THE HIGH COURT

[2024] IEHC 658

Record No. 2022/4876P

Between

CHRIS MURRAY AND ROSE MURRAY

Plaintiff

and

THE COUNTY COUNCIL OF COUNTY OF MEATH

Defendant

Judgment of Mr. Justice Conor Dignam delivered on the 20th day of November 2024

INTRODUCTION

1. This judgment concerns two motions. In order to understand the relief that is sought it is worth noting at the outset that these proceedings are concerned with an earlier set of proceedings brought by the defendant ("Meath County Council" or "the Council") against the plaintiffs ("the Murrays") under section 160 of the Planning and Development Act 2000. In those proceedings, Edwards J made an Order against the Murrays directing them to remove an unauthorised development from their land. That Order was subsequently upheld by the Supreme Court. The relevant judgments are to be found at *[2010] IEHC 254* and *[2018] 1 IR 189* respectively. Meenan J also made a subsequent consent Order. I will refer to those proceedings as "the section 160 proceedings". In the current proceedings the Murrays seek, inter alia, to set aside the Orders made in the section 160 proceedings.

2. In one of the motions before the Court, the Murrays seek various interlocutory Orders in the nature of injunctions or a stay in respect of the section 160 proceedings and the Orders made therein. In summary, they seek an injunction restraining Meath County Council from taking any steps in those proceedings, including on foot of Edwards J's Order or the Order of the Supreme Court, or a stay on those proceedings and a stay on Meenan J's Order or any undertakings given by the Murrays on the occasion of that consent Order.

3. Meath County Council, by separate motion, seeks an Order pursuant to Order 19 Rule 28 striking out the Murrays' Plenary Summons and Statement of Claim and dismissing the proceedings on the grounds that the claims made are frivolous, vexatious and/or disclose no reasonable cause of action or an Order pursuant to the Court's inherent jurisdiction striking out the proceedings on the basis that they are bound to fail and constitute an abuse of process.

4. The evidence in relation to the Murrays' application is an affidavit of Ms. Rose Murray of the 22nd September 2022, an affidavit of Mr. John Murtagh which bears the date the 16th September 2020 but which appears likely to have been sworn on the 16th September 2022, an affidavit of Mr. Seán Clarke (of Meath County Council) of the 15th December 2022, a First Supplemental Affidavit of Ms. Rose Murray of the 26th January 2023, and an affidavit of Ms. Rose Murray of the 9th June 2023 (this affidavit was sworn in respect of both motions). There was a dispute about the admissibility of this affidavit in circumstances where it was delivered after the date that had been fixed for delivery of the Council's submissions, where leave had not been given for delivery of any further affidavits, and the Council therefore did not have an opportunity to reply. The Council formally objected to it being admitted but did not push the objection. It seems to me that the affidavit should be admitted, with the Court noting that the Council had not had an opportunity to reply and therefore its contents should not be treated as accepted by the Council. The evidence in respect of Meath County Council's motion is an affidavit of Mr. Seán Clarke of the 8th February 2023 and the affidavit of Ms. Rose Murray of the 9th June 2023. Mr. Clarke, in his affidavit of the 15th December 2022, exhibits the section 160 proceedings. I have considered all of these affidavits and the exhibits thereto. The parties also provided the Court with chronologies and Counsel for the Murrays referred to a presentation aid. There were disputes about these three documents and I therefore did not refer to them.

BACKGROUND

5. There is a lengthy factual background to the current proceedings and these applications. Much of that background is set out in detail by McKechnie J in his judgment in the Supreme Court (*Meath County Council v Murray [2018] 1 IR 189*) and I gratefully adopt that account. In those circumstances, I endeavour to summarise the factual background and will then deal with the up-to-date facts which give rise to the current claims and application for interlocutory relief.

6. In or around 2006, the Murrays became the owners of lands in County Meath owned by three siblings, John Murtagh, Michael Murtagh and Nora Drain ("the Murtaghs"). The lands were part of a larger holding owned by the Murtaghs. Prior to the Murrays' purchase of their lands, the Murtaghs had decided, inter alia, to give sites to the children of John Murtagh and Michael Murtagh and grants of planning permission had issued in respect of two daughters of John Murtagh for the construction of houses on parts of the original holding. These permissions were recorded in the planning register with reference numbers KA140653 and KA140669 and issued on the 7th July 2005 and the 18th August 2005 respectively.

7. Both of these permissions contained a condition which is at the centre of these proceedings. It read:

> "Prior to commencement of the development the owner of the land holding of which the site forms part as shown outlined in blue on the location map submitted on […] shall have entered into a legal agreement with the planning authority under the provisions of s.47 of the Planning and Development Act 2000, providing for the sterilisation from any housing or non-agricultural development on the entire remainder of this land holding."

8. Prior to the grant of these permissions, by identical letters dated the 20th April 2005, Mr. John Murtagh wrote to the planning authority in relation to each of the applications indicating his willingness to agree to sterilisation of the lands. These letters are also central to the Murrays' claims in the current proceedings and it is therefore worth quoting from them. In his letters. Mr. Murtagh, having referred to the relevant application, wrote:

> "To whom it may concern,
>
> I refer to the above planning application and hereby state that I am willing to enter into an agreement to sterilise the remainder of the land holding (excluding the site which relates to a current application [referring to the other application])"

It will be noted, of course, that Mr. John Murtagh was just one of the owners (the others being Mr. Michael Murtagh and Ms. Nora Drain). McKechnie J stated in his judgment (paragraph 8) that Mr. John Murtagh wrote this letter "*presumably on behalf of the then registered owners*…" This also plays a central part in the current proceedings.

9. Formal agreements under section 47 of the 2000 Act were not entered into in respect of either of these planning permissions . McKechnie J notes at paragraph 9 of his judgment:

> "For some reason, which has not been explained, formal agreements under s.47 of the 2000 Act were never entered into in respect of either planning permission. However, it would appear that the Planning Authority was satisfied with such letters, particularly having received

commencement notices in respect of both developments, and in the knowledge that each has been completed."

10. The Murrays sought planning permission for the construction of a house on part of the lands they had bought. That application was refused on the 29th June 2006. Four reasons were given for this refusal. These are set out in McKechnie J's judgment and I do not propose to quote them in full. In summary, they were that (i) the development would give rise to an excessive density and would contravene the Meath County Development Plan, (ii) would result in an excessive concentration of development served by the wastewater treatment systems in the area, and (iii) the scale, height and design of the development would be contrary to the proper planning and sustainable development of the area. The fourth reason is central to these proceedings. It states:

> "The development contravenes materially conditions attached to existing permissions for development, namely, condition number three attached to the permission granted by Meath Council under planning register reference number KA/40669 and condition number three attached to the permission granted by Meath County Council under planning register reference number KA/40653."

11. This refusal was not appealed by the Murrays.

12. Notwithstanding the refusal of planning permission, the Murrays constructed a dwelling house on the lands. This was very considerably larger than the development for which they had sought permission.

13. Meath County Council wrote to the Murrays on the 2nd March 2007 referring to what they referred to as an "unauthorised development" and requesting its removal. Proposals were sought, failing which enforcement proceedings were threatened. The Murrays made a retention application shortly thereafter. This was refused by Meath County Council on the 3rd May 2007. This refusal was appealed by the Murrays to An Bord Pleanála and this appeal was refused on the 12th December 2007. In the meantime, the section 160 proceedings were issued by the Council on the 29th June 2007. A further application for planning was made on the 8th September 2008 consisting of an application to demolish parts of the house and retain the other part. That application was refused by Meath County Council on the 30th October 2008 and an appeal by the Murrays was subsequently rejected by An Bord Pleanála. As noted by McKechnie J (paragraph 13 of his judgment) the reasons set out above were common to all of these refusals by Meath County Council and the Board.

14. Ultimately, Edwards J gave judgment on the application under section 160 on the 29th June 2010 (*[2010] IEHC 254*) and made Orders restraining the Murrays from carrying

out any unauthorised development on the lands, from continuing with the unauthorised use of the lands, directing them to remove the unauthorised development and restore the lands to a condition suitable for agricultural use. He put a stay of twenty-four months on his Order "*on a humanitarian basis…in the light of the particularly difficult economic times in which we are living which the Court recognises may make compliance with the Court's order all the more difficult for the respondents*". This was appealed to the Supreme Court and McKechnie J gave the judgment referred to above on the 19th May 2017. He upheld the Order of Edwards J. He concluded at paragraph 142:

> "For all of the reasons above mentioned, the order of the High Court will be upheld. The court is mindful of the hardship this will cause for the respondents and the difficulties they may have in complying with the order. However, it cannot lose sight of the fact that the respondents have been living in the unauthorised development, which was deliberately constructed in flagrant breach of the planning laws, for over a decade. In all of the circumstances, a stay on the order for a further period of 12 months from the date of this judgment is appropriate. However, it must be understood that the intention of this stay is so that the order of the High Court order can be complied with in full on or before that date."

15. As matters transpired, the Order was not complied with and Meath County Council issued a motion for the Murrays' attachment and committal on the 4th March 2019. There was an exchange of affidavits in relation to this motion (exhibited to Mr. Clarke's replying affidavit to the Murrays' current application). It seems that the parties reached agreement (which is referred to in the Murrays' pleadings as a "settlement agreement") and on the 24th September 2020, Meenan J received an undertaking from Mr. and Ms. Murray "*…to vacate the property on or before the 24th September 2022 and to facilitate the demolition of the premises by the County Council or its agents*" and on that basis made an Order granting Meath County Council possession of the premises for the purpose of carrying out demolition works and extended the stay granted by Edwards J in 2010 for a further two years (i.e. from the 24th September 2020). The Order provided that "*…in the event of the undertakings provided by the Respondents not being complied with, such Order to take effect on the 25th September 2022 and such demolition works to be completed as expeditiously as the circumstances allow*." He also made an Order for Meath County Council's costs with a permanent stay on that Order in the event of the undertakings by the Murrays being complied with.

16. Three days before the expiry of the period of the undertaking and the stay granted by Meenan J, the Murrays commenced these proceedings seeking to set aside all of those previous Orders and issued the current motion for interlocutory reliefs. I turn to the claims made in the proceedings and the basis for the interlocutory relief shortly but, in summary, the Murrays claim that they had very recently come into possession of new evidence which must lead to those Orders being set aside and the interlocutory relief

being granted. They also say that a judgment given by Owens J in separate proceedings (but relating to lands from the same holding) brought by Mr. Michael Murtagh's daughter must lead to the Orders being set aside.

17. The evidence which is advanced as new evidence is (i) evidence that there was no section 47 sterilisation agreement, and (ii) evidence from Mr. John Murtagh, the owner of the landholding who had written the letters indicating that he was willing to enter into a sterilisation agreement. He had informed the Murrays that he had not discussed his letters of the 20th April 2005 with his co-owners, they were unaware that he was going to send or had sent those letters, and he did not have their authority to write the letters on their behalf. As noted above, he swore an affidavit on the 16th September 2020. It is pleaded at paragraph 12 of the Statement of Claim that this was an incorrect date and it was in fact sworn on 16th September 2022 and due to this error it was sworn again on 28th September 2022. I have not seen the affidavit which was sworn on 28th September but in any event I am presuming for the purpose of this judgment that the original affidavit was in fact sworn on 16th September 2022 rather than 2020. This affidavit was filed in the section 160 proceedings. Mr. Murtagh says at paragraph 1 of the affidavit that in 2004 he was the registered co-owner of an undivided quarter share of the relevant lands (ie. approximately 25 acres in Folio MH14049) along with Michael Murtagh and Nora Drain (née Murtagh) and goes on to say, inter alia:

> "2. I say that in 2004 the co-owners agreed on the distribution of potential sites from that Folio identified for building and separately lands to be retained for sale. I gave two sites, as in one each to my daughters, Orla Murtagh and Aoife Murtagh along with their partners. This was to allow them apply planning. Permission to build two separate dwellings on those respective sites … At the time I was aware that Michael Murtagh intended to allocate a site to his two daughters Louise Murtagh and Sinéad Murtagh. I am also aware that Nora Drain identified a site that she wanted.
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> 3. I understand that for the planning applications the applicants engaged a local public representative to assist them with their applications. I was asked to sign two pre-printed letters to say I was willing agree to enter into an agreement to sterilize the remainder of the land and was informed that these letters would enable planning permission to be granted to my daughters. I signed the two letters and after I signed, the two letters I believe were sent into the Council. I heard no more about it…
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> 4. I received no contact after that or letter from the Council acknowledging the letters or requiring me to attend or to have anything further to do with them. I did not discuss this with anyone at the time or thereafter. The other co-owners did not know that I had signed these letters as I had been asked to sign any sterilisation agreement anyway. After that planning was granted to Aoife and Orla Murtagh and when it came to the lands being sold and the other sites being transferred I did not mention it at the time. As far as I was concerned I had not signed any agreement to sterilise the other lands only the letters. I did not want to cause any

problems for my daughters with their planning so I did not say anything about when the lands by the three co-owners to Chris and Rose Murray.

5. I was never invited to any meeting to sign any sterilisation agreements, and I was not asked to attend Court on any occasion, or to swear any documents for the Council. I say that I met Chris Murray recently at my home. I had become aware of the problems he and Rose Murray had with the Council and other members of the Murtagh family with regards to planning. I only owned a quarter share in those lands and I was never asked to sign any agreement.

6. I regret very much the trouble that this has caused and I am prepared to stand over everything I have stated in this affidavit. I make this affidavit for the benefit of the Court and for the benefit of Chris and Rose Murray and others who have been affected by what has happened." [errors in the original]

18. Mr. Michael Murtagh and Ms. Nora drain are deceased since, I understand, 2011 and 2018 respectively.

19. There are two other relevant parts of the background.

20. Ms. Louise Murtagh, a daughter of Mr. Michael Murtagh, applied for planning permission on a site of the holding and this was refused by Meath County Council. She then appealed that to An Bord Pleanála and her appeal was refused on the 5th July 2021. She then brought judicial review proceedings. At the time of the institution of these proceedings by the Murrays, judgment was awaited from Owens J in Ms. Murtagh's judicial review proceedings. As matters transpired, when these applications came on for hearing, Owens J had delivered judgment. As is clear from that judgment (*Murtagh v An Bord Pleanála [2023] IEHC 345*) Ms. Murtagh's appeal was refused by An Bord Pleanála for three reasons. It is not necessary to consider the first two in any detail at this stage. The third reason related to the condition regarding sterilisation contained in the earlier permissions. It stated:

"The development contravenes materially conditions attached to existing permissions for development namely, condition number 3 of KA/40669 and condition no. 3 of KA/40653 which provide for the sterilisation from any housing or non-agricultural development on the entire remainder or the landholding of which the appeal site forms part. The requirements of those conditions are considered reasonable having regard to the existing level of development in the area."

21. Owens J held that this reason was invalid. The Murrays rely on this in these applications. While I am only dealing with the background at this stage, it may be opportune to set out the basis for Owens J's conclusion on this point. He deals with it at paragraphs 10-17

of his judgment. He notes at paragraph 10 and 11 that the earlier permissions (to John Murtagh's children) included a condition requiring a restrictive covenant agreement under section 47 and goes on to say:

> "12. These conditions were not complied with. There is no evidence that these agreements were executed by owners of the undeveloped part of this landholding.
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> 13. Section 47(5) of the 2000 Act requires that particulars of any such agreements must be noted on the planning register. This type of agreement must be registered as a burden if it is to bind a transferee for value of registered land: see ss. 52(1) and (2) and 69(1)(k) and (r) of the Registration of Title Act 1964.
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> 14. Agreements under s.47 of the 2000 Act can be enforced by injunction. Their principal role is to enforce the agreed restrictions by discouraging sales to potential purchasers. Land and residential units are less saleable if they are subject to covenants which restrict development or disposal for general occupancy. Sterilisation agreements, had they been executed, would have enabled the planning authority to prevent further development on the land on a contract basis and not on a planning basis.
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> 15. This type of agreement, or a condition in a planning permission requiring execution of same, cannot pre-determine the result of any subsequent application for planning permission to carry out development on land. Any application for planning permission must be decided solely by reference to criteria set out in s.34(2) of the 2000 Act.
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> 16. The planning authority and the Board were entitled to have regard to the planning history of the site and the surrounding area. The rationale for imposition of sterilisation conditions in the 2005 planning permissions was relevant to the Board's consideration of Louise Murtagh's current application. That rationale might continue to apply on the basis that the 2005 permissions were exceptional and that further development close by remains inappropriate.
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> 17. However, the manner in which para.3 of the Board's decision is expressed elevates the status of these planning conditions to the equivalent of zoning under the development plan and proceeds on the basis that they have some sort of legal effect on "the entire remainder of the landholding of which the appeal site forms part," which they do not."

22. The Murrays place very considerable emphasis on this decision. Senior Counsel described it as a "*hugely significant event*" and that it "*trumps everything*". I return to it below.

23. Owens J also held that one of the other reasons was invalid. However, he was satisfied that the third reason was valid and that it was sufficient to support the decision and "*[i]t follows that it is not appropriate to set the decision aside"*.

24. The second relevant matter is that the Murrays made a further planning application and, at the time of the hearing, this application had not been determined. The details of the

application are not important for the purposes of this judgment. The Murrays relied very heavily on the fact that there was an outstanding application in seeking interlocutory relief, arguing either that there must be an arguable case that they would obtain retention permission, particularly in light of Owens J's judgment, and therefore the first limb of the interlocutory injunction is satisfied, or that the balance of convenience or justice favoured the granting of an interlocutory injunction in light of the fact that there was an outstanding application which, if successful, would remove the need to demolish the structure. However, I was informed between the date of the conclusion of the hearing and the delivery of judgment that retention permission had been refused, that this refusal had been appealed to An Bord Pleanála and that this appeal had been refused on the 23rd July 2024. I was furnished with a copy of the decision of the Board. It was not put on affidavit but there is no dispute between the parties in relation to this matter. I was told by Senior Counsel for the Murrays that this decision has not been challenged. The reasons given by An Bord Pleanála were (i) that the development would contribute to the excessive density of development and overdevelopment of a rural area contrary to the Meath County Development Plan, (ii) that part of the development which was proposed to be retained is out of character in the rural area by reason of its scale, massing and design and fails to align with the Meath County Development Plan, and (iii) the Board was not satisfied that the effluent generated from the dwellinghouse would be safely disposed of on-site and that the development which was proposed to be retained would be contrary to the Meath County Development Plan. This is obviously just a summary of the reasons for the refusal. It is not necessary to recite the full detail of each reason. The point is that the reasons for the refusal did not include any reference to the sterilisation issue or the conditions in the earlier permissions relating to sterilisation. I was also informed that a further application for permission has been made by the Murrays.

25. It is also pleaded in the Statement of Claim that the Murrays and their son each submitted planning permission applications for two new houses at different locations on the lands and that these were refused including on the basis of the sterilisation issue. It is also pleaded that these were appealed to An Bord Pleanála. I understand that their son withdrew his appeal.

THE PLAINTIFFS' CLAIM

26. The Murrays issued these proceedings by Plenary Summons dated the 22nd September 2022 and delivered a Statement of Claim on the 27th January 2023.

27. The reliefs claimed in the General Indorsement of Claim and the Statement of Claim are not identical. They do, however, largely reflect each other. I will therefore refer to the relief sought in the Statement of Claim. Those reliefs may be summarised as follows:

(i) Orders setting aside the High Court (Edwards J) and Supreme Court Orders made in the section 160 proceedings;

(ii) An Order dismissing the section 160 proceedings;

(iii) An Order that the settlement agreement made on consent between the parties on the 24th September in the context of the attachment and committal motion in the section 160 proceedings be set aside. This agreement led to the undertakings of the Murrays and Meenan J's Order of that date;

(iv) A declaration that "*the purported section 47 (sterilisation) agreement, did not exist and is void ab initio…*";

(v) An Order that Meath County Council by failing to comply with a statutory requirement to register a section 47 (sterilisation) agreement on the Planning Register or a burden on the Folio was guilty of negligence, breach of duty and breach of statutory duty;

(vi) An injunction staying any further action or proceedings by Meath County Council until a further hearing of new evidence relevant to the dispute between the parties is considered by the Court;

(vii) A declaration that "*the Defendants are not entitled to prosecute proceedings under Section 160, of the Planning Act, 2000 for any offence other than a minor offence as prescribed by Article 38.2 of the Constitution and any provision under the said Section 160 of the Planning Act 2000 providing for the prosecution by a body authorised by law under Article 37 of the Constitution, where without statutory limitation or restriction, renders Section 160 of the Planning Act, 2000 repugnant to constitution being wholly or partially in direct conflict and contravention of the limitations provided by law under those aforementioned Articles of the Constitution*."

28. The basis for these reliefs is set out in the Statement of Claim. It is expanded upon in the exchange of affidavits but the starting point must be the pleadings. I have considered the pleadings and the affidavits in their entirety. Some of the matters which are pleaded are already set out in the Background section above. In summary, the claim is as follows:

(i) Meath County Council, in refusing the planning application and retention application prior to the institution of the section 160 proceedings, "*cited a purported section 47 (2000 Act) sterilisation agreement ("s.47 Agreement") in addition to Condition 3 of planning permissions KA40669 and KA40653 (the "2004 Permissions"), as one of the reasons for refusal to grant planning permission in both instances. The s.47 Agreement was purported by the Defendant to have been made between one of the Co-Owners, John Murtagh in return for the 2004 Permissions to build a house each for his two daughters, Aoife and Orlagh Murtagh*."

(ii) This was given as a reason for the refusal of five planning or retention applications by the Murray family over the years.

(iii) The purported section 47 Agreement and Condition 3 of the 2004 Permissions never legally existed or are otherwise null and void.

(iv) The bases for claiming that the section 47 Agreement and Condition 3 never legally existed are as follows:

(a) Mr. John Murtagh was just one of the owners and he agreed to sterilise the remainder of the landholding without seeking the consent of the co-owners and without informing them of "the purported s.47 Agreement." The Murrays claim that Mr. Murtagh only made this known in September 2022 and it is therefore new evidence to the Murrays.

(b) Meath County Council failed to enter the section 47 Agreement on the Planning Register as it was statutorily required to do. It is claimed that the consequence of the failure to register the section 47 Agreement is that it could have been challenged by the co-owners at the time and/or its existence would have turned up in title searches undertaken by the Murrays in advance of purchasing the land and they may not have purchased as a result.

(v) Meath County Council knew or ought to have known that there was a serious issue about the purported section 47 Agreement because the solicitors acting for the Council had previously acted for the Murtagh family, knew that there were co-owners and therefore knew that the letters given by Mr. John Murtagh could not be sufficient because he was not acting with the authority of the other owners and had previously written in the context of the two applications confirming the correct ownership position and that the Defendant disregarded those letters, or in the alternative was negligent in ignoring them.

(vi) Meath County Council was guilty of lack of transparency and an abuse of process. I have to confess that the precise claim in this respect in the Statement of Claim is not entirely clear to me. It is dealt with in paragraphs 18-21 of the Statement of Claim. When these are read with the affidavits the claim appears to be (i) the Council knew that there was no section 47 agreement in place and failed to disclose this to the High Court and Supreme Court and (ii) the Council knew that Mr. John Murtagh was just one of three co-owners and therefore that he did not have authority to agree to sterilise the lands on behalf of the owners and did not tell the High Court or Supreme Court this in the section 160 proceedings. It is claimed that this was an "*egregious abuse of process*" and the full impact of it can only now be revealed due to the new evidence (that of Mr. Murtagh).

(vii) In the separate proceedings brought by Ms. Louise Murtagh against An Bord Pleanála, Ms. Murtagh challenged the validity of the reason for refusal of planning permission relating to the condition in the earlier permissions relating to sterilisation. At the time of delivery of the Statement of Claim it was pleaded that Owens J had made comments during the hearing of those proceedings casting some doubt on the validity of the reason for refusal based on section 47. By the time these applications came on for hearing, Owens J had given his judgment. This is referred to above. It is therefore claimed that the refusals prior to the section 160 proceedings are invalid because they rely on the section 47 issue in the same way as in the Louise Murtagh case.

29. The Murrays' substantive claim as contained in the pleadings and the affidavits can be summarised as follows. The previous High Court and Supreme Court Orders under section 160 must be set aside because:

(a) the purported section 47 agreement was not registered;

(b) new evidence discloses that (i) there was no section 47 Agreement, and (ii) Mr. John Murtagh's letters were not written with the authority of all of the landowners;

(c) These facts were known to Meath County Council at the time of the section 160 proceedings and the Council did not inform the courts of them;

(d) It has been held by Owens J that the refusal on the basis of the sterilisation condition in the earlier permissions was invalid and this reasoning must apply in this case.

30. They say that there is a fair issue to be tried on these points and that the balance of justice clearly favours the grant of an interlocutory injunction or a stay as otherwise the house might be demolished prior to those points being determined in their favour. There was some lack of clarity as to the precise terms and basis of the application for an interlocutory injunction. They relied very heavily on the fact that a further retention application had been made and argued that they should be given an injunction pending determination of that application. This is obviously very different to an injunction pending determination of the substantive proceedings. I have approached the application on the basis that they were seeking an injunction pending determination of the retention application and/or the substantive proceedings.

GENERAL PRINCIPLES

31. As set out above, there are two applications before the Court: the Murrays' application for interlocutory relief and the Council's application for an Order dismissing the claim on the basis that it is frivolous, vexatious and/or discloses no reasonable cause of action and that it is bound to fail and constitutes an abuse of process.

32. It seems to me that the Council's motion and the first limb of the test for an interlocutory injunction can be effectively dealt with together as, if the Council is unsuccessful in its motion, then it would follow that the first limb of the test for an interlocutory injunction, i.e., that there is a fair issue to be tried is satisfied; conversely if the Council is successful in its motion it must follow that Murrays do not have a fair issue to be tried (with one qualification, which I will return to). Ms. Murray states in her affidavit of the 9th June 2023 in respect of the Council's motion that the written submissions filed by them in their motion for interlocutory relief provide "*legal arguments as to why these proceedings are not an abuse of process.*" Thus, I propose to consider the matters primarily by reference to Meath County Council's motion. This seems to me to be most fair to the Murrays because the burden of proof in that application is on Meath County Council and, therefore, unlike on the injunction application, the Murrays are relieved of the burden. The burden of proof on an application of the type brought by the Council is a high bar.

33. These applications were heard before the introduction of the new version of Order 19 Rule 28 and I have therefore considered them under the version of the rule that applied at the time of the hearing.

34. The principles applying to applications to dismiss claims either under Order 19 Rule 28 of the Rules of the Superior Courts or under the Court's inherent jurisdiction are well-established. It is not necessary to set them out in full. They are considered in such cases as, for example, *Barry v Buckley [1981] IR 306*, *Salthill Properties Limited v Royal Bank*

of Scotland plc [2009] IEHC 207, *Lopes v Minister for Justice, Equality and Law Reform [2014] IESC 21*, *Keohane v Hynes [2014] IESC 66*, *Clarington Developments Limited v HCC International Insurance Company plc [2019] IEHC 630*, *Kearney v Bank of Scotland [2020] IECA 92*). The principles, particularly in relation to the exercise of the Court's inherent jurisdiction, have recently been stated by the Court of Appeal in *Scotchstone Capital Fund Ltd & anor v Ireland & anor [2022] IECA 23*, and in *McAndrew v Launceston Property Finance DAC & anor [2023] IECA 43*.

35. In summary, the jurisdiction, whether under Order 19 Rule 28 or the Court's inherent jurisdiction, is subject to a number of overarching principles: first, the default position is that proceedings should go to trial and that a person should only be deprived of a trial when it is clear that there is no real risk of injustice; second, it is a jurisdiction to be exercised sparingly, given that it relates to the constitutional right of access to the courts; third, the onus is on the moving party to establish that the pleadings do not disclose a reasonable cause of action or that the case is frivolous or vexatious or bound to fail or that it is an abuse of process, and the threshold to be met is a high one; fourth, the Court must take the plaintiff's claim at its high-water mark; fifth, the Court must be satisfied not just that the plaintiff will not succeed but cannot succeed; and sixth, the Court must be satisfied that the plaintiff's case would not be improved by an appropriate amendment to the pleadings or through the utilisation of pre-trial procedures such as discovery or by the evidence at trial.

36. It is well-established that there is a difference between the jurisdiction which arises under the applicable Order 19 Rule 28 of the Rules and the inherent jurisdiction of the Court. In an application to dismiss proceedings under that version of Order 19 Rule 28 the Court must accept the facts as asserted in the plaintiff's claim and if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim and should not be struck out. Subject to what I say in the next paragraph, on an application under that Order 19 Rule 28 there is to be no enquiry into, or assessment of, the facts as pleaded. They must be taken as correct and the enquiry must be solely concerned with whether those facts give rise to a cause of action. On an application under the Court's inherent jurisdiction, on the other hand, there may be a limited analysis of the facts. Clarke J addressed this difference in a number of cases, including *Salthill Properties Limited & anor v. Royal Bank of Scotland plc & ors [2009] IEHC 207*, *Lopes v. Minister for Justice Equality & Law Reform [2014] IESC 21*, and *Keohane v Hynes [2014] IESC 66*.

37. It was held by Fennelly J in *Kenny v Trinity College Dublin [2008] IESC 18* (paragraph 56) that where the application under Order 19 Rule 28 is in respect of a claim the substance of which is the validity of a final decision of a court of competent jurisdiction, the court hearing the application "*must be permitted to examine the impugned decision,*

including the reasoning of the judgment. It cannot be constrained by the version of that decision disclosed in the pleadings seeking to set it aside." That overlaps with the manner in which the court might address an application to dismiss under its inherent jurisdiction.

38. In any event, it seems to me that in the circumstances of this case the real issue in relation to the application to dismiss is whether the proceedings should be dismissed under the Court's inherent jurisdiction. For those two reasons I will consider the matter under the Court's inherent jurisdiction first. In the event that I am not satisfied that the proceedings should be dismissed under that jurisdiction I will return to a consideration of the application under Order 19 Rule 28.

39. The general principles applying to the Court's inherent jurisdiction to strike out proceedings on the basis that they are frivolous, vexatious, bound to fail, or are an abuse of process were recently stated by the Court of Appeal in *Scotchstone Capital Fund Ltd & anor v Ireland & anor [2022] IECA 23*, and in *McAndrew v Launceston Property Finance DAC & anor [2023] IECA 43*. These judgments usefully pull together the long-standing applicable principles. In paragraph 290 of the judgment in *Scotchstone*, the Court said:

> *"290. …In essence these are:*
>
> *a) An application for a strike out of a plaintiff's claim on the basis of the inherent jurisdiction is not a substitute for summary disposal of a case;*
>
> *b) The jurisdiction exists, not to prevent hardship to a defendant from defending a case, but to prevent against an abuse of process of the court by the plaintiff, e.g. causing a manifest injustice to the defendant in being asked to defend a case which is bound to fail;*
>
> *c) The burden of proof is on the defendant;*
>
> *d) There is a degree of overlap between bound to fail jurisprudence and cases which are held to be frivolous and vexatious. However, the latter are cases which may have a reasonable chance of success but would confer no tangible benefit on a plaintiff or are taken for collateral or improper motives or where a plaintiff is seeking to avail of scarce resources of the courts to hear a claim which has no prospect of success;*
>
> *e) The standard of proof is on the defendant/respondent to show that the claim is bound to fail or frivolous or vexatious;*
>
> *f) Bound to fail may be described inter alia, as devoid of merit or a claim that clearly cannot succeed;*
>
> *g) Frivolous and vexatious must be understood in their legal context as claims which are, inter alia, futile, misconceived, hopeless;*

h) The threshold for the plaintiff successfully to defend such a motion is not a prima facie case but a stateable case;

i) It is a jurisdiction only to be used sparingly, in clear cut cases and where there is no basis in law or in fact for the case to succeed;

j) The court must accept that the facts as pleaded by the plaintiff in considering whether an Order pursuant to O.19, r. 28 may be made but in the exercise of its inherent jurisdiction the court can to some extent look at and assess the factual basis of the plaintiff's claim;

k) Where the legal or documentary issues are clear cut it may be safe for a court to reach a conclusion on a motion to dismiss;

l) Even where a plaintiff makes a large number of points, each clearly unstateable, it may be still safe to dismiss; and

m) In some cases, even if the factual disputes are clear cut or may be easily resolved, the legal issues or questions concerning the proper interpretation of documentation may be so complex that they are unsuited to resolution within the confines of a motion to dismiss."

40. These were reflected in *McAndrew v Launceston Property Finance DAC & anor [2023] IECA 43*.

41. The rationale for the Court's inherent jurisdiction is, in essence, to prevent an abuse of process by the maintenance of proceedings that should not have been brought. In *Togher Management Company Ltd & Anor v Coolanleen Developments Ltd [2014] IEHC 596*, Haughton J noted at paragraph 28 that the principles in relation to the Court's jurisdiction are well-established and that it exists to ensure that an abuse of process does not take place. Barron J stated in *Jodifern Limited v Fitzgerald [2000] 3 IR 321* at 333 that "*[T]he function of the Court is to consider one question only, was it proper to institute the proceedings."*

42. It is not possible to set out an exhaustive list of the circumstances in which a Court may conclude that proceedings are frivolous or vexatious or an abuse of process. Those circumstances, of course, include where proceedings are bound to fail, but the jurisdiction is, subject to the overarching principles set out above, broader than this. That is clear, for example, from paragraphs (b), (d) and (g) in the above quote from *Scotchstone.* Paragraph (b) gives a case that is bound to fail as just one example of a case that is an abuse of process. Paragraph (d) notes that even cases which might succeed may be an abuse of process in certain circumstances, including where there would be no tangible benefit for the plaintiff on the pleadings or where the claim is brought for collateral or improper motives. Paragraph (g) identifies cases that are misconceived as an example of

proceedings that are frivolous and vexatious. Irvine J dealt with the meaning of "frivolous and vexatious" in *Fox v McDonald [2017] IECA 189*. While Irvine J was writing in respect of Order 19 Rule 28, the same principle applies to the Court's inherent jurisdiction. She said, inter alia: "*[t]he word 'frivolous' when used in the context of O. 19 r.28 is usually deployed to describe proceedings which the court feels compelled to terminate because their continued existence cannot be justified having regard to the relevant circumstances*."

43. Proceedings may be frivolous and vexatious or an abuse of process where they are fundamentally procedurally misconceived, or are brought for an ulterior or improper purpose, including being brought as a collateral attack on a final and binding decision. The Court may also, subject to a consideration of all of the circumstances, dismiss proceedings as an abuse of process where the plaintiff is attempting to re-litigate matters that have already been determined or where they are attempting to litigate matters which could have been raised in earlier proceedings and were not (*Henderson v Henderson [1843] 3 Hare 100*). Costello J said in *Morrissey v Irish Bank Resolution Corporation [2015] IEHC 200* (paragraph 5):

> "It is a fundamental principle of law that a party should not be entitled to re-litigate matters or raise issues which have already been determined by a final judgment of a court of competent jurisdiction between the same parties and their privies. This is known as the principle of res judicata. But beyond the strict limitations of res judicata the courts have long recognised that there may be abuse of process outside of the relatively confined limitations of the rule and the courts have always been prepared to balance the rights of parties to have their cases heard and determined by the courts with the rights of the opposing parties to fair procedures in the conduct of litigation and, where necessary, to strike out proceedings if they amount to an abuse of process."

44. The central relief sought by the Murrays is the setting aside of previous Orders. The jurisdiction to do so was considered by the Court of Appeal in *Launceston Property Finance DAC v Wright [2020] IECA 146*. Having reviewed the authorities, Irvine J, on behalf of the Court, said:

> "7. In summary, the jurisdiction:-
>
> (i) is wholly exceptional;
>
> (ii) it must engage an issue of constitutional justice;
>
> (iii) requires the applicant to discharge a very heavy onus;
>
> (iv) is not for the purpose of revisiting the merits of the decision;
>
> (v) alleged errors which have no consequence for the result do not meet the required threshold;

(vi) cannot be invoked on the basis of the discovery of new evidence;

(vii) requires the applicant objectively to demonstrate that there is a fundamental issue concerning a denial of justice, by which is meant some error which is so fundamental as to have an effect on result;

(viii) cannot be used as a species of appeal where a party seeks to address, critically or otherwise, the judgment;

(ix) is to be distinguished from the application of the Slip Rule in respect of errors of fact which have no bearing on the outcome."

45. Irvine J gave this summary of the principles applying to the jurisdiction following a review of relevant authorities, including *In re Greendale Developments Limited (No. 3) [2000] 2 IR 514*, *Forest Fencing Ltd (Trading as Abwood Homes) & Anor. v. Wicklow County Council [2011] IEHC 69*, *DPP v McKevitt [2009] IESC 29, Bailey v The Commissioner of An Garda Síochána [2018] IECA 63*, *Tassan Din v Banco Ambrosiano SPA [1991] 1 IR 569*, and *Kenny v Trinity College Dublin [2008] 2 IR 40*.

46. In *Greendale Developments Limited (No. 3) [2000] 2 IR 514*, Denham J said at page 544-545:

"The Supreme Court has a jurisdiction to protect constitutional rights and justice. This jurisdiction extends to an inherent duty to protect constitutional justice even in a case where there has been what appears to be a final judgment and order. A very heavy onus rests on a person seeking to have such jurisdiction exercised. It would only be in most exceptional circumstances that the Supreme Court would consider whether a final judgment or order should be rescinded or varied. Such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, through no fault of the party, he or she has been subject to a breach of constitutional rights."

47. In *Forest Fencing Ltd (Trading as Abwood Homes) & Anor. v. Wicklow County Council [2011] IEHC 69*, Herbert J noted that in *LP v MP [2002] 1 IR 219* the Supreme Court did not endeavour to set out an exhaustive list of the sort of matters which could properly be regarded as "*exceptional circumstances*" and noted that this is something which will have to be determined on a case by case basis. Herbert J also noted that the Supreme Court in *AA v The Medical Council [2003] 4 IR 302* indicated that negligence, inadvertence, accident or a failure to exercise reasonable diligence by a party could not amount to "*special circumstances*".

48. In *DPP v McKevitt [2009] IESC 29*, the Supreme Court held that:

> "Firstly the application must patently and substantively concern an issue of constitutional justice other than the merits of the decision as such. Secondly, the grounds of the application must objectively demonstrate that there is a substantive issue concerning a denial of justice in the proceedings in question consistent with the onus of proof of an applicant."

49. In *Launceston Property Finance*, Irvine J noted that in *Bailey v The Commissioner of An Garda Síochána [2018] IECA 63*, the Court of Appeal emphasised that only a fundamental error which has a significance or a consequence for the result could amount to a denial of justice within the meaning of the case law.

50. Importantly in the context of the instant case, she also noted that the Supreme Court in *Tassan Din v Banco Ambrosiano SPA [1991] 1 IR 569* held that the discovery of new evidence, even if it would have affected the result if available at the time of the original hearing, is not a basis for setting aside a final order or judgment.

51. In the *Tassan Din v Banco Ambrosiano* case an application was made to set aside an earlier Order of the Supreme Court on the basis that material evidence which was available to the defendants had been deliberately concealed by them. Murphy J in the Supreme Court referred to the authority of *The Ampthill Peerage [1977] AC 547* and held that only fraud pleaded with sufficient particularity and ultimately established on the balance of probabilities would constitute a sufficient basis for setting aside the earlier decision on the basis of new evidence. In *Kenny v Trinity College Dublin [2008] IESC 18*, Fennelly J considered the jurisprudence, including *Tassan Din*, at paragraphs 44 – 57 of his judgment, and said at paragraphs 54 and 55:

> "54. I am satisfied that, in order to ground an action to set aside a judgment, the plaintiff must allege fraud in the true sense, that is deliberate and purposeful dishonesty, knowing and intentional deceit of the court…
>
> 55. In addition, the fraud alleged must be such as to affect the impugned decision in a fundamental way. It will not suffice to allege that the new situation revealed by the uncovering of the fraud might have affected the judgment. It will not be enough to show, for example, that a witness lied unless it shown that the true version of his evidence would probably have affected the outcome…I believe that, in an action to set aside a judgment based on an allegation that the court was deliberately deceived into making the impugned decision no less stringent test should be required. There must be something fundamental, something that goes to the root of the case."

He also held that the allegation of fraud must be pleaded with "*particularity and exactness*" and that "*the nature of the fraud, deceit or dishonesty must be clearly and unambiguously alleged*." In the circumstances of the case he was satisfied that the information which was alleged to have been concealed was completely irrelevant to the

previous decision and he concluded that the amended statement of claim failed to disclose a stateable cause of action.

52. In *Forest Fencing Ltd (Trading as Abwood Homes) & Anor. v. Wicklow County Council,* Herbert J held that there is no real distinction between fraud and conscious and deliberate deceit from the point of view of whether "*exceptional circumstances*" exist. In that case, it had been found that *"deliberate deception of the Court on a material point by a party to litigation, particularly in circumstances where that party obtained an advantage thereby at the expense of the other party was an "exceptional circumstance" which required him to vary an otherwise final and conclusive decision if the other party was not to be denied fundamental justice."* I do not believe that there is any difference of substance between *Forest Fencing Ltd* and *Kenny v Trinity College*. Fennelly J included "*knowing and intentional deceit of the court*" in the meaning of fraud in *Kenny v Trinity College*.

53. It was somewhat unclear whether the Murrays accept that fraud (including deception or conscious and deliberate deceit) was required in order for new evidence to constitute exceptional circumstances in respect of the Order of Edwards J and the Supreme Court. At the hearing, Senior Counsel initially accepted that "*concealment or fraud*" is necessary in order to set aside the previous orders but in his reply to the Council's submissions he stated that the Murrays do not "*have to hit the bar of fraud*". They relied on the decision of the Court of Appeal in *Dormer v Allied Irish Banks plc [2017] IECA 199* to submit that the Orders could be set aside on the basis of misrepresentation and that fraud was not necessary. In their written submissions they limited the application of *Dormer* to Meenan J's Order (which was made on the foot of an agreement between the parties) but seemed to argue at the hearing that it applied to all of the Orders. In *Dormer,* summary summons proceedings were settled between the parties on terms that the bank would take a certain step. The settlement resulted in a consent Order. The plaintiffs claimed to have discovered material to establish that the bank had not complied with the terms on which the claim was settled and they sued in respect of the alleged breaches of the settlement agreement. There were two applications: an application by the plaintiffs to amend their Statement of Claim to plead, inter alia, fraudulent misrepresentation (they had previously said they were not claiming fraud); and an application by the defendants to strike out the proceedings on the ground that they were an abuse of process. There were several issues in the case. Ryan P noted that the plaintiffs' case was in essence a claim for relief for misrepresentation and breach of contract in respect of the settlement agreement. Ryan P, at paragraph 50 and 51 of his judgment, noted that McGovern J in the High Court had applied the general rule that it is not possible to revisit and reopen a decision of the High Court for the purpose of setting it aside unless there is an allegation of fraud as there has to be finality to litigation. However, he went on at paragraph 52 to hold:

> "52. When the Dormers issued their proceedings, they did not include a claim for fraud and the case was as stated above. I do not consider that the rule concerning the setting aside of a judgment, restricting it to the circumstance where fraud in obtaining the judgment is the claim applies in this case. The Dormers are not claiming that the bank misled the High Court into giving judgment; their case is, rather, that the bank did not comply with the agreement of settlement of the summary summons proceedings and, as a result, the bank was not entitled to obtain the judgment that was granted [in the Summary Summons proceedings]. In my judgment, if it is a term of a settlement that one party will consent to judgment on the happening or non-happening of events and judgment is duly given on a basis of fact, it is open to an aggrieved party to complain that the other engaged in conduct amounting to misrepresentation or breach of contract which vitiated that party's contractual entitlement to the judgment under the terms of the settlement agreement…I would not propose a new general rule but would rather merely declare that in the circumstances as they obtain in this case the Dormers were not shut out of the remedy they sought, namely, vacation of the High Court order. The fact that the Dormers did not allege fraud in the pleadings or did not make the case that the judgment was actually obtained by fraud does not in itself represent a bar to the relief they claimed in the very unusual and particular circumstances in which the judgment that was given by the court was a term of the contract between the parties. It was not that the court resolved a dispute and gave judgment; the parties agreed between themselves that on the happening or non-happening of certain events judgment would arise."

54. I have serious doubts that *Dormer* even goes as far as determining that misrepresentation is always sufficient where an Order is made on consent. Ryan P was clear that he was not proposing "*a new general rule*" but merely dealing with the circumstances of that particular case. He also noted the very unusual and particular circumstances in which the consent judgment was given. However, I do not need to resolve this and I will proceed on the basis that it could apply to Meenan J's Order. It is absolutely clear that Ryan P was not holding that the long-established rule (set out in *Tassan Din* and *Kenny*) that a final judgment given after the court resolves a dispute could only be set aside on the basis of new evidence where the evidence had been concealed through fraud no longer applied.

55. Thus, in order to set aside the Orders of Edwards J and the Supreme Court, the Murrays will have to establish at trial, not only the fact of new evidence, but that the new evidence was concealed by the Council's fraud or deceit, and that it would probably have affected the outcome if it had been available at the time of the original Orders. The fraud must be pleaded unambiguously and with exactness and particularity. Obviously, the Court, on these applications, is not determining the substantive question but solely whether the Murrays have established a fair issue to be tried or whether those proceedings can succeed, are frivolous or vexatious or an abuse of process.

DISCUSSION AND CONCLUSION

56. I am satisfied that the Murrays' claim is frivolous, vexatious and an abuse of process in the sense set out above on a number of different bases when taken separately and cumulatively. These bases overlap. I am also satisfied that there is not a fair issue to be tried.

57. The suggestion that the facts that there was no section 47 agreement and that there were three joint landowners are new and were only disclosed by the new evidence is unsustainable. All of these facts were recited in the judgments of the High Court and the Supreme Court. In fairness to the Murrays, however, the main point they make in relation to the new evidence is that it discloses for the first time that Mr. John Murtagh acted without the knowledge or authority of the other landowners and that will be the focus of the following discussion.

58. For the purpose of this judgment, in particular the Council's application, I must accept the facts as pleaded (in respect of the application under Order 19 Rule 28, subject to Fennelly J's caveat in *Kenny v Trinity College Dublin*) and must take the Murrays' case at its high water mark.

Improper Collateral Attack and Improper Proceedings

59. At its core, the basis upon which the Murrays seek to set aside the previous Orders of the High Court and the Supreme Court in the section 160 proceedings is that those courts should not have made the Orders under section 160 because the underlying planning decisions were wrong or invalid and that those courts would not have made them if they had known the facts which show that those refusals were wrong and invalid. Underlying the entirety of the Murrays' case is that each of the planning decisions made by the planning authorities (Meath County Council and An Bord Pleanála) are null and void because one of the reasons for the relevant decision was "*the disputed s.47 Agreement and Condition 3 of the 2004 Permissions*". For example, it is pleaded at paragraph 6 of the Statement of Claim that:

> "6. In all proceedings to date a central issue in the Defendant's ongoing refusal to grant planning permission is the disputed s.47 Agreement and Condition 3 of the 2004 Permissions, perpetually relied upon by the Defendant to oppose as a pre-condition, every planning and retention application made by the Plaintiffs. The Plaintiffs claim that the purported s.47 Agreement and Condition 3 of the 2004 Permissions never legally existed or are otherwise were null and void."

60. Furthermore, the relief sought in the Statement of Claim includes, inter alia:

"A Declaration that the purported section 47 (sterilisation) agreement, did not exist and is void ab initio, either formally, informally or by inference or at all.

An Order that the Defendant, owing to its failure to comply with a statutory requirement that to register a section 47 (sterilisation) agreement on the Planning Register or/and as a burden on the Folio, is negligent, in breach of duty and in breach of statutory duty."

61. The underlying challenge to the validity of the planning decisions is also contained in the affidavits sworn by Ms. Murray and in the submissions delivered on behalf of the Murrays. At paragraphs 9 and 10 of their written submissions the "*fair issue to be tried*" (for the purpose of the interlocutory injunction application – which must of course be grounded in the substantive claim) is described as including:

"9. The normal test for an injunction applies but, in this case, it is an immutable fact that John Murtagh never entered into a binding legal agreement with the Defendant under the provision of s.47 of the 2000 Act. The Council was and is under a positive duty to register any purported s.47 Agreement on the planning register under s.47(5) of the 2000 Act, which it failed to do. This point was acknowledged by Mr. Justice Edwards in the High Court in *Meath County Council v Murray & anor [2010] IEHC 254* and Mr. Justice McKechnie in the Supreme Court in *Meath Co. Co. v Murray & anor [2017] IESC 251*.

10. In his recent Judgment in *Murtagh v An Bord Pleanála [2023] IEHC 245*, the Court considered the enforceability in respect of the very same purported s.47 Agreement that the Defendant continues to rely on. When considering this and common Condition, number 3 in the planning permission granted to Orla and Aoife Murtagh, which relied on a "*legal agreement with the planning authority under the provisions of Section 47 of the Local Government (Planning Development) Act 2000*" Mr. Justice Owens concluded as follows:

"*However, the manner in which para.3 of the Board's decision is expressed elevates the status of these planning conditions to the equivalent of zoning under the development plan and proceeds on the basis that they have some sort of legal effect on "the entire remainder of the landholding of which the appeal site forms part," which they do not.*"

It is submitted therefore that the Council clearly had no legal basis on which to rely on either a s.47 Agreement or Condition 3 of planning permissions KA/40653 and KA/40669 granted in 2005."

62. At paragraph 13 of their written submissions the point is repeated where it is submitted that "*The Council has never explained why it did not attempt to register the s.47 Agreement, a matter that is central to these proceedings and something that should be ventilated fully at the plenary hearing of the matter*".

63. At paragraph 24, they return to Owens J's decision in submitting that:

> "The Plaintiffs were never made aware of the purported s.47 Agreement before they purchased the 18 acres from the Murtagh Siblings in 2006 because the Defendant never registered the Agreement on the planning register as they were required to do by law, or as a burden on the Folio. In this regard, Mr. Justice Owens said in Murtagh v An Bord Pleanála *[2023] IEHC 245* [2021] 778 JR:
>
> > "*Section 47(5) of the 2000 Act requires that particulars of such any agreements must be noted on the planning register. This type of agreement must be registered as a burden if it is to bind a transferee for value of registered land: see ss.52(1) and (2) and 69(1)(k) and (r) of the Registration of Title Act 1964.*"
>
> As such the Plaintiffs were unfairly treated by the Defendants prior to submitting their planning application in 2006 by the failure of the Defendants to register a s.47 Agreement as a burden on Folio M14049."

64. These points are directed at the lawfulness of the planning decisions. Even the new evidence is directed towards the question of the lawfulness of those decisions. The significance of the new evidence, according to the Murrays, is that it shows that Mr. Murtagh did not have authority to sterilise the lands and therefore the refusal of permission in reliance on the condition in the earlier permissions or on Mr. Murtagh's letters is wrongful.

65. Leaving aside the question of whether the Court, when dealing with section 160 proceedings, could even have regard to such matters (to which I return below), to seek to have the section 160 Orders set aside on the basis of the wrongfulness of the underlying decisions is an improper attack in the following circumstances.

66. Section 50(2) of the Planning and Development Act, 2000 provides:

> "(2) A person shall not question the validity of any decision made or other act done by—
>
> (*a*) a planning authority,
>
> (i) on an application for permission under this Part, or
>
> (ii) under s. 179
>
> (b) a decision of the Board -
>
> (i) on any appeal or referral,

(ii) under section 175, or

(iii) under Part XIV,

otherwise than by way of application for judicial review under Order 84 of the Rules of the Superior Courts (SI No. 15 of 1986) ("the Order")."

67. Regarding time limits, Section 50(6) and (8) provide:

"(6) Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(a) applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate...

(8) The High Court may extend the period provided for in *subsection (6)* or *(7)* within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that—

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension."

68. In *Sweetman v An Bord Pleanála & Ors [2018] 2 IR 250* Clarke CJ, with whom the other members of the Supreme Court agreed, said at page 264:

"[38] The rationale behind the collateral attack jurisprudence is clear. A party who has the benefit of an administrative decision which is not challenged within any legally-mandated timeframe should not be exposed to the risk of having the validity of that decision subsequently challenged in later proceedings which seek to quash the validity of a subsequent decision on the basis that the earlier decision was invalid. Like consideration would apply to a State decision maker who has rejected an application or other similar decisions.

[39] The requirements of legal certainty make clear that a person who has the benefit of a decision which is not challenged within whatever time limit may be appropriate is entitled to act on the assurance that the decision concerned is now immune from challenge subject to very limited exceptions such as fraud and the like."

69. In *Kenny v Trinity College [2020] IESC 54* O'Malley J said:

> "159…As McKechnie J. observed in *An Taisce v. An Bord Pleanála* [2020] IESC 39, the concept of collateral attack has its roots in the effective administration of justice, in litigation fairness and in legal certainty. The overall aim is to protect the integrity of the legal norm.
>
> 160. As noted above, the primary view taken by this Court in the compliance judicial review was that (apart from the issues in respect of the trees, now abandoned) the appellant had failed to show any respect in which the Council's decision was not within the scope of the authority given to it by the Board. The case now made by the appellant cannot be seen as anything other than an attempt to re-open the issue as to whether the compliance decision came within the scope of that authority, based on new arguments that were available to him from the start but not previously pursued.
>
> 161. In the circumstances it would be entirely contrary to the principle of finality of litigation, and to what was described in *McCauley v. McDermott* [1997] I.L.R.M. 486 as the general interest of the community in the termination of disputes and the finality and conclusiveness of judicial decisions, to permit this litigation to proceed further. I consider that Feeney J. was correct in finding that to do so would be to permit an abuse of process, and I would therefore dismiss the appeal."

70. In *Kirkke v. Barranafaddock SE Ltd. [2023] 1 ILRM 81,* Woulfe J (with whom the other members of the Supreme Court agreed) held at paragraph 80 that the provisions of section 50 govern the questioning of the validity of planning decisions on any legal grounds and no exception was carved out by the Oireachtas. Hogan J, at paragraph 16 of his judgment in the same case said:

> "[16] Yet even if one were to take the view that the actions of the Council in this regard were to be judged as unlawful so that the decision was in principle liable to be quashed, the effect of s. 50 (2) of the 2000 Act is nonetheless now to shield that decision from judicial challenge. Section 50 (2) of the 2000 Act operates as a sort of statutory suture which serves to bind up the wounds of invalidity and to banish all infirmities (subject only to some possible exceptions in the case of non-compliance with EU law) which might heretofore have attached themselves to the decision once – as here – the appellants did not commence the appropriate judicial review proceedings in a timely fashion as required by the sub-section or where time was not extended for this purpose. This is simply another example of the more general principle of legal certainty which Henchy J articulated in *Murphy v. Attorney General* [1982] IR 241 at 314:
>
> > "*For a variety of reasons, the law recognises that in certain circumstances, no matter how unfounded in law certain conduct may have been, no matter how unwarranted its operation in a particular case, what has happened and cannot, or should not, be undone*."
>
> [17] It is perhaps necessary here to consider whether there are any possible exceptions to this statutory rule in the manner suggested, for example, by the judgment of McKechnie J in *Mone*

> *v. An Bord Pleanála* [2010] IEHC 395 where a planning permission was apparently granted in the face of a statutory prohibition and where no proceedings had been brought in a timely fashion. It may be that this is a special case, but even here such is the breadth of s. 50 (2) that all types of legal errors – ranging from the trifling to the egregious – seem to be captured thereby. To that extent, therefore, I agree with Woulfe J that *Mone* would appear to have been wrongly decided."

71. The Oireachtas has provided that any challenge to a planning decision must be brought by way of judicial review proceedings within eight weeks of the relevant decision or such extended period as the High Court may allow. On the basis of *Kirkke*, that includes where the Council deliberately or fraudulently concealed evidence or information. The Murrays did not bring such a challenge. Instead, they seek to claim in these proceedings that the decisions of the High Court and the Supreme Court in the section 160 proceedings should be set aside because they were based on invalid planning decisions, i.e., that they should be set aside because evidence is now available and a judgment has now been given (by Owens J) which shows that those decisions are invalid on a number of grounds. Such a challenge is a paradigm collateral challenge to the decisions of the planning authorities and, in circumstances where the Oireachtas has designated that any such challenge must be brought in judicial review proceedings within a specified time period, these proceedings must be an abuse of process.

72. That does not leave the Murrays without a remedy. Their remedy is to be found in section 50(8) under which they may apply for an extension of time within which to bring an application for leave to apply for judicial review and seek to persuade the Court that there is good and sufficient reason for an extension and that the circumstances that resulted in the failure to make such application for leave within eight weeks were outside their control. What they cannot do is circumvent those statutory provisions by seeking to have the section 160 Orders set aside by way of a collateral challenge to the planning decisions in these proceedings.

New Evidence and Lack of Transparency

73. The Murrays claim in the proceedings that the earlier Orders must be set aside on the basis of new evidence becoming available which is relevant to those earlier Orders, the new evidence being that there was no section 47 agreement and that Mr. John Murtagh had written his letters indicating his willingness to enter such an agreement without the knowledge and authority of the other landowners. As already noted, the focus is on the second of those. It is claimed that these facts were known by Meath County Council at the time of the Orders and they did not disclose them to the courts.

74. Notwithstanding the requirement to take the Murrays' case at its height, there are a number of matters which inevitably lead to the conclusion that the Murrays have not established a fair issue to be tried and that the proceedings amount to an abuse of process, even if section 50 did not act as a bar to these proceedings.

75. Firstly, as is clear from the authorities discussed above, the mere fact of the existence of new evidence is not sufficient. A final Order (with the possible exception of an Order made on foot of a settlement agreement) will only be set aside on the basis of new evidence where the party and the Court was deprived of the benefit of that evidence through the fraud (including conscious and deliberate deceit) of the other party. Furthermore, as is clear from *Kenny v. Trinity College Dublin [2008] IESC 18*, the "*nature of the fraud, deceit or dishonesty must be clearly and unambiguously alleged*" and the allegation of fraud must be pleaded with "*particularity and exactness*". The difficulty for the Murrays is that fraud or deliberate and conscious deceit is not pleaded in the Statement of Claim. Instead, what is pleaded is a "*Lack of Transparency".*.

76. Notwithstanding that fraud or deceit are not expressly pleaded, I have also considered whether the substance of the claim made in the Statement of Claim is one of fraud and whether that case is properly alleged and pleaded. I am satisfied that it is not. For example, the most relevant factual basis that is pleaded is contained in paragraphs 9, 10, 14, 15, 19 and 20. It is worth quoting these at some length. At paragraphs 9 and 10 it is pleaded that:

> "[9] As there was no severance or partition of ownership on the Register for to the lands in the Murtagh Estate/Folio MH14049 for each deed of transfer the Co-Owners were obliged to join each other in the delivery and execution of title to the voluntary transferees, in order to give legal effect to those transfers. At the time Regan McEntee & Partners Solicitors then acting on behalf of the Co-Owners prepared the necessary legal papers to complete the transfer of each parcel of land from John and Michael Murtagh to their daughters. Regan McEntee Solicitors therefore having provided all the legal advice to the Co-Owners were fully conversant with and aware of all the facts and details regarding ownership, the proportionate quantitative interests and their distinct individual nature.
>
> [10] It was revealed by John Murtagh in September 2022 that without consulting or seeking the consent of the other Co-Owners, he agreed to sterilise the remainder of the landholding as the putative landowner with authority, in order that his two daughters and their partners could secure the 2004 Permissions to each build houses on their land. At no time since 2004 did John Murtagh or the Defendants seek the consent or make any effort to inform the remaining Co-Owners; Michael Murtagh or Nora Drain (née Murtagh), of the purported s. 47 Agreement. This resulted in the disputed s.47 Agreement being unlawfully imposed by the Defendants on the entire of the lands in the Murtagh Estate/Folio MH14049, including the Plaintiffs lands without any authority or agreement whatsoever. To compound the unlawfulness

of the agreement and the dubious manner in which it came into being, the Defendant further failed, refused or neglected to enter the s.47 Agreement as burden on the Folio because, the Defendant knew or should have known either from its files and / or from their legal advisors, Regan McEntee Solicitors, that no s. 47 Agreement existed over any of the lands in the Murtagh Estate/Folio MH 14049."

77. In paragraphs 14 and 15 it is pleaded that:

> "[14] In 2007, ten months after the sale of the Lands to the Plaintiffs and after their planning application had been refused by the Defendant, Regan McEntee and Partners Solicitors now acting for the Defendant, were instructed to initiate s. 160 (2000 Act) enforcement proceedings against the Plaintiffs for construction of their dwelling house without planning permission. Without prejudice to the foregoing, the Defendant could have been in no doubt, following a perusal of their own planning file by their legal advisors that there was a serious legal issue with the purported s. 47 Agreement. The circumstances where Regan McEntee's Solicitors had prior knowledge and dealings with the Co-Owners of the Murtagh Estate as outlined previously. As a result of the actions and inactions of the Defendant, the Plaintiffs through no fault of their own, but as a direct result of the misrepresentations of the Defendant, effectively acquired "a pig in a poke" title to the Lands they purchased from the Co-Owners: John, Michael, and Nora Murtagh.
>
> [15] A review of the planning files for the 2004 Permissions, granted to John Murtagh's two daughters included the two site maps where the houses were to be built, along with an additional map identifying the remaining land in Folio MH14049. However, the two 2004 Letters issued to the Defendant by John Murtagh giving permission to "s*terilize the remainder of the land holding*" had no map attached and did not refer to any folio number. It transpired that John Murtagh's daughters, Orla and Aoife, when submitting their applications for the 2004 Permissions, both incorrectly stated that John Murtagh was the sole owner of the lands for which they were seeking planning. This incorrect assertion was later corrected by a letter from Regan McEntee & Partners Solicitors on the planning file dated 26 April 2004, which disclosed the correct position of the Co-Ownership structure over all the lands contained in the Murtagh Estate. This letter clarified that there were three landowners each with an interest in the lands comprised in Folio MH 14049. It appears therefore that the Defendant disregarded the letter dated 26 April 2004, or in the alternative was negligent in ignoring it."

78. Those pleas are a very long way from pleas of fraud or deceit let alone '*clear and unambiguous*' or '*particularised and exact*' pleas.

79. The closest the Murrays come to pleading fraud or deceit either in terms or in substance is in paragraphs 19 and 20 (which appear under the heading "*Lack of Transparency*"):

> "[19] Having failed by its statutory duty to register the s. 47 Agreement on the Planning Register and given the two houses for which planning permission had been granted in the 2004 Permissions, were now long built, the Defendant at that point knew it was effectively prohibited

from taking any remedial action to correct their actions. In 2007 the Defendant brought enforcement proceedings in the High Court 2007/MCA 76 wherein Mr. Justice Edwards made a retrospective declaration that what John Murtagh did, was to enter into an "agreement to enter an agreement", which was accepted by the Court as a de facto compliance with the 2004 Permissions, specifically with Condition 3 therein.

[20] The proceeding maintained against the Plaintiffs at all times depended entirely on the veracity and the propriety of the Defendant standing over its insistence that the sterilisation of the lands in Folio MH14049 attaching to the 2004 Permission, which arose out of the purported s. 47 Agreement. The failures of the Defendant to be wholly transparent and completely candid with the Court has recently been revealed by the new evidence in the Affidavit of John Murtagh."

80. A case that the Council acted fraudulently or deceitfully is made to some extent in the affidavits and, when considering whether the claim should be dismissed on the basis of the Court's inherent jurisdiction, the Court can have limited regard to the affidavits. Furthermore, when considering whether there is a fair issue to be tried for the purpose of the test for an interlocutory injunction, I can have regard to the affidavits. For example, in paragraph 4 of her grounding affidavit, Ms. Murray alleges that the Council 'consciously misled' the High Court and the Supreme Court. In paragraphs 5-7 she alleges that the Council allowed the Court to proceed on the basis that the condition in relation to sterilisation had been satisfied because of the letter from Mr. John Murtagh but the Council knew that he did not write this with the authority of the other landowners. In paragraphs 8 and 10, Ms. Murray alleges that the Council knew that McKechnie J's presumption that Mr. John Murtagh signed the letters on behalf of all of the landowners was wrong and did not "*disabuse*" the Court of its idea that the lands were legally sterilised when they were not or that *"in spite of ample opportunity when it arose during the hearing, the Council and their legal representatives failed to disclose it to the Court or to correct the Court's judgment when it was apparent that the Court was mistaken."* Similar, though stronger, allegations are made in paragraphs 15 and 17 and paragraphs 5, 7 and 10 of Ms. Murray's supplemental affidavit of the 26th January 2023. At paragraph 7, for example she states that "... *the Defendant relied upon a state of affairs which it knew to be false"* and at paragraph 10 stated *"the Defendant purposely allowed the High Court and the Supreme Court to believe that John Murtagh had the authority to agree the sterilisation of the lands even though it had documentation in its possession that confirmed John Murtagh did not have the authority*". Similar allegations are contained in the affidavit of Ms. Murray of the 9th June 2023.

81. However, on the other hand the Murrays qualify these allegations by claiming that the Council either knew *or ought to have known* the relevant information. For example, Ms. Murray says at paragraph 4 of her grounding affidavit:

> "I say that new evidence has only in the last six weeks become known for the first time, to my husband and me which, it is alleged, proves that both the High Court and the Supreme Court were consciously misled into believing that certain facts as sworn and purportedly substantiated by exhibits were true, whereas it would appear that they were false and Meath County Council, its servants or agents knew ***or ought to have known*** they were false. I say and believe that these facts, in the context of those proceedings, were of crucial and fundamental importance to the determinations and findings made." [emphasis added]

82. At paragraph 5 of Ms. Murray's supplemental affidavit she says that the Council and their legal advisors knew *or should have known* that Mr. John Murtagh had no authority to sign the letters providing his consent to sterilise the lands in the Murtagh Estate/Folio MH14049. At paragraph 4 of the affidavit of the 9th June 2023 Ms. Murray says that "... *the Defendants previous position in misleading the High Court and the Supreme Court has been compounded in circumstances where the Defendant knew* ***or should have known*** *that John Murtagh had no authority to sign the letters providing his consent to sterilise the lands*". [emphasis added].

83. It seems to me that these qualifications are not consistent with a clearly pleaded and particularised case in fraud or deceit.

84. Thus, I am not satisfied that a case in fraud has been properly made and on the basis of the papers to date the Murrays could therefore not succeed in having the previous Orders set aside on the basis of the new evidence. I refer to the case of misrepresentation in respect of Meenan J's Order below.

85. However, in light of the fact that there is a basis in the affidavits for the conclusion that the Murrays claim fraud or deceit, the obligation that I must take the plaintiffs' case at its height, that the Court should not dismiss proceedings where a defect in the pleadings can be remedied by an appropriate amendment, and that I am also considering the plaintiffs' case for an interlocutory injunction, I will go on to consider the matter on the basis that the Murrays have properly brought and pleaded a claim in fraud or alternatively that the proceedings can be amended to properly plead such a claim. I will also do so in case I am wrong that the Murrays have to establish fraud, deceit or deception.

86. The authorities are clear that the evidence which was fraudulently must be relevant and would have or would probably have an effect on the original result. The Court of Appeal held in *Launceston Property* that "*alleged errors which have no consequence for the result do not meet the required threshold*" and Irvine J in *Bailey v. Commissioner of An Garda Síochána* emphasised that only a fundamental error which has a significance or a consequence for the result could amount to a denial of justice within the meaning of the

law. Fennelly J said in *Kenny v. Trinity College [2008] IESC 18* (paragraph 55) that "*the fraud alleged must be such as to affect the impugned decision in a fundamental way. It will not suffice to allege that the new situation revealed by the uncovering of the fraud might have affected the judgment. It will not be enough to show, for example, that a witness lied unless it is shown that the true version of his evidence would probably have affected its outcome*." This seems to be accepted by the Murrays. At paragraph 6 of Ms. Murray's affidavit of the 9th June 2023, she says "*The heavy onus that myself and my husband bear is clear however, when the Defendant misrepresented significant facts in the High Court and Supreme Court,* ***which had a material effect on the outcome of s.160 proceedings****, this I say absolutely represents an exceptional circumstance*" and, at paragraph 25 she says, "*Your deponent also understands that should new evidence come to light which indicates there is an arguable case that a court was deliberately or recklessly misled by the Defendant and* ***this could materially affect the original decision****, then notwithstanding the amount of litigation that has gone before, there is a case to be answered by the Defendant.*" [emphasis added]. At paragraph 30 of their written submissions, it is submitted "*that if the Plaintiff has provided a sufficient factual basis on which to conclude that there is an arguable case that the Defendant misrepresented facts to the Court,* ***something that would have made a material difference to outcome****, then an injunction against the demolition of the Plaintiffs' home should be granted, until the substantive claim against the Defendant is heard in its entirety*". [emphasis added]

87. As touched on above, the new evidence relates to the validity of the planning decisions. The High Court and the Supreme Court did not consider or determine the validity of those decisions in the section 160 proceedings. Indeed, the High Court and the Supreme Court have already determined that they could not consider the correctness or otherwise, or the legal validity, of the planning decisions in the section 160 proceedings. Edwards J said at paragraph 29 of his judgment that:

> "The first named respondent then goes on in his affidavit to address each of the grounds on foot of which planning permission was refused, namely…. Although he joins issue with each of these reasons at some length and in great detail it is not necessary for the Court to review his arguments in this regard as these issues are not issues which are justiciable in the context of the present proceedings. The reason for that is that section 50(2) of the Planning and Development Act, 2000 states expressly that…"

88. The Supreme Court did not disagree with this. In his judgment, McKechnie J said (paragraph 125 and 126):

> "125. …The question arises as to how far a judge, on a s.160 application, can review the merits of a retention refusal given by either the Planning Authority or An Bord Pleanála.

126. It is not an easy task to try and articulate a visible boundary line beyond which a judge should not go when applying the proportionality test. Some engagement with the facts is obviously required. However he is not permitted to reach his own independent view on the planning merits of a case. That is a function of the planning process. The courts must not act as a surrogate for the nominated bodies. They have no role in performing such function through some process of reviewing the merits of a decision by either of them within their remit. Still less do they have the expertise to carry out such a function."

89. He noted that this very point had been made by Finlay P in *Dublin Corporation v Garland [1982] ILRM 104* (and by Kearns P in *Wicklow County Council v. Kinsella [2015] IEHC 229*). Finlay P said at page 106 in respect of the predecessor to section 160:

> "There can, in my view, be no function in the court on the making of an application under [s.27] in any way to review, alter or set aside a decision of the Planning Authority with regard to the granting or withholding of permission. The entire scheme of the Planning Acts is that, subject to the limited exceptions for the determination by the High Court of questions of law specifically referred to it, that decisions as to the proper planning and development of any area are peculiarly the function of the Planning Authority in the first instance and of An Bord Pleanala (sic) on appeal from them."

90. McKechnie J, at paragraph 128 of his judgment in *Murray*, did leave the door open to the possibility of some consideration of the merits of the planning decision. At paragraph 128 he said:

> "I am not suggesting that this passage from *Dublin Corporation v Garland* [1982] ILRM 104 is necessarily the last word on the point, as the concept of proportionality has evolved very considerably in the past 30 years. However, even considering that development, I am satisfied that the court should not embark on what might in effect be a further review of matters the determination of which is committed by legislative policy and statutory provision to stipulated bodies. Although in a somewhat different context, Denham J, in *Meadows v Minister for Justice* [2010] IESC 3, [2010] 2 IR 701, emphasised that the courts should be reluctant to interfere with the decisions of expert bodies, such as An Bord Pleanála. See also *South Bucks DC v Porter* [2003] UKHL 26, [2003] 2 AC 558."

91. However, even the very limited possibility of some sort of review of the planning decisions touched upon by McKechnie J was limited to the factual merits of the reasons for the planning decision for the purpose of determining whether a demolition order would be proportionate in all the circumstances and not for the purpose of deciding whether the planning decision was right or wrong. McKechnie J was not referring to a review of the legal merits or validity of the reasons for refusal. The challenge in this case is to the legal validity of the reason for refusal relating to the condition regarding the sterilisation of the lands in the earlier permissions.

92. The evidence that Mr. John Murtagh did not have authority to bind the other landowners can only be relevant to the basis for the refusal of planning permission. As the Courts decided that they could not consider the validity or correctness of the planning decisions the new evidence can not be relevant to the decision of either court.

93. Thus, even proceeding on the basis that fraud or deceit is alleged and will be established, the new evidence simply has no bearing on the decisions that were made and are now sought to be set aside and, therefore, the Murrays could not succeed in having those decisions set aside on the basis of that evidence.

94. As is clear from *Greendale Developments*, "a *case will only be reopened where through no fault of the party, he or she has been subject to a breach of constitutional rights"*. Neither side dealt with this and I therefore have not considered it.

No Tangible Benefit

95. It was held in *Scotchstone* that proceedings may be an abuse of process where, even if there is a reasonable chance of success, they would provide no tangible benefit to the party.

96. The Murrays' criticism of and challenge to the Orders in the section 160 proceedings is on the basis that Meath County Council's reliance on the condition in the earlier planning permissions sterilisation is unlawful.

97. However, that was only one of the reasons for the refusal of planning permission.

98. In *Murtagh v An Bord Pleanála*, Owens J found that two reasons of three given by An Bord Pleanála for the refusal of planning permission on appeal were invalid and had to consider whether to set aside the decision in those circumstances. The reasons were very similar to the reasons given for the initial refusals at first instance and on appeal in this case. Owens J dealt with this issue at paragraphs 71 to 79 of his judgment. At paragraphs 75 to 79 he said:

> "[75] A decision may be allowed to stand where legal errors by the decision-maker do not affect the result. This approach to the remedy of judicial review requires proper exercise of discretion. The 5th Edition of Lewis on "*Judicial Remedies in Public Law*" contains the following useful analysis of the approach of English courts to some aspects of this issue at para 5–036 (p. 201):

> "The courts have accepted that in appropriate circumstances they will give effect to the intra vires parts of an act and deny validity only to those parts that are ultra vires. The courts may quash the invalid part only and or may grant a declaration that the measure is not to take effect in so far as it is invalid. The difficulty comes in identifying the test and predicting the circumstances in which the courts will sever the ultra vires part of a measure or treat a measure as partially invalid. This difficulty arises in part from the wide variety of circumstances in which the question of partial invalidity arises, but it also reflects differences of opinion on the proper role of the courts in this area. On the one hand there is a desire to give effect to legal acts in so far as possible rather than striking down the whole acts, much of the content of which is unobjectionable. In the words of Ormerod LJ the courts "should not strive officiously to kill to any greater extent than it is compelled to do so".
>
> On the other hand, there is a need to ensure that the courts do not usurp the functions of the decision-maker by quashing part of an act and leaving something in force which is different in character from the original act and which the courts cannot be sure would have been made by the decision-maker. As with so much in public law there is a balance to be struck. The third option open to the courts would be to reject any possibility of severance and always to strike down the whole act where any part of that act is shown to be ultra vires. This course has "the merit of simplicity and of encouraging the [decision maker] to keep within his powers. The disadvantage of such course is that much to which no objection can be taken is then unenforceable". The courts have decisively rejected this option."

[76] There are some circumstances where this excision of the bad from the good is not possible. A court cannot rewrite the decision of an administrative body. The reasoning leading to a decision may involve cumulative reasoning which makes it impossible to sort out the bad from the good. In some cases, the decision maker may have a plurality of purposes, some bad and some good. An example of a decision which involved a plurality of purposes can be found in the judgment of Fennelly J on behalf of the Supreme Court in *Kennedy v. Law Society of Ireland (No. 3) [2002] 2 I.R. 458* at pp. 486 to 489. Another example of a circumstance where excision of the bad from the good was not possible in the context of bye-laws is [1990] 2 A.C. 783.

[77] However, where some of the reasons for the decision are invalid and a decisive stand-alone valid reason given by the decision-maker produces the same result, then that result does not depend on any invalid reasoning. The valid reason for the decision remains valid and disposes of the matter. In considering this appeal, the Board came to its own conclusions on why permission for the proposed development should be refused. Inevitably, this consideration also involved taking a view on whether the approach taken by the planning authority to other issues was correct.

[78] Para. 2 of the Board's decision was a stand-alone conclusion which did not depend on evaluation of any special status enjoyed by Louise Murtagh as an established resident of a "Strong Rural Area" or the status of the planning conditions imposed in the 2005 permissions.

> It was not part of a cumulative process of reasoning which led to refusal of permission. It refused permission for the proposed development for other reasons which were dispositive.
>
> [79] The Board stated that the proposed development would be contrary to proper planning and sustainable development of the area by reference to planning considerations identified in that paragraph. That remains the position irrespective of invalidity of reasoning which underpins the conclusions at paras. 1 and 3. The Board arrived at separate conclusions on separate issues for separate reasons.

99. It seems to me that the same logic applies in this case. *Murtagh v An Bord Pleanála* was brought by way of judicial review proceedings in which the actual planning decision was challenged. As discussed at length above, such a challenge has not been brought in this case. Instead, what is sought to be argued is that the Orders made under section 160 should not have been made (and should be set aside) because the underlying planning decisions are wrongful. One basis upon which they are said to be wrongful is the reliance on the sterilisation condition in the earlier permissions. However, even if the Murrays are entitled to make that case in these proceedings (which they are not) and we are to presume that they will be successful in that case, that would still leave three reasons for the refusals of permission. These reasons remain unchallenged. Therefore, there would still be three valid reasons for the refusals of permission. These are stand-alone reasons which are not related to the sterilisation reason and therefore, on the logic of Owens J's judgment, the refusals would still be valid and there would, on the logic of the Murrays' case, be a valid underlying basis for the section 160 Orders. That being the case they could not secure the substantive relief sought and there would be no tangible benefit for the Murrays even if they were successful in their argument.

100. As discussed above, there is some authority for the proposition that misrepresentation is sufficient to have an Order made on foot of a settlement agreement set aside on that basis. However, even if I accept that this is correct and that Meenan J's Order might therefore be set aside, this would be of no tangible benefit to the Murrays in the context of these proceedings as the Orders made by Edwards J and the Supreme Court would still stand.

Constitutional Challenge

101. The Murrays seek "*a declaratory order that the Defendants are not entitled to prosecute proceedings under Section 160, of the Planning Act, 2000 for any offence other than a minor offence as prescribed by Article 38.2 of the Constitution and any provision under the said Section 160 of the Planning Act 2000 providing for the prosecution by a body authorised by law under Article 37 of the Constitution, where without statutory limitation or restriction, renders Section 160 of the Planning Act, 2000 repugnant to constitution*

being wholly or partially in direct conflict and contravention of the limitations provided by law under those aforementioned Articles of the Constitution."

102. This can not succeed in circumstances where the necessary parties are not joined to the proceedings and there has been no indication given that it is intended to join them.

103. Furthermore, the correct time to have sought such relief was when the section 160 proceedings were first brought, either within those proceedings or by separate plenary proceedings. It is long-established that it may be an abuse of process to attempt to litigate matters which could have been raised in earlier proceedings or at an earlier stage and were not. It was held in *Henderson v Henderson [1843] 3 Hare 100* (repeatedly endorsed since then) that:

> "[W]here a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time."

104. Costello J said in *Morrissey v Irish Bank Resolution Corporation [2015] IEHC 200* (paragraph 5):

> "It is a fundamental principle of law that a party should not be entitled to re-litigate matters or raise issues which have already been determined by a final judgment of a court of competent jurisdiction between the same parties and their privies. This is known as the principle of res judicata. But beyond the strict limitations of res judicata the courts have long recognised that there may be abuse of process outside of the relatively confined limitations of the rule and the courts have always been prepared to balance the rights of parties to have their cases heard and determined by the courts with the rights of the opposing parties to fair procedures in the conduct of litigation and, where necessary, to strike out proceedings if they amount to an abuse of process."

105. As touched on by Costello J, the rule in *Henderson v Henderson* is not applied rigidly or inflexibly and the Court retains a discretion in order to balance the rights of the parties (see, for example, Hardiman J in *A.A. v Medical Council [2003] 4 IR 302*). However, in the circumstances of this case, the Murrays give no reason given as to why this point was not made at the time of the section 160 proceedings. In this regard, it is important to

note that other constitutional arguments, relating to, inter alia, Article 40.5 of the Constitution, were advanced. It goes without saying that the new evidence is not relevant to the particular constitutional challenge. Thus, the fact that this evidence was not known at the time of the original proceedings is not a basis for the exercise of the Court's discretion in respect of the constitutional challenge.

Murtagh v. An Bord Pleanála

106. The Murrays place significant reliance on the judgment in *Murtagh v An Bord Pleanála* to submit that the manner in which Meath County Council and An Bord Pleanála dealt with the condition relating to sterilisation in the earlier permissions was unlawful and that the decisions of the High Court and the Supreme Court must be set aside. However, the point that was raised in *Murtagh v An Bord Pleanála* could have been raised by the Murrays at the time of the section 160 proceedings (by way of separate judicial review proceedings). The new evidence was not necessary for them to raise that point.

107. Similarly, the Murrays' claims that the original planning decisions are invalid because there was no section 47 agreement or such agreement was not registered could have been, and to a certain extent were, raised at the time of the original section 160 proceedings. Of course, as discussed above, those points should be brought by way of judicial review (section 50). It is not open to the Murrays to argue that they should be considered in these proceedings as a basis for setting aside the section 160 Orders when they either were raised and determined or were not raised. It was submitted at the hearing on behalf of the Murrays that it is open to them to re-argue the point about non-registration of a section 47 agreement because of the concealment by the Council of the new evidence and because of Owens J's judgment. I am not at all persuaded by this. The absence of the evidence which has now come to light did not preclude the Murrays from challenging the planning decisions on the basis that there was no section 47 agreement or that such agreement was not registered. Both of those facts could be established without the new evidence.

Time Point

108. In their written submissions (paragraphs 39 – 47), the Murrays submitted that section 11(6)(a) of the Statute of Limitations 1957 provides that an action shall not be brought upon a judgment after the expiration of twelve years from the date on which the judgment became enforceable, that the relevant date regarding planning enforcement is the date of the original Order (the 27th July 2010 or the 11th March 2011), and therefore the Council are statute-barred from enforcing the original Order.

109. At the hearing, it was correctly accepted on behalf of the Murrays that this is not part of the pleaded case and it was stated that it was not being advanced at this stage. In those circumstances, I do not have to consider it. It was submitted on behalf of Meath County Council that its inclusion reinforces that the proceedings are an abuse of process. In light my findings above, it is not necessary for me to determine this point.

Conclusion

110. For all of those reasons on the application of the principles set out above and, notwithstanding the high bar for such an application, I am compelled to conclude that the proceedings are frivolous and vexatious and an abuse of process and should be struck out under the Court's inherent jurisdiction.

Injunction Application

111. It must follow that the Murrays are not entitled to an interlocutory injunction. This is so for two reasons. Firstly, the purpose of an interlocutory injunction is to best arrange matters pending determination of the substantive proceedings. Where I am satisfied that those proceedings must be dismissed there are no proceedings to be determined. The Murrays have, of course, had the benefit of an injunction pending the hearing of these applications and the delivery of this judgment. Secondly, the arguments in respect of the Murrays' application for an interlocutory injunction and Meath County Council's application for Orders dismissing the proceedings, were largely the same with one exception, and it seems to me that where Meath County Council has been successful in its motion then it follows that the Murrays have not succeeded in establishing the first limb of the test for an interlocutory injunction.

112. The exception that I refer to is a specific argument made by the Murrays in respect of the interlocutory injunction. At the time of the hearing the Murrays had made a further application for retention and it was submitted that in those circumstances there must be an arguable case or serious issue that they would get retention and therefore the first limb of the test for an interlocutory injunction was satisfied. It was argued that this was particularly the case in light of Owens J's decision in *Murtagh v. An Bord Pleanála* in respect of the sterilisation condition. This point has largely become moot in circumstances where, before this judgment was given, the parties informed me that the retention application had been refused by both Meath County Council and An Bord Pleanála (the latter for reasons which do not refer to the sterilisation issue). However, I was also told that a further application for permission had since been made. It was not pushed too vigorously that this meant that the Murrays must have an arguable case but, nonetheless,

in those circumstances I should say that I do not accept that the fact that there is an outstanding planning or retention application (whether or not it has a good chance of success) in itself satisfies the first limb of the test for an interlocutory injunction application. The serious issue must be an issue in the proceedings. The question of whether or not retention or planning permission might be granted is separate from the question of whether the proceedings themselves raise a fair question to be tried. The existence of such an application may be a matter to be considered in the balance of justice limb of the test for an injunction. Furthermore, it is well-established under section 160(3) that a retention application does not give rise to a stay or a bar on section 160 proceedings. It would be illogical, in those circumstances, if such an application could ground an application for an Order restraining, not section 160 proceedings themselves, but final Orders made by the High Court and the Supreme Court within those proceedings.

CONCLUSION

113. In all of those circumstances, I am forced to conclude that I must refuse the plaintiffs' application for an interlocutory injunction and that I should make an Order dismissing the plaintiffs' claim under the Court's inherent jurisdiction on the basis that it is frivolous and vexatious and an abuse of process. I will hear the parties as to what Order, if any, should be made in relation to the plaintiffs' application for interlocutory reliefs and any ancillary Orders.