LAGAN ASPHALT LIMITED

APPLICANT

AND

HANLY QUARRIES LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 7 July 2021

INTRODUCTION

1. This judgment is delivered in respect of an application to stay the within proceedings. The proceedings are enforcement proceedings taken pursuant to section 160 of the Planning and Development Act 2000 ("***PDA 2000***"). The respondent contends that the proceedings should be stayed or adjourned pending the making of a decision by the local planning authority as to whether it intends to pursue enforcement action itself.
2. This judgment considers the respective roles of the court and a local planning authority in enforcement matters.

NO REDACTION REQUIRED

PROCEDURAL HISTORY

3. These enforcement proceedings relate to quarrying activities which are being carried out near Elphin, County Roscommon. The activities on-site include concrete batching and bitumen manufacturing. In brief, the applicant objects that the erection and operation of what is described as a "bitumen plant" represents unauthorised development for the purpose of the PDA 2000. A related objection is made that there has been a breach by the respondent of its air emissions license. These two objections have been advanced in a single set of proceedings notwithstanding that the alleged breaches arise under two separate statutory schemes.

4. The respondent seeks to defend the proceedings on the basis that the bitumen plant merely *replaces* plant which had been authorised by an earlier grant of planning permission. It is said, therefore, that the erection of the replacement plant constitutes a form of exempted development. It is common case that the plant is some 440 metres from the locus of the plant being replaced.

5. Prior to the institution of these proceedings, the applicant had made a formal complaint to the local planning authority, Roscommon County Council. The complaint was made on the applicant's behalf by its solicitors by letter dated 5 March 2021. The letter called upon Roscommon County Council to confirm that it would investigate the complaint, and take all necessary action so as to prevent unauthorised development at the quarry. As of 5 July 2021, the planning authority had not yet notified any substantive decision on this complaint.

6. These proceedings were instituted on 26 March 2021. The respondent issued a notice of motion on 10 May 2021 seeking to stay, or adjourn generally, the within proceedings pending the conclusion of the planning authority's investigation into the matters the subject of these enforcement proceedings. This investigation is mandated pursuant to

section 153 of the PDA 2000. There is an aspirational time-limit of twelve weeks applicable to such investigations.

7. The motion is grounded on an affidavit sworn by one of the directors of the respondent company. The affidavit sets out the chronology of events leading up to the institution of these proceedings. The deponent then offers the view that there is a "clear risk of different conclusions under different obligations" arising from the existence of these proceedings and the planning authority's investigation.

8. The motion came on for hearing before me on 5 July 2021.

DISCUSSION

9. In principle, there are two statutory functions exercisable by a planning authority which might potentially be relevant to enforcement proceedings taken by a third party pursuant to section 160 of the PDA 2000.

10. First, a planning authority has jurisdiction under section 5 of the PDA 2000 to make a declaration as to whether or not a particular act represents "development" or "exempted development". There is a right of review thereafter to An Bord Pleanála in respect of the planning authority's decision of first instance. The case law over the last fifteen years or so has confirmed that (i) section 5 of the PDA 2000 has largely ousted the High Court's jurisdiction to grant declaratory relief in respect of planning matters; and (ii) an unchallenged section 5 declaration may be relied upon in enforcement proceedings, at least where the parties to those proceedings had been privy to the section 5 reference. This case law is discussed in detail in *Krikke v. Barrannafaddock Sustainability Electricity Ltd* [2019] IEHC 825 (at paragraphs 64 to 88).

11. Secondly, a planning authority has a role under Part VIII of the PDA 2000 in investigating complaints of unauthorised development and has enforcement powers open

to it. These enforcement powers include an entitlement to issue enforcement notices and to institute proceedings under section 160 of the PDA 2000.

12. It is important to emphasise that the application to stay the within proceedings is premised exclusively on this latter set of functions. This judgment is not, therefore, concerned with the vexed question of the interaction between section 5 of the PDA 2000 and the enforcement mechanisms under Part VIII of the Act. That question is currently being considered by the Court of Appeal in other proceedings, namely *Krikke v. Barrannafaddock Sustainability Electricity Ltd* and *Narconon Trust v. An Bord Pleanála*.

13. The issue to be resolved in the within proceedings is much more straightforward. The respondent contends that the High Court should defer the exercise of its statutory jurisdiction under section 160 of the PDA 2000 until such time as Roscommon County Council has reached a decision on whether to take some form of enforcement action in its own right. Two principal arguments are advanced in support of this contention. First, it is said that there is a risk of conflicting decisions as between the court's assessment of whether there has been unauthorised development and that of the planning authority. Secondly, it is said that, at the very least, it will be of assistance to the court in the exercise of its *discretion* under the section to know the views of the planning authority.

14. With respect, neither of these two arguments is convincing. Save possibly in the specific context of section 5 of the PDA 2000, a planning authority has no function in determining whether or not particular works or a particular change of use constitute unauthorised development. This is confirmed by the judgment of the Supreme Court in *Meath County Council v. Murray* [2017] IESC 25; [2018] 1 I.R. 189 ("***Murray***"). On the facts of *Murray*, the relevant planning authority had instituted enforcement proceedings under section 160 of the PDA 2000. The developer had contended that the planning authority had, in some way, purported to determine that the relevant development was

unauthorised, and that this involved a usurpation of the court's function. The Supreme Court roundly rejected this contention. The judgment reiterates (at paragraph 56) that the ultimate decision of "authorised" or "unauthorised" in the enforcement context is that of the court not the planning authority. A planning authority will—as a necessary antecedent to deciding to institute enforcement proceedings—have formed the opinion that the development in question is unauthorised development. Crucially, however, the opinion remains but an opinion. The planning authority's opinion does not carry any special value nor is a court required to give credence to it.

15. A similar approach had been adopted in respect of the statutory precursor to section 160 of the PDA 2000, namely, section 27 of the Local Government (Planning & Development) Act 1976. See, for example, *Monaghan County Council v. Brogan* [1987] I.R. 333 (at 338) where Keane J., having noted that a person other than the planning authority can set in motion the machinery under section 27 of the 1976 Act, went on to say that there is nothing in the wording of the section to suggest that the right to do so may be stultified simply because the planning authority has taken a view, which may or may not be in law correct, that no material change in use is involved.

16. It follows that the outcome of Roscommon County Council's investigation into the complaint made against the respondent will not have any legal significance insofar as the within proceedings are concerned. It is ultimately a matter for this court alone to determine whether the works and use in question entail unauthorised development, or, alternatively, constitute exempted development as claimed by the respondent. The views of the planning authority are irrelevant to the determination of these threshold issues.

17. Even where a court has made a finding of unauthorised development, it retains a discretion thereafter as to whether to grant or withhold relief. It is correct to say that there are observations in some of the case law which suggest that the views of the local

planning authority may be a factor relevant to the exercise of the court's discretion. It should be noted, however, that the view of the planning authority has rarely, if ever, been found to be decisive. Moreover, these observations most often appear in cases where the dispute centred on whether there had been compliance with a condition requiring the approval of the planning authority or where an issue arose in respect of delay. By contrast, the issues for determination in the within proceedings are more objective, and are directed to the question of whether the development is exempted or not.

18. The Court of Appeal has sounded a note of caution in respect of the weight to be given to the views of the local planning authority. In *Bailey v. Kilvinane Windfarm Ltd* [2016] IECA 92, Hogan J. stated as follows (at paragraphs 66 to 68).

> "[The High Court] attached some weight to the fact that the Council had not, qua planning authority, decided to take any enforcement action. For my part, I should have thought that this was largely a neutral factor, since the whole object of s. 160 (and its statutory predecessor, s. 27 of the Local Government (Planning and Development Act 1976) is to provide that, in the words of Henchy J. in *Morris v. Garvey* [1983] I.R. 319, 323:
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> > 'We are all, as users or enjoyers of the environment in which we live, given a standing to go to court and to seek an order compelling those who have been given a development permission to carry out the development in accordance with the terms of that permission.'
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> If, therefore, the fact that a planning authority elected not to take action in respect of development which was otherwise unlawful was to be a major factor in any assessment of the entitlement of a local resident to seek relief under s. 160 of the 2000 Act, this would tend to undermine the effectiveness of the s. 160 procedure itself.
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> That is not to say that the inaction of the planning authority could never be relevant to any assessment of the relevant discretionary factors. In some other circumstances, the inaction of the planning authority might help to show that the breach complained of was indeed simply trifling or transitory: see, e.g., the judgment of Herbert J. to this effect in *Grimes v. Punchestown Developments Ltd.* [2002] 1 I.L.R.M. 419. Nevertheless, in the generality of cases, the inaction of the planning authority is largely a neutral factor and it is certainly not one which could deprive an otherwise meritorious applicant of his or her entitlement to obtain s. 160 relief where the

> unauthorised status of a particular development had been clearly established."

19. I respectfully adopt these passages as representing the correct approach to take to the significance of the local planning authority's views.

CONCLUSION AND FORM OF ORDER

20. It would be wholly disproportionate to stay proceedings under section 160 of the PDA 2000 pending the outcome of a local planning authority's investigation. The summary procedure under section 160 is intended to ensure that alleged breaches of the planning legislation are addressed expeditiously. It would be destructive of this legislative intent, and inconsistent with the importance attached to public participation in all aspects of the planning process (including enforcement), were such proceedings to become becalmed for months on end pending a decision from the local planning authority. The limited benefit, if any, to the court in learning the views of the planning authority would be out of all scale to the enormous disbenefit caused by the delay, which delay would undermine the effectiveness of section 160.
21. The proper approach is to allow section 160 proceedings to take their own course. As it happens, in many instances the views of the planning authority will have become known prior to the proceedings having been allocated a hearing date. It is only in urgent cases, where an early hearing date has been fixed, that the proceedings will likely outpace the planning authority's investigation. Put otherwise, a stay would only ever have practical consequences in an urgent case. A stay would be singularly inappropriate in such a case.
22. It is apparent from the provisions of sections 153(8) and 160(7) that the various remedies under Part VIII of the PDA 2000 are not intended to be mutually exclusive. The existence of these proceedings does not, therefore, preclude the planning authority from instituting its own proceedings. Moreover, the planning authority could, if so minded, apply to be

joined as co-applicant in these proceedings. Equally, a decision by the planning authority not to pursue enforcement action would not affect the applicant's statutory right to pursue these proceedings.

23. For all these reasons then, the application for a stay is refused. These proceedings will be listed before me for case management next Monday (12 July 2021) at 2 pm. The intention is to put in place a timetable for the exchange of affidavits and written legal submissions which will allow the proceedings to be heard in full on 31 August 2021.

24. Insofar as the costs of the application to stay the proceedings are concerned, the attention of the parties is drawn to the notice published on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

25. The default position under Part 11 of the Legal Services Regulation Act 2015 is that a party who has been "entirely successful" in proceedings is *prima facie* entitled to costs against the unsuccessful party. The court retains a discretion, however, to make a different form of costs order. Order 99, rule 2 of the Rules of the Superior Courts provides that the High Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.

26. My *provisional* view is that the applicant is entitled to recover its costs of the motion on the basis that it has been "entirely successful" in resisting the stay application. If either

side wishes to contend for a different form of costs order, this can be addressed by oral submission next Monday.

Appearances

Jarlath Fitzsimons, SC and David Browne for the applicant instructed by A & L Goodbody Solicitors
Rory Mulcahy, SC and Aoife Carroll for the respondent instructed by Kane Tuohy LLP Solicitors

Approved Garrett Simons