[2019] IEHC 850

THE HIGH COURT

[2018 No. 234 MCA]

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

BETWEEN

SHARON MCARDLE, SHIRLEY MCARDLE AND OLIVIA MCARDLE

APPLICANTS

AND

DONAL CARROLL

RESPONDENT

JUDGMENT of Mr.Justice MacGrath delivered on the 3rd day of December, 2019.

1. These proceedings were commenced by way of notice of motion dated the 8th June, 2018. The applicants, inter alia, sought an order pursuant to s. 160(1) of the Planning and Development Act 2000 as amended ("*the Act of 2000*") to restrain the respondent from carrying out an unauthorised development on his lands, being a boundary wall. It was contended that the wall was of such a height as required planning permission in accordance with the provisions the Act of 2000 and Regulations made thereunder. An order was also sought for inspection of the respondents' property. In circumstances outlined hereunder, it is accepted that proceedings have now become moot and the sole remaining issue requiring the court's determination is in relation to costs.

2. The applicants and the respondent are neighbours and reside at Rock Road, Blackrock, Co. Louth. Before the emergence of this dispute in April, 2018, there is nothing to suggest that they were on anything but good terms. The respondent has described his family's relationship with the applicants as cordial and friendly. This situation pertained before the respondent decided to build a boundary wall. The wall was constructed to the rear of the applicant's dwelling house and behind an existing boundary wall thereon. The lands of the respondent are zoned for residential use. The respondent, in an affidavit sworn in opposition avers that he built the wall to improve and secure his own boundary. The applicants objected.

3. In circumstances outlined hereunder, the respondent applied to the local planning authority for permission to retain the wall and in the events which have transpired, An Bord Pleanála confirmed the local authority's decision to grant retention permission. The decision of the Board was made on 17th December, 2018. Thus, it is agreed that the proceedings became moot at this time.

4. The application for retention was lodged with the planning authority on 12th June, 2018. Some days prior to that, a site notice was erected. On the evidence, this occurred on the morning of the 7th June, 2018, being the day on which the first applicant swore her affidavit grounding the proceedings and one day prior to the institution of these proceedings. It appears, nevertheless, that the preparation of the proceedings was in train prior to the 7th June, 2018. This is evident from the supporting affidavit of Mr. J.P. Murphy, engineer, which was sworn on 6th June, 2018. He deposed to having inspected the planning register and he addressed the planning status of the property in his affidavit. He confirmed that the lands are zoned residential, that no applications had been

submitted for planning permission and that a warning letter had been issued to the respondent by the local planning authority.

5. In her affidavit, the first named applicant also complained that the wall had been erected over pipes servicing the dwelling house of the second and third named applicants and that a gap had been left between the two walls which was considered by the applicants to be dangerous and hazardous, particularly to children. The court was informed that separate proceedings had been commenced in respect of an alleged trespass. These also issued on 8th June, 2018. Apart from being served on the respondent, they have not been progressed to date.

6. The applicants maintain that the wall was built at such a pace that it was substantially completed by the morning of the 9th April, 2018, despite conversations which had taken place on site and the sending of a letter written on the 5th April, 2018 in which the applicant had expressed concerns. They maintain that they sought to avoid proceedings.

7. On the evidence, I am satisfied that the works commenced without prior consultation by the respondent with the applicants. I accept, on the evidence, that Mr. Carroll engaged a contractor on Wednesday 4th April, who in turn commenced excavation and poured the foundations for the wall.

8. I am also satisfied that there was communication on that day when the third applicant, Ms. Olivia McArdle, who leaned over the rear wall of her home and queried what was happening. She maintains that certain assurances were given to her as to the pace at which the works might take place. In his affidavit, para. 10, the respondent avers that she enquired of him as to when he proposed to construct a wall and he responded that it would probably be Monday or the following week. Ms. McArdle queried why he had not informed her that he was building a wall and Mr. Carroll states that he had intended to inform her sister, Ms. Shirley McArdle, in short course. On enquiry as to the height of the wall, Mr. Carroll avers that he confirmed that the wall would be the same height as the wall to the east, which bounded the property of another neighbour, approximately 1.8m above her garden level but that it would not be as high as a wooden partition fence dividing the applicant's garden into two sections. He also states that Ms. Olivia McArdle said to him *"[w]hat about my view?".* She inquired about the sewage pipe passing from her property to a council sewer running under and through her own property and he confirmed that he was aware of the council pipe and that he would not be encountering any pipe work in the course of excavating the foundation for the wall. This was because the pipe was approximately 2.6m underneath the ground.

9. Mr. Carroll also accepts that on the 5th April, at approximately 8:30a.m., Ms. Olivia McArdle once again leaned over the wall and requested that he cease all works immediately. A discussion ensued about the height of the wall and the respondent avers that he informed her that he understood that it was permissible to build a wall up to 2m in height without planning permission and that the finished wall would be less than 2m above ground level on her side. He states that Ms. McArdle informed him that she wished to have her engineer inspect the works to which he replied that he had no difficulty with

such course of action. Ms. McArdle also expressed concerns regarding the foundation of her boundary wall and Mr. Carroll states that he put her mind at ease about this. However, Mr. Carroll maintains that Ms. McArdle again demanded, in what he described as a very pointed and aggressive fashion that all works cease immediately, to which he responded that the works were in progress with men and all materials on site and advised her that he had a delivery of concrete arriving to fill the foundations which was "arriving imminently".

10. Mr. Carroll also confirms at para. 13 of his affidavit that the construction of the wall commenced on the 7th April, 2018 and that he was approached at approximately lunchtime by Ms. Sharon McArdle and Ms. Olivia McArdle who he says were quite aggressive towards the blocklayers and who demanded that they immediately cease laying blocks otherwise they would call the Gardaí. Mr. Carroll states that he believes the import of this communication to the workers in question was that they were in some way committing a criminal offence. Later that afternoon, Saturday 7th April, Ms. Olivia McArdle called to his front door. He was not there and his daughter informed Ms. McArdle that she was unaware of his whereabouts. Once again Mr. Carroll complains about the demeanour, tone and what he describes as the aggressive and oppressive nature of that demeanour, which made his daughter feel uncomfortable.

11. Mr. Carroll avers that on Sunday 8th April, 2018, he was present in the garden with a number of blocklayers and was confronted again. He informed Ms. Sharon McArdle that this was not a party wall, it was built entirely on his property, that the blocklayers were independent contractors who started on Saturday as they had another job waiting and because the weather was forecast to deteriorate. However, he confirmed that engineers retained by the applicants were welcome to inspect the works and could liaise with his engineer, Mr. McMahon, of Messrs. Padraig Herr and Associates who, he states, had already inspected the works the previous day and found that there was nothing wrong with either the wall or the foundations. He forwarded a copy of the engineer's report to them on Monday, 9th April, 2018. However, he states that Ms. Sharon McArdle dismissed this immediately and indicated that the report would not stand up in court. He acknowledges that Ms. Olivia McArdle accused him of deliberately misleading her because the workers had started on site on Saturday and not on the following Monday. That apparently was the last verbal communication between the parties.

12. I am satisfied that while there may have been no legal obligation to do so, the actions of the respondent in not communicating with the applicants in advance and the haste with which the wall was thereafter constructed significantly contributed to the colouring of the attitude of the applicants and to what subsequently transpired.

13. On Monday 9th April, 2018, Mr. Padraig Herr called on the respondent with Mr. J.P. Murphy, an engineer representing the applicants. It is evident that the primary concern at that time was the safety of the wall. Mr. Carroll confirms that at that time the wall was substantially completed by Wednesday the 11th April, 2018. He also avers that certain other work was put on hold because of the correspondence between the parties.

14. On the 17th April, 2018 the respondent received a warning letter issued by the local authority pursuant to s. 152 of the Act of 2000, advising that the wall was or may be unauthorised. This issued on foot of a complaint made by the applicants to the local authority on the 13th April, 2018.

15. In early May, 2018, the respondent advised the local authority that he intended to make an application for retention permission. This appears to have been in response to the warning letter and on the advice of his engineer. On the 2nd May, 2018, Ms. Sharon McArdle made a formal complaint to the local authority that the wall was a dangerous structure. This was not accepted by the local authority and on the 2nd May, 2018 Mr. Fergus Fox, council engineer who inspected the wall, recommended that the file be closed.

16. It would also seem that on the same day, Mr. Herr wrote to the local authority, informing them that he had been instructed by Mr. Carroll to prepare and submit a planning application for retention of the wall. In the meantime, communications were taking place between the parties regarding inspection facilities and an issue arose concerning whether such inspection facilities would be permitted in the absence of an indemnity (presumably to indemnify the respondent in respect of anything that might happen while the plaintiff's engineer was on the property). Mr. Carroll makes the complaint that this was not progressed before the proceedings issued on the 8th June, 2018. He also points to the fact that in the letter of 10th May, 2018, prior to the institution of proceedings, the solicitors on behalf of the plaintiff stated that they wished to have confirmation that not alone would the wall be removed but trees recently planted would also be removed and that there no reference request was made that the planning status of the wall be regularised by way of a grant of permission. The demand was one for removal of the wall.

17. Mr. Carroll also says that on the 7th June, 2018 being the date on which Ms. McArdle swore her affidavit, at approximately 8:30 a.m., a site notice was placed directly at his entrance gate (the main access road of Rock Road where all of the parties live) stating that the respondent was applying for retention permission for the wall. It is submitted that this site notice was clearly visible to all passers-by but that despite this, the applicants nevertheless went ahead with this application. The site notice stated:-

> *"LOUTH COUNTY COUNCIL*
>
> *SITE NOTICE*
>
> *WE DONAL & CAROLINE CARROLL*
>
> *INTEND TO APPLY FOR:-*
>
> *RETENTION PERMISSION*
>
> *FOR DEVELOPMENT AT THIS SITE:-*
>
> *THE ROCK ROAD, HAGGARDSTOWN, BLACKROCK, DUNDALK, COUNTY LOUTH.*

THE DEVELOPMENT WILL CONSIST OF:-

RETENTION OF A BOUNDARY WALL BETWEEN ACGRICULTURAL LANDS AND NEIGHBOURING DWELLINGS AND ASSOCIATED SITE DEVELOPMENT WORKS.

The planning application may be inspected, or purchased at a fee not exceeding the reasonable costs of making a copy, at the offices of the planning authority during its public opening hours.

A submission or observation in relation to the application may be made in writing to the planning authority on payment of the prescribed fee, €20, within the period of 5 weeks beginning on the date of receipt by the authority of the application, and such submissions or observations will be considered by the planning authority in making a decision on the application. The planning authority may grant permission subject to or without conditions, or may refuse to grant permission.

SIGNED:- (agent) Padraig Herr

DATE OF ERECTION OF SITE NOTICE:- 07TH JUNE 2018."

18. The application for retention was made on the 12th June, 2018 and the applicants and others objected. A report was prepared by representatives of the local authority's planning department. This was based on a site visit which occurred on 28th June, 2018. The authors described the height of wall as ranging between 2.4 m and 2.8 m. They observed that while:-

> *"…no application for residential has been submitted, the provision of such a wall of this nature would not be an uncommon feature/requirement as part of a planning application and is a requirement under s.6.7.13.[of the development plan]."*

The principle of the development was considered acceptable and it was recommended that retention permission be granted.

19. On the 26th July, 2018, the planning authority issued a decision to grant retention permission. A number of conditions were attached, including that the development comply with certain requirements of Irish Water. An appeal was lodged to An Bord Pleanála by the applicants and the Board of Management of the local school. On the 17th December, 2018, the Board granted retention permission on terms in accord with those specified by the planning authority on the 26th July, 2018.

20. By letter of the 7th August, 2018 the respondent's solicitors wrote to the applicants proposing that in order to avoid further legal costs, the proceedings should be adjourned pending the issue of a grant of planning permission or a final determination. This and a further letter of reminder were not responded to at that time. The applicants changed their solicitor at that time. While complaint is made that these letters were not responded to, nevertheless, it appears that no further substantial step was taken by the applicants. The respondent filed a replying affidavit. The respondent also filed and delivered an

affidavit sworn by a chartered engineer, Mr. Roger Cagney. This followed a number of inspections of the wall, including a joint inspection which occurred on 19th July, 2018 and which concerned the structure and the safety of the wall. In the affidavit he responded to a letter which had been sent by the applicants dated 4th May, 2018, in which concerns regarding the design, safety and structure of the wall were expressed. He refuted those concerns.

21. Mr. Connolly S.C., on behalf of the respondent points out that a court order was extant requiring the filing of a replying affidavit within a specified time and that in the absence of agreement to defer further proceedings pending the outcome of the appeal to An Bord Pleanála, the respondent was obliged to file that affidavit, thereby incurring costs.

22. Thereafter, it may be said that little occurred until after the application for retention was granted by An Bord Pleanala and before the issue of costs became a significant matter between the parties. It appears that the proceedings were adjourned on at least one occasion while the appeal was pending before the Board. No further affidavits were exchanged until early 2019. These included a supplemental affidavit sworn by the respondent on 17th January, 2019 in which he updated the situation regarding the granting of retention permission. A further affidavit was sworn by the first applicant on 10th April, 2019 to respond to and refute the contentions outlined in the respondent's first affidavit. She denied that the applicants were being unreasonable and reiterated her concern about the safety of the wall. She refuted any suggestion that the applicants were themselves in breach of the planning laws. She expressed her belief that the construction of the wall was in anticipation of an application for planning permission for a housing development and raised doubts as to the respondent's belief that the development was exempt. Reference was made to the fact that the respondent, in response to another warning letter under s. 152 in respect of another wall, had made application for retention permission for that wall which was also granted; and an issue was raised regarding compliance with the condition attached to the retention permission. She also stated her belief that the open market value of the lands exceeded €3,000,000 and that they had been acquired in 2006 for in excess of €5,000,000.

23. Mr Kavanagh, engineer, swore an affidavit on 29th April 2019. This was submitted on behalf of the applicants. He refuted certain assertions contained in Mr. Cagney's affidavit and reiterated his concern that the design of the wall was fundamentally flawed.

24. Mr. Gunne, auctioneer, in an affidavit sworn in support of the land valuation, stated that his valuation of the property was based on a valuation of €300,000 per acre, giving a gross value of €3,111,000. He avers that the residence was valued at €425,000 and given that it may be necessary to sacrifice the residence or to pay a premium for access, the net value of the land was, in his opinion, just over €3 million. Mr. Gunne avers that since the date of his first valuation, he learned that the respondents also have additional adjoining landholding which was not included in his initial evaluation. Reference is also made to a right of way which the respondent benefits over adjoining property. In conclusion, Mr. Gunne confirmed his valuation of €3,111,000.

25. These affidavits led to a further extensive affidavit in reply from Mr. Carroll. He referred to the meeting of engineers on 9th April, 2018. He rejected the suggestion that the application for retention was provoked by the institution of these proceedings. He exhibited a report from valuers, Sherry Fitzgerald Carroll, in relation to the valuation of his lands. It is fair to observe that this is more detailed than Mr. Gunne's.

26. The provisions of O. 99 of the Rules of the Superior Courts provide that, although ultimately it is a matter for the discretion of the court, an award of costs follow the event. If the court is minded to dis-apply this rule then, in accordance with dicta in *Godsil v. Ireland* [2015] 4 I.R. 535, it can only do so on a reasoned basis and one which is rationally connected to the facts of the case to include the conduct of the participants. The court has also been referred to a passage from *Delaney and McGrath on Civil Procedure,* (4th ed., 2018) that it enjoys a wide discretion not to award costs or to reduce the costs awarded where it disapproves of how the proceedings were conducted by the successful party.

27. The parties now essentially agree that the proceedings have become moot, and that the only issue which is now outstanding is that of costs. Both parties seek their costs.

28. Mr. O'Donnell B.L, counsel for the applicant, in reliance on the decision of Clarke J. (as he then was) in *Telefonica O2 Ireland Ltd v. Commission for Communications Regulation and Others* [2011] IEHC 380, a decision which shall be discussed in more detail below, submits that the generally accepted principle that where proceedings become moot as a result of an external event that the parties should bear their own costs does not apply because these proceedings were rendered moot by the actions of the respondent in applying for retention permission. The decision of An Bord Pleanála, which had the effect of rendering the proceedings moot, therefore, was not an event which was truly independent of the actions of the parties. It is submitted, that the court should exercise its discretion to award costs in favour of the applicants. To this end, significant emphasis was placed by counsel on the conduct of the respondent in constructing a wall at a height which attracted the requirement for permission under the Act of 2000, without prior notification to the applicants and which, despite their concerns and objections, he completed in a hasty manner. Emphasis is placed on certain assurances or representations made by respondent when the matter first arose on 4th April, 2018, that the wall would not be constructed until the following Monday but that the work was substantially completed earlier, over the weekend, and in spite of correspondence between the parties. It is submitted that the wall was built at a height which was considerably in excess of that for which permission is required under the Planning and Development Regulations. On 17th April, 2018 the planning authority issued a warning letter which indicated that unauthorised development may have been carried out and the applicants were unaware that the respondent intended to apply for retention permission before these proceedings were instituted. It is contended that the application for retention was made in response to the proceedings. Mr. O'Donnell B.L. submitted but for the proceedings being brought, the unauthorised structure would have remained in situ and

that it was only the subsequent decision of the Board that the structure obtain the benefit of planning permission that render that which was unauthorised, authorised.

29. Significant emphasis is placed on s. 162(3) of the Act of 2000 which provides that no enforcement action, including an application under s. 160 shall be stayed or withdrawn by reason of an application for permission or retention of unauthorised development under s. 34(12) or the grant of that permission. Counsel submits that this provision applies in a situation such as this, and that it was designed to avoid the type of scenario which is relied upon by the respondent and for which the provisions of s. 162(3) were enacted. It is submitted that the respondent waited for a considerable time before taking action despite having been notified of the applicants' concerns both verbally and in writing. Further, it is submitted that the respondent refused to allow inspection notwithstanding concerns raised about the structural stability of the wall.

30. The respondent's position is that he did not make the application for retention in response to the institution of these proceedings. It was made in consequence of the warning letter and on the basis of the advice which he received from his engineer. He believed that he did not require planning permission, as the construction of the wall to the height intended was exempt from the requirement to obtain planning permission. He states that his approach has been to limit the cost of the proceedings at an early stage, but that the applicants have added to the costs by the submission of further affidavits in April, 2019. This had the effect of significantly enlarging the case subsequent to the granting of the retention permission. The respondent also maintains that the filing of the affidavits must be viewed in the context of the respondent having made proposals to avoid escalating legal costs with particular regard to the letter of the 7th August, 2018, which went unanswered.

31. Mr. Connolly S.C., counsel for the respondent, submits that s. 162(3) of the Act of 2000 does not preclude the court from exercising its discretion in relation to costs in favour of the respondent. He points to several matters which, he submits, had the case gone to a full hearing, in accordance with the principles in *Morris v. Garvey* [1983] I.R. 319, as applied in *Meath County Council v. Murray* [2018] 1 I.R. 189, may have resulted in the court, in the exercise of its discretion, refraining from making the order. Counsel confirmed that it was not being suggested that, if deciding the case, the court might take another view i.e. that it was at all times an exempted development. Nevertheless, he advanced these matters such that the court may take into account in concluding that there was a plausible view that the respondent, or any other person might take, that this was an exempted development; and that his mistaken belief in that regard is also plausible.

32. In *Murray*, Mc Kechnie J. stated:-

> *"90. What, then, are the factors which play into the exercise of the Court's discretion? From a consideration of the case law, one can readily identify, inter alia, the following considerations:*

(i) The nature of the breach: ranging from minor, technical, and inconsequential up to material, significant and gross;

(ii) The conduct of the infringer: his attitude to planning control and his engagement or lack thereof with that process:

- *Acting in good faith, whilst important, will not necessarily excuse him from a s. 160 order,*
- *Acting mala fides may presumptively subject him to such an order;*

(iii) The reason for the infringement: this may range from general mistake, through to indifference, and up to culpable disregard;

(iv) The attitude of planning authority: whilst important, this factor will not necessarily be decisive;

(v) The public interest in upholding the integrity of the planning and development system;

(vi) The public interest, such as:

- *Employment for those beyond the individual transgressors, or*
- *The importance of the underlying structure/activity, for example, infrastructural facilities or services.*

(vii) The conduct and, if appropriate, personal circumstances of the applicant;

(viii) The issue of delay, even within the statutory period, and of acquiescence;

(ix) The personal circumstances of the respondent; and

(x) The consequences of any such order, including the hardship and financial impact on the respondent and third parties,

91. The weight to be attributed to each factor will be determined by the circumstances of a given case. Some, because of their importance, may influence whether an order is or is not in fact made: others, the scope, nature or effect of that order. This list is not in any way intended to be exhaustive, and it may well be that other matters might require consideration in an appropriate case. For example, in Pierson v. Keegan Quarries Ltd. [2010] IEHC 404, Irvine J took account of the hardship which demolition might cause to third parties, and referred also to the possible effect of the developer having relied in good faith on professional advisers. The jobs of non-related members of the public, mentioned at para. 90(iv), above, featured in Stafford v. Roadstone Ltd and Dublin County Council v. Sellwood Quarries Ltd [1981] I.L.R.M. 23. There are many other examples. However, the above list is generally representative of the type of factors which the judge will normally be called upon to consider. It is thus an appropriate framework within which to analyse the High Court's exercise of discretion in this case, conducted, as it only could be, by reference to the traditional or customary approach (see paras. 134-139, infra)..."

33. Adopting the above approach, Mr. Connolly S.C. points to the following factors:

a. The reasonable belief of the respondent, objectively verified, that the construction of the wall was an exempt development, or that he held a plausible view that the development was exempt. Particular emphasis is placed on his belief that it was permissible to measure the height of the wall from the perspective of the lands whose amenities were said to be affected;

b. The concern about the hazard allegedly created by the wall brought a sense of urgency into the proceedings was *nihil ad rem* and unrelated to planning matters;

c. The failure of the applicants to bring to the court's attention in the grounding affidavit the events and communications which occurred between the time of the construction of the wall and the date of the application before the court, particularly those in relation to the safety of the wall. The correspondence and a report on the safety of the wall which had been commissioned by the respondent and furnished to the applicant in April, 2018 was not exhibited or referred to in the grounding affidavit. The report of the engineer which had been furnished to the applicants on 9th April, 2018 was not exhibited in the grounding affidavit of Ms. McArdle, something which is described as significant omission particularly where it was Mr. McMahon's opinion that the wall would not adversely impact any existing drains or other services. In passing, it is to be noted however, that this letter did not address the planning status of the wall or whether permission was required for a development of such a nature and height. It is contended that by failing to refer to the available information unfairly coloured the urgency of the case from a safety perspective. Further, an application to the local authority under the dangerous structure legislation was not notified;

d. The absence of concern by other neighbours;

e. That the respondent applied for retention in response to the warning letter, rather than the proceedings and that in so doing he acted on the advice of his engineer;

f. At the time of the institution of the proceedings, the applicants were aware that the council had been investigating the issue, because they had made the complaint and a s. 152 warning letter had issued;

g. The applicants must be presumed to have been on notice of the making by the respondent of the application for retention, something which had been triggered by the Council's planning enforcement process but nevertheless, these proceedings were brought. Emphasis is placed on the site notice and the planning officers report on the 28th June, 2018 that the site notice was displayed and was in accordance with regulations and therefore, it was submitted that notices were validly in place and that the applicants ought to have been on notice of them. The respondent relies on what it describes as the presumption that the public notification

requirement in relation to the making of their retention application was complied with;

h. The applicant's initial demand for the removal of the wall, rather than its regularisation;

i. The unreasonable failure on the part of the applicant to furnish the respondent an engineering report and the exchange between the parties in relation to the engineer and the basis upon which an inspection might take place. It is emphasised in this regard that the applicants' engineer was not refused inspection facilities;

j. The respondent also maintains that the applicants' purported structural concerns in relation to the wall are unsustainable given the expert evidence which has been adduced. While the respondent maintains that this was a matter of agreement between the engineers, Mr. Murphy in his affidavit disputes this. The wall is structurally sound and has been built within the respondent's private property and within the curtilage of his dwelling.

k. It is suggested that the breach of the planning code in this case was undoubtedly "*minor, technical and inconsequential*", as discussed in Murray and that it was therefore wholly inappropriate for the applicants to seek to invoke the jurisdiction of the court under s. 160 in pursuit of what is described as a personal advantage, being the preservation of a view to the rear of their property, and a view which is beyond the rear garden boundary wall. No such general right exists;

l. The attitude of the planning authority - reliance was placed on the fact that no enforcement notice was ever issued.

m. It is also submitted it cannot be plausibly be argued that the public interest in upholding the integrity of the planning and development system necessitated the bringing of the proceedings.

34. The court has been referred to a number of authorities including the decision of Simons J. in *Tanager DAC v. Ryan* [2019] IEHC 649 as authority for the proposition that account is to be taken of factors such as:-

> *"whether the proceedings were seeking a private personal advantage, and whether the legal issues raised were of special and general public importance and potentially relevant but not necessarily determinative."*

35. Reference is made to the conduct of the applicants, that they have constructed out office buildings on a common boundary and that they have been in breach of the planning laws. The respondent also makes the point that following this a number of affidavits which were delivered on behalf of the applicants, including a supplemental affidavit from Ms. Sharon McArdle of the 29th April, 2019, Mr. Stephen Gunne, auctioneer, of 26th April, 2019 and Mr. Kavanagh, chartered engineer on the 29th April, 2019, that this necessitated the filing of further affidavits by both the respondent and by an engineer on his behalf.

36. In so far as the respondent's application for costs is concerned, the court has also been addressed in relation to the provisions of the Environment (Miscellaneous Provisions) Act 2011 *("the Act of 2011")*. *In North East Pylon Pressure Campaign Limited v. An Bord Pleanála No. 5* [2016] IEHC 490, Humphreys J. observed at para. 32:-

> *"The upshot is that the not-prohibitively-expensive rule applies (to the fullest extent that it is possible to read national law to that effect) to challenges based on national environmental law within the field of EU environmental law even if the challenges do not relate to the public participation rules. Thus there is no need to get unduly caught up in classifying challenges as relating to public participation only as opposed to national environmental law within the EU law field more generally because ultimately both come to the same thing. As regards the rider that national law should be read to this effect 'to the fullest extent possible', this is not a problem for Ireland as the discretion arising from O. 99 is sufficiently flexible that it can always be read in an EU law-compatible manner."*

37. In essence, the respondent maintains that if the court should determine that s. 3 of the Act of 2011 applies, the respondent is entitled to seek its costs pursuant to s. 3(3)(b) of the Act of 2011.

38. In response to these particular submissions, Mr. O'Donnell B.L. emphasises the statutory basis for an application under s.160 of the Act. He submits that the wall was built at a height which ought not to be regarded as a minor and technical or inconsequential breach, given that the height to which it was constructed was well in excess of that in respect of which permission is required. There was no acquiescence over a long period nor has there been shown gross and disproportionate hardship such as might have influenced the court to exercise its discretion to refuse any relief. Counsel relies on the decision of Morris v. Garvey in this regard. There, Henchy J. stated:-

> *"When s. 27(2) is invoked, the Court becomes the guardian and supervisor of the carrying out of the permitted development according to its limitations, and in carrying out that function it must balance the duty and benefit of the developer under the permission as granted against the environmental and ecological rights and amenities of the public, present and future, particularly those closely or immediately affected by the contravention of the permission. It would require exceptional circumstances (such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship, or such like extenuating or excusing factors) before the Court should refrain from making whatever order (including an order of attachment for contempt in default of compliance) as is "necessary to ensure that the development is carried out in conformity with the permission". An order merely restraining the developer from proceeding with the unpermitted work would not alone fail to achieve that aim but would often make matters worse by producing a part completed structure which would be offensive to the eye as well as having the effect of devaluing neighbouring property."*

Further, he submits that the respondent has displayed in his affidavits a knowledge of planning laws and that if he was confident that it was an exempted development, he should have had no difficulty in approaching his neighbours in advance. He submits that the making of the retention application was, in effect, an acceptance that planning permission was required and that at the when the application was lodged, the wall was an unauthorised structure and the proceedings were in being. If a genuine mistake was made by the respondent, Mr O'Donnell B.L. observes that no remorse for such a mistake was expressed in the replying affidavit.

39. I have taken into account the above submissions and the responses thereto, all of which I have considered in balancing how the discretion of the court ought to be exercised.

40. These proceedings were instituted on the 8th June, 2018 seeking an order pursuant to s. 160 of the Act of 2000 to restrain the unauthorised development being the boundary wall which as it transpires and despite the respondent's belief, was one to which the planning inspector, Mr. Niall Haverty, concluded that because of its height dimensions, required permission.

41. It must also be considered, nevertheless, that certainly in the initial stages, the applicants' concerns centred on the safety and stability of the wall. Letters were issued by and on behalf of the applicants on 5th April, 2018 and 11th April, 2018. The letter of 5th April was sent by the third named applicant who requested that he refrain from taking any further steps to construct any wall, foundation or other structure next to or near the wall at the rear of their property:-

> *"so as to allow us the opportunity to be appraised of the extent of the proposed works and ascertain whether or not they would affect the structure, stability, amenity, or otherwise of our property and/or the connection small property to and from the public main services."*

She felt that the request was reasonable in circumstances where the applicants had no prior notification of the proposed works such as would have afforded them an opportunity to ascertain the position. The letter concluded: "*we trust you will appreciate our concerns herein and would hope that this matter might be resolved amicably in due course*".

42. Unfortunately the response of the respondent was to persist with the works and while it may be that engineers were retained to look at the structure and stability of the wall, the fact remains that the wall was constructed despite the request of the applicants that it not be. In his replying affidavit, Mr. Carroll states that he built the wall to improve the security zone boundary because the boundary arrangements in place at that time consisted of a broken down concrete post and chain link fence. In the same affidavit, he avers that he had a number of concerns with respect to the applicants' low level garden wall. He states that these did not meet the appropriate standards for a wall retaining so many cubic tonnes of soil, it had no piers or expansion joints and was built with a single course of block laid on its edge. He also expressed concern about the lack of privacy and security. Nowhere is it suggested, that prior to his decision to construct this wall had he

raised any such concerns with the applicants. It is also evident from the respondent's affidavit, that he accepts that the third named applicant, Ms. Olivia McArdle, when she approached him on 4th April, enquired as to when he proposed to construct the wall and that he responded to her that it would probably be Monday of the following week. The works continued. He accepts that on 5th April, Ms Olivia McArdle once again leaned over the wall and requested that he cease all works. She queried the height of the wall because she thought the wall should only be six foot high. The respondent avers that he indicated to Ms. McArdle that it was his understanding that it was permissible to build the wall of up to 2m in height without planning permission, and that such measurement be taken from the ground level point on his side of the boundary line. This was above her foundation level before the pre-existing soil was stripped away. He informed her that the finished wall would be less than 2m above ground level on her side. It is clear, therefore, on the respondent's own evidence that the issue of the requirement for planning permission, or the lack of such requirement, was discussed as early as 5th April, 2018. It is also clear that when the wall was being constructed over the weekend, despite the protestations of the applicants, the respondent continued with the work and it is also of note that in his affidavit sworn on 6th September, 2018, he accepts that on Sunday, 8th April, 2018, Ms Olivia McArdle stated *"... that I had deliberately misled her because the workers had started on site on Saturday and not on Monday."* Mr. Carroll does not, in this affidavit, suggest that he made any response to this.

43. While the applicants maintain that the works were substantially completed by Sunday, 8th April, the respondent maintains that it was not until the 11th April that works were substantially completed, but other works including backfilling, repointing, drainage weep installation and closing of cavities were put on hold because of the threats in correspondence "*and the present proceedings which issued from the applicants' solicitor.*" It is also evident from the respondent's affidavit and in particular para. 19, that he gave some consideration to planning requirements. He avers that he interpreted the regulations to mean that the wall was an exempted development up to 2m in height measured from the pre-existing ground level before any foundation excavation took place. This corresponds with the averment regarding the discussion which he says that he had with Ms. McArdle on site on 5th April, 2018.

44. It appears that the focus of the meeting which occurred between the parties' engineers on Monday 9th April 2018 was on the structural integrity and safety of the wall, rather than on planning considerations. This is also evident from the letter of 11th April, 2018, written on notepaper of Messrs. McArdle and Co., a firm of solicitors in which the names two of the three applicants appear on the letterhead, in which the principal expressed concern relating to the structural impact of the works on the applicants' property. Proceedings were threatened. A request was also made for all planning permissions relating to the subject works together with the engineer's certificate of compliance in respect of same. Thus, it appears to me to be evident that planning issues were under consideration. Further, it emerges from para. 6 of the respondent's affidavit sworn on 11th June, 2019, that the respondent was aware that the warning letter had issued in response to a complaint to the planning enforcement section of the local authority, by

way of submission of an enforcement complaints form dated 13th April, 2018, on behalf of the applicants. He also avers that an official in the council planning enforcement section confirmed to him on 22nd May, 2018, in advance of the institution of these proceedings, that:-

> *"whilst rightly respecting the anonymity of the complainant, that receipt of the complaint… was officially acknowledged in writing to the complainant, together with confirmation that the council were investigating the matter".*

The respondent further accepts that the issuing of the warning letter was a matter which he considered to be of the utmost seriousness.

45. The letter of 4th May, 2018 from the applicants' solicitors, while heavily emphasising the issue of trespass and safety, advised that the applicants reserved the right to apply for any necessary orders to ensure that the danger was removed.

46. In all the circumstances, I am satisfied that prior to the institution of the proceedings, while the principal focus was on the safety of the structure and issues relating to trespass, the respondent ought to have been aware that the applicants were concerned, *inter alia*, about the planning status of the wall. There is no evidence of an attempt being made prior to the proceedings to expressly or directly communicate with the applicants or otherwise inform them that an application for retention was in contemplation or was in the process of being made, save for the erection of a site notice which I address below .

47. While the respondent maintains that he was of the belief that he did not require planning permission, nevertheless, he does not appear to have made appropriate inquires either before construction or when objection was raised.

48. With regard to issues relating to engineering inspection prior to proceedings, any dispute between the parties as to the basis on which such inspection might take place or the requirement for an indemnity, was removed when the parties consented to an order for inspection on 2nd July, 2018. It also seems to me that the issue of the planning status of the applicants' premises was unlikely to have been raised but for these proceedings.

49. It seems to me that in balancing all matters to which Mr. Connolly S.C. and Mr. O'Donnell B.L. have referred and which, had this case gone to a conclusion, a court might have had regard to in determining whether to exercise its discretion to grant the relief claimed under s. 160, significant weight must be attached to the actions of the respondent from the outset, without which this dispute might never have arisen. While prior consultation with the applicants may not have been required as a matter of law, one would have thought that in order to maintain good neighbourly relations, matters ought to have been approached differently by the respondent, particularly when objection was raised. Perhaps had that been done, matters may have turned out differently.

Decision

50. Having considered the applicable legislation and the authorities, I am satisfied that it remains the position, in a planning law context, but with particular regard to the facts of

this case, that this Court retains a discretion in relation to costs as specified in O. 99 of the Rules of the Superior Court. Therefore, had there been an event, on the basis of the rules and on the authorities, costs ought to follow that event unless there is good, expressed and stated reason to the contrary. Where proceedings become moot, different considerations may apply to the exercise by the court of its discretion. *Cunningham v. The President of the Circuit Court* [2012] 3 I.R. 222 and *Telefonica O2 Ireland Ltd* indicate that the default position is that there should be no order as to costs where the proceedings have been rendered moot by the happening of an external and independent event or occurrence, over which the parties have no control. This was addressed by Clarke J. (as he then was) in *Telefonica O2 Ireland Ltd* at para 2.6.1 of his judgement where he observed:-

> *"2 6.1A question can become moot for a whole range of reasons. It is impossible to be overly prescriptive as to the proper approach which the court should adopt for the range of factors that may be relevant are wide, However, it seems to me that a factor which is at least of some significance is an analysis of how it came about that proceedings had become moot. Sometimes (as was the case in Eircom), external factors over which the parties have no control render proceedings moot. In many such cases there may at least be an argument for the court making no order as to costs. It clearly would, at least in the vast majority of cases, be an unacceptable use of scarce court resources for a hearing to have to go ahead to decide a moot issue simply for the purposes of deciding who should pay the costs. Indeed, given that all that will be at issue are the costs up to the time when the proceedings become moot, it would seem particularly foolish for parties to have to incur much more costs solely for the purposes of deciding who should bear the costs up to the point when the case became moot."* (emphasis added).

Having analysed the position of both parties in such a situation, he continued:-

> *"That analysis seems to me to lead to a view that a court should favour making no order as to costs in proceedings which became moot in the absence of other significant countervailing factors. <u>However, that analysis is based on a situation where the case becomes moot by reason of factors entirely outside the control of the parties.</u> It seems to me that somewhat different considerations apply where the reason (or at least a significant contributory reason) to the proceedings becoming moot derives from the actions of some but not all of the parties to the case."* (emphasis added)

Referring to the decision of the Supreme Court in *Murray & Anor v. Commission to Inquire into Child Abuse* [2004] 2 I.R. 222, he observed at para 6.6.5:-

> *"It seems to me, therefore, that a significant factor to be taken into account in the exercise of the court's discretion as to costs in proceedings which have become moot is to analyse whether it can reasonably be said that the actions of any relevant party have rendered the proceedings moot. If that be so, then that is a significant factor to be taken into account in the award of costs. The situation with*

which the court is then faced remains one where, in the absence of trying a moot case, the court will not know who would have won. However, the situation of any party who was not involved in rendering the issue moot, in not being able to establish that their side of the case was right, has resulted not from any action which that party took or, indeed, from some entirely external event over which no one had any control, but rather from actions taken by their opponent. That is a factor which ought weigh significantly in favour of the grant of costs to the party who was not involved in the action which led to the proceedings being moot. This remains the case even where, as here, there were entirely understandable reasons why the parties took the actions - settling the case - which they did."

51. On the facts, I am satisfied that a decision was made by the respondent to seek retention some weeks prior to the institution of these proceedings. This is evident from the letter written by Mr. Herr on the 2nd May, 2018 which confirmed that the application for retention would be made within two weeks. Nevertheless, while that decision may not have been made in response to the institution of proceedings, it was significantly prompted by what had occurred up to that time. There is no evidence, however, that the intention of the respondent to apply for retention was expressly communicated to the applicant in advance of the institution of the proceedings. The respondent maintains, however, that the applicant ought to have been aware of the application because it was made in response to a warning letter which he had received from the local authority and which warning letter had been precipitated by the applicant's complaint. In essence, the claim of the respondent in this regard is that the applicant was precipitous in seeking the relief sought in these proceedings.

52. In consideration of why the proceedings became moot, the applicants submit that the decision of the Board is not a truly independent event, but one to which the respondent contributed. The respondent maintains that it does not follow that by engaging in the statutory process that one has or assumes control over the outcome of that process or that it is or becomes a unilateral act; and that the process of application and granting retention is one in which an independent decision is made by an independent body.

53. It is difficult to accept that where a person a) who is subject to enforcement proceedings, or where he or she has been in receipt of a warning letter; and b) where at the time of the institution of the proceedings he or she may have been in default of his or her planning obligations; and c) is subsequently successful in his or her application for a retention permission thus thereby bringing the proceedings to a stage of mootness, that he or she can thereafter maintain that this is a truly independent event over which he or she has no control. Here the granting of the retention permission could not have come about without the application by, and participation of, the respondent in that process. The respondent contributed significantly to that process.

54. While each case must be considered on its merits and within its own factual and legal context, it seems to me that the court's conclusion in this regard is reinforced in the particular context of planning enforcement legislation. In my view the proposition

advanced by the respondent is difficult to reconcile with the provisions of s. 162 (3) of the Act of 2000, which expressly provides that no enforcement action, including an application under s.160, shall be stayed or withdrawn by reason of an application for retention of permission under s. 34(12) or the grant of that permission (emphasis added). To hold that the granting of permission in respect of the subject matter of the enforcement action thereby renders those proceedings moot would appear to be inconsistent with the express provisions of that subsection. I am therefore not satisfied that it has been established that, as a matter of principle, because the proceedings are now moot that the generally stated proposition that there should be no order as to costs applies. Thus, I am not satisfied that the circumstances which arise in this case require the application of any general principle that each party should be required to bear its own costs on the grounds of mootness of proceedings.

55. Nevertheless, there continues to remain the issue of the manner in which the court ought to exercise its discretion in the light of the necessity, timing or circumstances surrounding the commencement of proceedings. On this issue, it appears to me that, on the authorities, the court is required to assess the overall circumstances including the conduct of the parties. Further, it is also relevant to consider the criteria to which this Court has been referred and as outlined in *Morris v. Garvey* and as discussed in *Murray* in the context of planning injunctions.

56. In my view, the failure of the respondent to engage with the applicants in advance of the works, and the expedition with which such works took place contrary to certain representations made as to when they might commence, contributed significantly to the subsequent course of events and to the institution of these proceedings. While it may have been, and on the facts I am satisfied that it was, decided that an application for retention was to be made considerably in advance of the institution of the proceedings, it is clear that this intention was not communicated to the applicants. The fact that a site notice may have been in place at 8a.m. on the morning on which the grounding affidavit was sworn does not appear to me to be of great significance. Such notices are required to be put in place for particular periods of time to give the public a reasonable opportunity to be aware of the application in respect of a proposed development. That someone does not see that notice immediately when it is erected is not, in my view, a matter for which he or she ought to be criticised, and this is particularly so when a letter in advance of action had been served. Again, a simple communication would have removed any mystery about what was intended. Further, placing the site notice in position did not alter the planning status of the wall or render authorised that which may have been unauthorised.

57. In all the circumstance, I am satisfied that in so far as the timing of the proceedings is concerned, the applicant is not to be criticised, particularly in the light of the threat of proceedings, the conduct of the respondent in the hasty construction of the structure, which on all the evidence, was unauthorised because of its height and in the absence of communication in advance that retention would be sought. That the respondent may have harboured a subjective belief that planning permission was not required must be viewed in the context of the immediate objection by the applicants to what was taking place.

58. The respondent, however, also raises issues concerning the failure of the applicants to disclose the course of dealings between the parties and communications with the local authority, together with that authority's response, relating to the safety of the wall. Mr. O'Donnell B.L., counsel for the applicants, submits that the applicants could not to be criticised for their failure to inform the court about these matters. He submits that this is particularly so where no interim or interlocutory relief is sought and where it is anticipated that after the commencement of proceedings a further exchange of affidavits, and the joining of the issues between the parties, is to be anticipated.

59. In applications under s. 160 it is accepted that even where a prima facie case for relief is established, the court retains a discretion to refuse relief, to be exercised in accordance with principle. In my view, if a position is stated on affidavit which does not provide a complete and fair picture of the circumstances leading up to and surrounding the application, this may be taken into consideration by the court in determining how it might exercise its discretion. The weight to be attached to this must relate to the nature of the application and the relief, statutory or non-statutory which is sought. Here, the matters that were not fully expressed to the court concerned issues relating to the safety of a structure, rather than its planning status, nevertheless it is a factor which in the particular circumstances of the case I ought to take into consideration.

60. It also appears to me that I should consider, and take into account, the conduct of the parties while the proceedings were ongoing including, in this case, the lack of response to the respondent's invitation in August, 2018 that matters might be stayed pending the decision of An Bord Pleanála on appeal. In view of the provisions of s. 162(3), it may be said that there was no obligation on the applicants to desist from pursuing the proceedings, and further, it may also be contended that had the respondent applied for a stay on the proceedings it is likely to have been refused in the light of the express wording of s. 162(3). Nevertheless, I do not believe it is appropriate, when considering the question of costs, that the reply to communications or the failure to do so should be ignored by the court.

61. The contents of the affidavits which followed subsequent to August, 2018, on both sides, far from lowering the temperature served only to increase the tension with allegations of a hate campaign, breach of the Act of 2000 by the applicants - a matter which appeared not to concern the respondent up to this time - and the introduction of matters regarding other planning issues concerning the respondent, and his regularisation thereof; again something which does not appear to have exercised the minds of the applicants before now.

62. The parties are neighbours and may continue to be long after these proceedings have concluded. Taking everything into account, in my view, any inclination of the court to award costs of the application, up to the time of the proceedings becoming moot, must be considered in the light of the absence of constructive communication thereafter, to which both parties have contributed.

63. I have come to the conclusion that in all the circumstances and weighing all matters in the balance including the respective conduct of the parties, the applicant should be entitled to their costs up to the date on which an event occurred which rendered the proceedings moot, namely the 12th December, 2018 and that the court should make no order as to costs incurred by the parties arising thereafter. It seems to me that the primary precipitating factor giving rise to the dispute between the parties and the subsequent institution of the proceedings was the conduct of the respondent in erecting a wall of a height, which was shown in the events which transpired, required planning permission and which was constructed in a hasty fashion without prior consultation and communication with the respondents, his near neighbours.

64. As to the level of those costs, I have considered the affidavits of the parties including the supporting affidavit of Mr. Gunne and in particular the reports of Sherry Fitzgerald Carroll which have been exhibited to the respondent's affidavits. There is no issue but that this court has jurisdiction to entertain this application. Rather the issue is whether, given the jurisdictional limits, the proceedings ought to have been brought in the Circuit Court. In my view, the onus of proof lies on the applicants to establish that which was alleged in the initiating grounding affidavit, that the value of the respondent's lands on the open market was in excess of €3 million. On the basis of the affidavits and evidence before the court, I am not satisfied that the applicants have discharged the onus of proof on this issue. In view of the description of the property outlined in the application and grounding affidavit, and the evidence and contents of the reports of the valuers, I am not, and cannot, be satisfied that it is more likely than not that the lands the subject matter of these proceedings exceed €3 million in value. I find the report of Sherry Fitzgerald Carroll, dated 21st May, 2019, which is detailed in its description of the lands and has had regard to comparators, more convincing in this regard. Some emphasis was placed during the course of argument on the description of the land outlined in the grounding affidavit, which were confined to the property comprising one folio of land owned by the respondent. In my view, on the basis of the analysis conducted in each of the reports and in the affidavit of Mr. Gunne, even if one were to consider the land as comprising those contained in four rather than one folio and extending to 13.08 acres, rather than 4.27, I remain more convinced of the respondent's valuation.

65. For similar reasons as outlined above I am not satisfied that the respondent is entitled to a costs order. Thus, issues which may have arisen pursuant to the Act of 2011, do not require to be considered.

66. Therefore the applicants are entitled to their costs up to the time of the decision of An Bord Pleanála on 12th December, 2018, but not thereafter, costs to be adjudicated on the Circuit Court scale. Each party must bear the costs incurred by them after that date.