THE HIGH COURT

[2021] IEHC 542

RECORD NO. 2020 206 CA

BETWEEN

KERRY COUNTY COUNCIL

PLAINTIFF

AND

MICHAEL MCELLIGOTT

DEFENDANT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 30 July 2021

Summary

1. This is an appeal by Kerry County Council (the "plaintiff") from a decision of the Circuit Court in the South Western Circuit of Kerry of 13 November 2020 whereby, pursuant to s. 160, it was ordered that Mr. McElligott (the "defendant") carry out works necessary to render his development at Ross Court, Tarbert, Co Kerry compliant with planning condition 12 of a 2008 planning permission. No order was made in relation to additional reliefs sought by the plaintiff seeking the removal of gates. This appeal is concerned solely with the failure of the Circuit Court to grant those additional reliefs.

2. The gates in question do not have planning permission and I have concluded they also prevent compliance with condition 12 of the existing planning permission. The defendant has raised a large number of what might be described as technical defences in relation to jurisdiction, as well as asserting there is insufficient proof of unauthorised development, that it is for the plaintiff to establish that no exemption applies that would render the presence of the gates compliant with planning rules, and that the plaintiff was motivated by considerations unrelated to planning when bringing these proceedings. I have concluded that none of these arguments are meritorious. In relation to evidence of unauthorised development, I am satisfied with the evidence adduced by the plaintiff, and I identify and consider same below. Insofar as the defendant invokes exemptions, I conclude that if the defendant wishes to rely upon an exemption or other exception, he must identify it and prove it. No such identification or proof has been proffered. Finally, the discretionary factors that I must consider in the context of s.160 all point to the grant of the relief: the defendant has never sought to explain the reason for the erection of the gates or explain why they were compliant with the 2008 planning permission; he has made unwarranted complaints about the motivation of the plaintiff in taking these proceeding; and, most significantly, the gates he erected have resulted in a traffic hazard over a considerable period, impacting in particular on the users of a local GAA club (who include young children). Accordingly, I have granted the relief sought under s.160.

Nature of works

3. The development in question is for four residential houses and associated parking at Ross Court. Planning permission was granted for two houses in 2005 under planning reference 1974/05 (the "2005 permission"). In 2008 an application was made for a further two houses. As part of that application a letter of 8 May 2008 was sent by Paul O'Dowd & Associates, consulting engineers, on behalf of the defendant. In that letter, Mr. O'Dowd stated that the proposed vehicular access to the site via the laneway was as a result of earlier discussions had with Kerry County Council Planning Office but that they were

happy to regard the access through this laneway as pedestrian access only. The laneway in question is called Chapel Lane. I attach a copy of the revised site layout sent by Mr. O'Dowd showing vehicular access from Church Street only and pedestrian access to the laneway as appendix A to this judgment since understanding the layout of the site makes understanding the issues arising in this case easier to understand. It may be noted that Chapel Lane is simply described as "laneway" at the bottom left-hand corner of the site layout.

4. It is also important to understand there is a second laneway relevant to the issues arising in this case and that is the strip of land owned by the defendant between Church St. and Chapel Lane. That is described as the "defendant's laneway" in this judgment.

5. Planning permission was granted by the plaintiff under Planning Register 493/08 on 5 June 2008 (the "2008 permission"). Condition 12 dealt with the question of vehicular access and car parking. It provided as follows:

> *"the 2 no. dwelling houses shall be erected and located on the site as outlined on the site layout received on the 13th May 2008. Vehicular access to the dwelling houses shall be from the Church Street entrance only and car parking shall be provided as shown on the site layout received by the Planning Authority on the 13th May 2008"*

The reason given was to regulate and control the layout of the development.

6. Condition 12 is clear – there is to be no vehicular access other than from the Church Street entrance and car parking was to be provided as shown in the drawing i.e. recessed off the defendant's laneway to the right of the two sets of houses approaching the lane from Church Street. That parking is clearly identified in the site plan. It is clear from looking at the drawing that to access that parking, there must be unimpeded access from Church Street as vehicular access may only be from the Church Street entrance. Moreover, the defendant's lane is effectively a cul-de-sac and does not connect with Chapel Lane.

7. In 2015, complaints were sent to the plaintiff from users of the GAA pitch, Tarbert GAA, adjacent to the housing the subject of the application, which pitch is accessed through Chapel Lane. It was asserted that the occupants of the four houses (the defendant's tenants) were parking their vehicles outside the house on Chapel Lane, even though the planning permission only grants *pedestrian* access to those properties from Chapel Lane.

8. A letter was exhibited to the affidavit of Mr. Van Schoor of 14 June 2018 from Ms Maire Ni Scanlain, the parent of a child who plays at Tarbert GAA, of 4 March 2016, which referred *inter alia* to a gate having been constructed which prohibited access via Church Street. She said that the old gate had been recently removed and a new gate erected. A similar assertion was made in a letter of 4 April 2016 from Tarbert GAA, where Mr Joe Langan stated that a new gate had recently been erected across the authorised entrance to the

two houses in question in Church Street and photographs of the original gate and of the new gate were included.

9. On 4 March 2015, the defendant had applied to the plaintiff for permission to retain the houses with revised site boundaries and to vary the parking arrangements at the said house. The application was for 4 car parking spaces to be placed in front of the houses adjacent to Chapel Lane. In the site layout map that accompanied the application there was a drawing of a barrier across the defendant's lane close to the Church Street side and this was described as "*existing gate".*

10. A decision was made on 24 April 2015 to refuse the application on the basis that it would (1) *"contravene materially condition 12… The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area" and (2) "It is considered that the proposed development would endanger public safety by reason of traffic hazard, because the traffic movements generated by this development would be likely to cause an obstruction to road users."*

11. This decision was appealed to An Bord Pleanala and a decision was made on 7 August 2019, whereby the proposed development was refused permission on the following basis:

> *"Having regard to the planning history of the site and principles of good traffic management and attendant road safety, the Board considers that the existing vehicular access and car parking provision for the dwelling houses on the site are preferable to the alternative arrangements now proposed. It is considered, therefore, that the proposed development would result in an unwarranted material contravention of condition number 12 of the permission granted under planning register reference number 08/493 …."*

12. Following the complaints made to the plaintiff, the properties were inspected on 20 August 2015 and Mr Van Schoor, Executive Planner with the plaintiff, prepared an "Alleged Unauthorised Development Memo" on 10 December 2015. In that memo he noted that the defendant's laneway was closed off by means of timber gates and that there was not sufficient room for the identified parking spaces in the defendant's laneway. He recommended that an enforcement notice be served, requiring that the parking bays be marked out on the east side of the defendant's lane as per the plan of 13 May 2008 and that public access be permitted to the parking areas.

13. An enforcement notice in those terms was served on the defendant on 10 December 2015 requiring the defendant to carry out the works by 19 February 2016. On 15 February 2016 the plaintiff received a letter from architects on behalf of the defendant identifying that there were certain impediments to the defendant constructing the parking arrangements in compliance with his planning permission. No impediment was identified that would prevent the removal of the gates.

14. On 21 June 2016 Mr Jim Fox, Planning Enforcement Officer with the plaintiff prepared a further report and recommended the withdrawal of the earlier enforcement notice and the

serving of a new and more comprehensive enforcement notice. In his report Mr Fox identified additional matters and noted outstanding items, including that the car parking had not been provided and that there was a gate across the access to the area where parking is to be provided.

15. An enforcement notice was served on the defendant on 4 July 2016 requiring the removal of the gate across the entrance, as well as other steps, by 30 September 2016.

16. A further site inspection was carried out on 19 May 2017 and photographs of the development were taken by Mr Van Schoor. He exhibits an undated Alleged Unauthorised Development Site Report which refers to the fact that the defendant's laneway giving access from Church Street is closed off for access from Church Street by means of a padlocked timber gate. That gate is clearly identifiable on the photographs in the Report.

17. An affidavit was sworn by Mr Fox, Planning Enforcement Officer on 10 February 2020 where he avers that he visited the site on 30 January 2020 and drew up a report on 31 January 2020. At paragraph 2 he says that, on his visits to the site, he noticed that the access to the laneway where parking is to be provided continues to be blocked at the Church Street end by wooden gates. He says *"there is no planning permission in place for these gates. I say that these gates when closed prevent any access to the laneway for vehicles".* In his report dated 31 January 2020, he identifies a report he did on 30 June 2017 where he stated:

> *"the houses do not have direct access to the parking area as they are walled off from it. At present, the parking area only serves as an access to Mr. McElligott's property, a builder's yard, to the east.… Also the car park is closed off with a gate at the entrance, which is locked. (See photos 8 & 9). This gate is unauthorised".*

18. On the last page of the report of 31 January 2020 he refers to his site visit noting that *"the gates appeared locked but the padlock was placed wrongly and thus was ineffective. (This may or may not have been deliberate)".* Photographs number 8 and 9 show the gate in 2017. Photograph U show the gate on 30 January 2020.

Section 160 application

19. By way of motion brought on 24 July 2018 the plaintiff sought relief under s.160 of the Planning and Development Act 2000 as amended. The first relief in the motion was that the defendant comply with the conditions in the 2005 planning permission. The second relief was that the defendant comply with the conditions in his 2008 planning permission. Various other reliefs were sought, including the provision of parking spaces as per the site layout plan submitted to the plaintiff on 13 May 2008 and marking out same with paint.

20. The third relief sought, at paragraph (c), was as follows:

> *"(i) Open up the laneway intended to serve his said developments from Church Street, Tarbert, County Kerry for vehicular access;*

(ii) Remove the gateway placed across the laneway accessing the Defendant's developments."

21. By Order of 13 November 2020, the Circuit Court directed that the defendant carry out works necessary to render his development compliant with planning condition 12 of the 2008 planning permission. However, no order was made pursuant to the reliefs at paragraph (c). The plaintiff's appeal is in relation to the failure to grant them. These are the only reliefs I am concerned with in this appeal.

22. A further Order was made by the Circuit Court on 24 November 2020 directing that the defendant comply with the Order of 13 November 2020 within 6 months.

23. At the Circuit Court hearing, which I am told lasted for almost a day, the focus was on compliance with condition 12 in relation to the provision of parking. I understand that much of the submissions were focused on the fact that it was alleged that it was a practical impossibility for the defendant to comply with those conditions because of an error in the measurements that had originally been provided by the defendant's architect in 2008.

24. These objections were not successful and ultimately an Order was made compelling the defendant carry out the works necessary to render his development compliant with planning condition 12. Despite the fact that a defence of impossibility had been run in the Circuit Court, in fact it was submitted by counsel for the defendant in both written and oral submissions before me that the defendant had carried out the works directed by the Court, although it was also noted by counsel for the plaintiff that there is no agreement between the parties as to whether the works comply with the Order of the Circuit Court. No affidavit was filed in relation to this issue.

25. These issues are no longer live. Those parts of the affidavits and submissions dealing with whether the parking works can be carried out are irrelevant to this appeal. There is no equivalent averment or submission in relation to the removal of the gates. I therefore proceed on the basis that there are no practical impediments to removing the gates.

Appeal to High Court

26. There was no appeal by the defendant against the Order of 13 November 2020. The plaintiff appealed and by its notice of appeal, dated 20 November 2020, identified that it was appealing:

> *"… that part of the decision of the Circuit Court given herein on the 13th day of November 2020 not to grant the reliefs sought by the Plaintiff at paragraphs c(i) and c(ii) of the Originating Notice of Motion dated the 24th July 2018 and the decision of the Circuit Court not to grant an Order for the costs of the proceedings to the Plaintiff".*

Preliminary Objection to Jurisdiction

27. The defendant makes the following arguments by way of preliminary objection to jurisdiction.

28. First, he observes the plaintiff is seeking to appeal not the Orders made, but rather Orders not made, either in the Order of 13 November or 24 November i.e. there is no Order refusing the reliefs under (c)(i) and (ii). The defendant argues that under s. 37 of the Courts of Justice Act 1936 an appeal may only be brought against *"every judgment given or order made… by the Circuit Court"* and that an appeal may only be brought in respect of a positive Order. In short, the argument appears to be that if the Order had included the words *"and the relief sought at (c) is refused"*, it would be permissible to appeal but because that was not done, it is not possible to appeal the Order.

29. This approach seems to me to be an unprofitable exercise in semantics. Where a plaintiff comes to court seeking a number of reliefs and the order provides for the grant of certain reliefs and does not refer to any others, it is implicit in that order that there has been a refusal to grant the other reliefs sought.

30. It would certainly have been preferable if the Order in this case had contained an explicit refusal to grant the additional reliefs sought, but to read the Order as if there has been no decision upon the additional reliefs is, in my view, incorrect. This is confirmed by the fact that the Order refers to the Notice of Motion of 14 June 2018, which contains the reliefs at (c).

31. Moreover, the preamble to the Order refers to *"reading the pleadings and documents filed and hearing counsel for the plaintiff and counsel for the defendant".* There is no suggestion in the preamble to the Order that any part of the Notice of Motion was not disposed of by the Court, or that the Court was hearing only part of the application on the relevant date.

32. Further, the Order also deals with the matter of costs, which normally are dealt with at the end of an application. There is no suggestion that any aspect of the application was left over for determination on a further date. The fact that a further Order was made on 24 November 2020 addressing the time for compliance with the Order of 13 November 2020 does not alter the situation, since that Order is clearly only concerned with the period for compliance.

33. Additionally, contrary to what is asserted by the defendant, the reference in the notice of appeal to an appeal from the part of the decision "not to grant the reliefs" does not mean that this application is in substance a judicial review of the Circuit Court appeal. It is squarely an appeal against the decision not to grant the reliefs identified at paragraph (c) and as such is within the jurisdiction of the High Court as conferred upon it by s. 37 of the Courts of Justice Act 1936.

34. Accordingly, I find that the Order, correctly construed, refused the reliefs sought at (c), albeit implicitly rather than expressly, and therefore may be appealed against in this respect.

35. Second, it is argued that, if there is an appeal, it can only be a full appeal and as such all issues are to be reheard and that an appeal in part is not permissible. The defendant

relies on the *de novo* jurisdiction of the High Court under s. 37 in this respect, referring to s. 37 (2) which provides as follows:

> *(2) Every appeal under this section to the High Court shall be heard and determined by one judge of the High Court sitting in Dublin and shall be so heard by way of rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made, but no evidence which was not given and received in the Circuit Court shall be given or received on the hearing of such appeal without the special leave of the judge hearing such appeal.*

36. However, s.37(2) must be read in the light of s.40 of the 1936 Act, which makes it quite clear that an appeal in part is permissible. The relevant part of s.40 provides: *"(a) any such appeal may be limited to a specified part of the judgment or order which is the subject of such appeal;".* Equally, Order 61 rule (2)(1) of the RSC reflects that statutory provision, providing in relevant part: "*The notice shall state whether the whole or part only of such judgment or order is appealed from and in the latter case shall specify such part."*

37. An appeal in part is therefore envisaged by the 1936 Act and there is no difficulty with the plaintiff bringing such an appeal. That means that there is no obligation to rehear the entire matter.

38. All of the above means that I am only dealing with an appeal relating to whether or not the relief sought at paragraph (c) of the Notice of Motion should be granted. Because I am not addressing the issue of compliance with condition 12 and the provision of the parking spaces, I do not, contrary to the submissions of the defendant, have to deal with the consequences of setting aside the Circuit Court decision in relation to the provision of parking spaces.

Substantive arguments under Section 160

39. The case law on s.160 makes it clear that for an applicant to succeed in obtaining relief under that section, it must demonstrate (a) that unauthorised development is being carried out and (b) that the court considers it appropriate to make an order under s. 160 (1) requiring a cessation of that unauthorised development (see for example *Urban Entertainment* [2019] IEHC 620).

Is the development unauthorised?

40. I turn therefore to the first issue, whether the development is unauthorised. At paragraph 56 of *Meath County Council v. Murray* [2017] 1 I.R. 189, McKechnie J. made it clear that in the context of a s.160 application, it is for the court to decide whether an alleged breach is unauthorised development: *"…When [the Council is] so acting, it is like any other public body seeking to enforce one of the functions assigned to it by the underlying legislation. The ultimate decision of "authorised" or "unauthorised" in the enforcement context is that of the court. No presumption whatsoever arises in any way".*

41. The plaintiff asserts that the erection of the gates is unauthorised development in circumstances where there is no planning permission for the gates and where the gates

render the development non-compliant in this respect with the 2008 planning permission. The plaintiff refers to the application for planning in 2008 that identified the defendant's laneway and did not indicate the presence of any gates on same or seek permission for a gateway to be erected on same. The gateway first appeared on a site layout map in 2015 when retention permission was sought (which permission was refused).

42. The plaintiff refers to the evidence that has been put before the Court in relation to its assertion that the gates are unauthorised development, including the report of Mr Fox of 2017, Mr Fox's averments, the enforcement notices in relation to the gates, the decision of the plaintiff refusing retention permission and the upholding of that decision by An Bord Pleanala.

43. The defendant, on the other hand, makes three arguments in response. First, he argues that the defendant could not have known about the plaintiff's assertion that the gates were unauthorised development sufficiently to put him on notice of this objection and allow him to identify on affidavit why they are not unauthorised. I reject entirely the notion that the defendant did not know that the plaintiff was asserting the gates were unauthorised development. The basis of the s. 160 application is that the development in question is unauthorised. The position of the plaintiff is made clear by the relief sought (c)(ii) of the Notice of Motion, whereby the gates are sought to be removed, and at (c)(i) that the laneway be opened up. The only basis upon which the plaintiff could be seeking that relief, given this is a s.160 application, is on the basis that the gates are unauthorised development. The defendant was clearly on notice that the plaintiff was making an assertion that the development was unauthorised.

44. Second, the defendant argues that the reliefs at paragraph (c) are not within the remit of s.160 relief, not being planning matters, and may therefore not be the subject of a s. 160 application. I find this submission difficult to understand. The reliefs sought clearly relate to a planning matter i.e. the presence of gates said by the plaintiff to be unauthorised development. The planning complexion of the matter is highlighted by the fact that the gates are having the effect of making it impossible for the defendant to comply with condition 12 of the 2008 planning permission. However, this appeal is not in relation to a breach of condition 12 but rather a stand-alone case of unauthorised development. The application is clearly in respect of a planning matter and the relief sought is designed to end the defendant's alleged non-compliance with obligations under planning law.

45. The defendant also submits that in cases applying to planning permissions, the moving party is obliged to adduce evidence under the express terms of s.160(1)(c) that the development was not carried out in conformity with the permission, and that only allegations and not proof have been put before the court. In that respect, he relies on dicta from the case of *Dublin City Council v. Liffey Beat Ltd.* [2005] IEHC 82 to the effect that it is for the moving party to demonstrate with particularity "proof that the use complained of offends and is in breach of a condition of the planning permission".

46. This submission is misconceived. First, there is no contest but that the gates are present. The plaintiff must put before me evidence that the gates are unauthorised development.

The plaintiff has done so by providing evidence that the gates do not benefit from planning permission and are not in compliance with condition 12 of the 2008 permission granted.

47. Turning to the evidence, condition 12 of the 2008 permission explicitly required that vehicular access from Church Street to the designated parking bays on the defendant's lane was required. That access could not be obtained if there was an impediment preventing parking in the designated spots. The gates clearly constitute an impediment to access. The defendant did not contest the evidence by the plaintiff's deponents that the gates block access to the parking identified in the 2008 permission. Both the planning authority and An Bord Pleanala have confirmed that the vehicular access identified under condition 12 is required for good traffic management. The presence of the gates is therefore incompatible with the access to the defendant's lane that is required by condition 12.

48. Mr Fox, Planning Enforcement Officer, avers at paragraph 2 of his affidavit of 10 February 2020 that *"There is no planning permission in place for these gates. I say that these gates when closed prevent any access to the laneway for vehicles".* In the same affidavit, he exhibits his report of 31 January 2020 which in turn quotes from his enforcement report no. 4 of 30 June 2017 where he refers to the gate and states the gate *"is unauthorised".* Further, the plaintiff has exhibited a number of alleged unauthorised development reports and enforcement notices served upon the defendant, which identify the breach and the requisite action. For example, in the enforcement notice of 10 December 2015, the plaintiff requested the defendant to allow for public access to the parking areas. A more detailed enforcement notice was sent to the defendant on 4 July 2016 where it is stated that the development is not in compliance with the 2005 and the 2008 planning permissions and the Council requires the development to proceed in conformity with the conditions, including condition 12. It requires, *inter alia, "the removal of the gate across the entrance".*

49. Importantly, in the application for retention made in 2015 by the defendant, the gates were shown on the map submitted. In its refusal, the plaintiff identified that the proposed development (which included the gates) *"would contravene materially Condition 12".*

50. In summary, the essential proof under s.160 is that the moving party must prove that the development is unauthorised. The plaintiff has established that an application for planning was made in respect of the area of land where the gates may be found. No application was made for the erection of gates, and no permission was granted in either the 2008 or the 2005 permission for the erection of gates. No planning permission exists for the erection on gates on the defendant's laneway. Retention permission for a development that identified the gates on the drawing was rejected as not being in conformity with condition 12. None of this has been controverted.

51. It is clear from the dicta at paragraph 56 in *Murray* (quoted above) that it is ultimately for me to make a finding of unauthorised development. I am satisfied that the plaintiff has provided evidence to show that the gates are unauthorised development, both because

they have no planning permission and because they make compliance with condition 12 impossible.

Onus of proof in respect of exemptions

52. Next, counsel for the defendant submitted that the gates could, for example, benefit from an exemption from the planning code or that there may be some other reason that they should not be treated as unauthorised development, and that it was for the plaintiff to prove the gates did not benefit from any exemption. Importantly, the defendant did not identify any applicable exemption from which the gates might benefit, or any other legal basis that would absolve the gates from requiring planning.

53. The plaintiff argued that if the defendant wished to argue the gates did not require planning permission, it was for him to establish that on the basis of the maxim *"he* (or she) *who asserts must prove".*

54. The defendant relied upon the decisions of *Fingal County Council v. Kennedy* [2015] IESC 72 in support of its argument that the burden of the essential proofs in an application for s.160 relief lies with the plaintiff. That was a case where a local authority had sought relief under s.160 in respect of the mooring of a 100 tonne vessel in Balbriggan harbour. The question facing the Supreme Court was whether the mooring of the vessel and its subsequent use by its owner for habitation was an unauthorised development. The Court held that if the vessel was moored to and floating over the foreshore, it would be unauthorised development. However, the question arose as to whether the Council had proved that it was over the foreshore, i.e. below the line of high water of medium tides as if this was not the case, then it had not been proved that the vessel was within the functional area of Fingal. The matter was adjourned to hear submissions on the issue of proof of the location of the vessel.

55. When the matter returned to Court, Clarke J. noted that no attempt had been made to introduce additional evidence and that the position had not changed since the original judgment, i.e. there was a technical lack of proof that the vessel was within the functional area of Fingal.

56. The defendant placed great emphasis on this case; but it establishes nothing more than the time-honoured proposition that a party must adduce adequate evidence in support of the case it seeks to make, including in a s.160 application.

57. Reliance was also placed upon paragraph 56 of the decision of the Supreme Court in Murray where McKechnie J. observed that it is for the moving party in a s.160 case to undertake the onus of establishing its stated position to the necessary evidential and legal threshold required to obtain an order under s.160.

58. Again, that is an uncontroversial proposition. It does not in my view establish that a plaintiff who has shown that (a) there is no planning permission for works requiring planning; and (b) that the works contravene a condition of a permission, is required to exclude the application of every possible exemption in the planning code. The import of

the defendant's approach is that the onus is on the plaintiff to address every potential exemption under the planning code (of which there are very many) and explain why none of these are applicable to the works. No authority has been cited for that remarkable proposition. This is not a case where there is a dispute about whether a particular exemption applies, and the court is required to decide whom the onus rests upon to establish the applicability of the exemption. Here, strikingly, the defendant has not identified any applicable exemption or other exception which would displace the evidence before me, i.e. the lack of permission for the works and the incompatibility of the works with condition 12.

59. In those circumstances, applying first principles, I consider that the onus lies on the defendant to prove the proposition he is asserting *in abstracto* i.e. that the development benefits from an exemption. He has signally failed to do so, not even identifying the nature of such exemption. Nothing in this argument persuades me I should depart from my conclusion that the development is unauthorised.

Delay

60. The defendant asserts delay in this case in two different respects: first he says Section 160(6)(a) has been breached and second, he says that general delay on the part of the plaintiff disentitles it to relief.

61. In respect of the former argument, under s. 160(6)(a)(ii), it is provided that an application shall not be made in respect of a development for which permission has been granted, after the expiration of seven years beginning on the expiration of the appropriate period. Section 40 of the 2000 Planning and Development Act as amended makes it clear that the expiration of the appropriate period insofar as a permission is concerned takes place 5 years after being granted, providing in relevant part:

> *40.—(1) Subject to subsection (2), a permission granted under this Part, shall on the expiration of the appropriate period (but without prejudice to the validity of anything done pursuant thereto prior to the expiration of that period) cease to have effect as regards—*
>
> *(a) in case the development to which the permission relates is not commenced during that period, the entire development, and*
>
> *(b) in case the development is commenced during that period, so much of the development as is not completed within that period.*
>
> *…*
>
> *(3) In this section and in section 42, "the appropriate period" means—*
>
> *(a) in case in relation to the permission a period is specified pursuant to section 41, that period, and*

(b) in any other case, the period of five years beginning on the date of the grant of permission.

62. The defendant however argues that an application shall not be made in respect of development for which planning has been granted after the expiration of a 7-year period *from the date of the commencement of the development* (my emphasis). He goes on to say that in these proceedings the plaintiff did not attempt to demonstrate when the gates were erected, even though the burden of proof falls on the plaintiff to show it has brought these proceedings in time. He says the proceedings have not been brought within 7 years from the date of the commencement of the development and the delay of the plaintiff in bringing the proceedings is entirely unexplained. The defendant argues that the burden of proof lies on the plaintiff to establish that it comes within s. 160(6)(a). No case law is cited in respect of that proposition.

63. Before addressing those arguments, it is necessary to point out the inaccuracy in the defendant's submission as to when time begins to run. Time does not begin to run from the commencement of the development. It runs from the expiration of the appropriate period given the definition of same in s. 40 quoted above.

64. Given the clarity of that provision, identified by counsel for the plaintiff, it is hard to understand why the defendant's argument in this respect was not withdrawn.

65. The plaintiff responds that it is for the defendant to put forward an established delay on the part of the plaintiff as a basis for defeating its claim for relief and establish the relevant facts in that respect. The plaintiff relies upon the decision in *County Council of Wicklow v. Whelan* [2017] IEHC 480 where, at paragraph 73, Heneghan J. held that it was "*now well established by the case law that the seven year limitation period was a matter of defence and the onus of proof lies with the party asserting it".*

66. I am satisfied that established jurisprudence as referred to by Heneghan J., including the case of *Pierson v. Keegan Quarries Ltd.* [2010] IEHC 404, requires that if a defendant wishes to raise a defence of delay and argue that s. 160(6)(a) does not apply, he or she bears the burden of so doing. This is because the date upon which the development was commenced is a matter within the peculiar knowledge of the defendant. In this case, the defendant has made no averments at all on affidavit as to when he erected the gates or when he says time begins to run. He has not explained why he says that the plaintiff is out of time. The defendant has failed to make out a case in this respect.

67. Separately, the defendant alleges delay from the date upon which the plaintiff became aware of the infringements through the retention application and the letters of complaint and argues that as s.160 is a discretionary relief, I should take such delay into account in refusing the relief.

68. I am satisfied there was no delay in the following circumstances. Complaints were first received by the plaintiff in early 2015. By 10 December 2015 the plaintiff had investigated and issued an enforcement notice. Solicitors for the defendant wrote to the plaintiff on 15

February 2016. A more substantial enforcement notice was issued on 4 July 2016. There was further correspondence in June 2016.

69. Section 160 proceedings (bearing record number 295/2017) were issued on 12 July 2017 in almost identical terms to the present proceedings (the "2017 proceedings"). However, despite both the defendant and his solicitor swearing affidavits in those proceedings, the issue of defective service upon the defendant was raised, with the solicitor for the defendant asserting he did not have authority to accept service of these proceedings. On 7 February 2018, an Order was made striking out those proceedings on the grounds of defective service on the defendant. The defendant's decision to object to service, and his success in so doing, is somewhat difficult to understand where he had sworn a substantive affidavit in those proceedings on 22 December 2017, reciting the history of the matter and asking that the proceedings be struck out with costs awarded to him.

70. In any case, on 7 March 2018, the plaintiff's solicitor wrote to the defendant's solicitor asking him if he had authority to accept service of the proceedings. His solicitor, who had sworn an affidavit on behalf of his client in the 2017 proceedings, did not obtain instructions to accept service of the proceedings. It was therefore necessary for the plaintiff to bring a motion for substituted service. Liberty was sought on 31 May 2018 to issue and serve the within proceedings on the defendant. The within proceedings were instituted on 14 June 2018, service having been effected on the defendant in Brooklyn, New York.

71. Insofar as the defendant chose to make an issue of service in the 2017 proceedings, despite having participated in the proceedings, he cannot complain of delay occasioned by his decision to object to service, which decision necessitated the issuing of a further set of almost identical proceedings and delayed this matter by almost two years.

72. Nor was there any culpable delay in investigating the matter, corresponding with the defendant and issuing proceedings. The decision of the plaintiff to commence by way of enforcement notices and then decide to proceed by way of s.160 cannot be criticised. The plaintiff is entitled to consider which approach is more likely to lead to a satisfactory resolution of the problem and adapt its approach accordingly.

73. In all the circumstances I do not believe there was any culpable delay on the part of the plaintiff disentitling it to relief under s.160.

Motivation

74. A key part of the defence is that the plaintiff has impermissibly allowed itself to become an actor for persons who are not parties to the proceedings, specifically the GAA club at Tarbert. The defendant alleges that considerations other than planning considerations motivated the institution of the two Circuit Court cases. He says that the manner in which the appeal has been prosecuted is misconceived, improper and has caused actual and manifest prejudice to the plaintiff.

75. In his affidavit of 5 December 2019, the defendant says *inter alia* that Tarbert GAA has a relationship with the plaintiff and that the plaintiff acts as a vehicle to facilitate the agenda of Tarbert GAA. At paragraph 20 the defendant avers that the proceedings are not brought from the perspective of proper planning and development but as a result of agitation at the behest of third parties which if not champerty all, at least borders on misfeasance in public office.

76. In summary he says that he does not accept that the application is brought before the court in good faith but rather that the plaintiff is promoting the interests of the GAA club at the expense of the defendant. He adds that the plaintiff has not reached the required standard of can draw and he seeks that the proceedings be dismissed in those circumstances

77. The basis of his complaint appears to be two letters that he describes as undisclosed documents not put on the plaintiff's online version of the planning file.

78. One is a letter dated February 2019 from Mr O'Brien, Senior Executive Officer of the plaintiff to Mr PJ Langdon, Secretary, Tarbert GAA club, which provides *inter alia*:

> *"Dear Mr Langan,*
>
> *… As you are aware at this stage, a new planning application was lodged by Michael McElligott on the 4th February in advance of the Court sitting on the 5th February. The Counsel were in agreement to the adjournment in December to allow a new application be made within a defined period. It was made very clear to Mr. McElligott what would be acceptable from the Council's perspective to resolve this long running matter. The Council's Barrister made this clear to the Judge on the 5th February last. Having had an opportunity to carry out a brief initial assessment of the application before the court sitting, the Council's Barrister made the Judge aware that the application which had been submitted was not in line with what was discussed and agreed and was similar to previous applications that had been (unreadable) and that it was also submitted outside the agreed timeframe. The Council's Barrister outlined the Council's frustration with not being able to deal with the matter on the day.*
>
> *Notwithstanding all the above the Judge agreed to the adjournment application (unreadable) primarily because there was now a new planning application before us. The (unreadable) now stands adjourned to the next Court sitting on the 21st May to allow time for (unreadable) to be made on this application.*
>
> *(Unreadable) reiterate that Kerry Council are committed to pursuing this matter to a (unreadable) conclusion".*

79. The second is a letter from Mr Langdon where he states that, despite settlement of the civil proceedings between the defendant and the club, he intends to lodge an objection to the current planning permission application as it yet again seeks to gain vehicle access

down Chapel Lane to the pitch and again cross over Tarbert GAA property to access his houses and refers to the fact that it would be beyond belief if Kerry County Council were now to grant the application.

80. The defendant avers that he found the letters in the hard copy of the planning file which was available for public inspection. He avers that he was told by a person in the planning department that he could not take copies of the letters, although he did take copies by phone and has exhibited those letters. He complains that it appears the plaintiff deliberately withheld the letters since they were marked with yellow stickers which stated *"Do not scan. Place in plastic pocket as per Ger O'Brien".*

81. An affidavit was filed in response by Mr Gerard O'Brien of 3 February 2020 when he notes that a Senior Executive Officer would not normally swear an affidavit in proceedings such as these but has done so because of the allegations of improper motives or impropriety on the part of Kerry County Council or the enforcement unit. He strenuously denies the allegations of lack of *bona fides* or misfeasance in public office. He fully accepts that the plaintiff received representations from third parties in respect of non-compliance of the development with the conditions attached to the permission and says that it is quite common that the first indication of the planning department has with issues regarding breaches of the planning codes is by way of notification from third parties. He says the planning department is mandated to investigate the matter.

82. Counsel for the plaintiff referred to s. 153 of the PDA in this respect which imposes, *inter alia,* an obligation on a planning authority to issue an enforcement notice under s.154 or make an application under s.160 if the planning authority has established that unauthorised development is being carried out.

83. Mr. O'Reilly goes on to say at paragraph 21 that, in almost all cases where enforcement action is taken, there are third parties who have a collateral interest in the enforcement action who will undoubtedly express their position to the enforcement unit and that this case is no different in that regard. He says those are secondary considerations to the plaintiff and at the end of the day the proceedings are brought to uphold the integrity of the planning process.

84. In respect of the correspondence from members of the public regarding the proceedings, he acknowledges he has received same and has replied to that and in replying he confirmed that Kerry County Council was committed to seeing the proceedings through to a conclusion. He says that he is obliged within reason to respond to such reasonable correspondence and he would be in dereliction of his duties and open to criticism were he not to provide, within reason, basic updates to an individual who seeks information from the local authority regarding the status of ongoing litigation enforcement proceedings.

85. In relation to the so-called "undisclosed documents" Mr O'Brien notes at paragraph 25 of his affidavit that the defendant has failed to distinguish between a planning file and an enforcement file. Matters relating to the former are kept on a planning file and are available to the public but that is not the case in respect of an enforcement file. Letters

referred to by the defendant were considered to be matters relating to the enforcement issue and therefore they were not placed on public view on his planning file. He concludes by stating there has been no effort to hide any dealings between the plaintiff and Tarbert GAA and that the plaintiff has exhibited the written complaints received from Tarbert GAA.

Analysis

86. Before addressing the specific complaints identified above, I note that in both the affidavits of the defendant and the replying affidavit of Mr O'Brien, reference is made to proceedings between the defendant and Tarbert GAA. In his replying affidavit of 19 June 2020, the defendant spends some time criticising the GAA club for entering into a settlement with him, while at the same time continuing to complain to the plaintiff. That is matter as between the defendant and the GAA club. It has no relevance to these proceedings and I will not therefore consider any of the averments in this respect.

87. I find that the complaints made by the defendant in respect of the motivation of the plaintiff in bringing these proceedings to be quite unfounded. The fact that action was taken by the plaintiff following complaints of third parties, including parents of children who play at a local GAA club, is entirely appropriate given the statutory functions of the plaintiff to investigate allegations of breach of the planning laws and to take enforcement action where appropriate. As Mr O'Brien notes, it will very often be the case that action by local authority will be prompted by complaints and it is important that members of the public know that their complaints to a local authority will be taken seriously and acted upon where appropriate.

88. In relation to the specific complaint about two letters identified by Mr McElligott, as pointed out by Mr O'Brien, there will often be third parties with an interest in the outcome of enforcement proceedings between a local authority and a person the subject of proceedings, and in that context corresponding with complainants to update them as to the progress of the investigation is appropriate.

89. It is of course important that any local authority maintains an adequate distance from complainants and ensures that all correspondence and communications with same are professional in nature. Personal animosity must never animate the actions or decisions of a local authority. However, there is no evidence of same in the correspondence that was exhibited by the defendant.

90. Finally, I accept that the reason that the correspondence was not on the public file was because it was (correctly) deemed to be part of the enforcement file, and that the post-it notes indicating it should not have been scanned were created in that context.

91. In conclusion I do not see any basis for a finding that the plaintiff was motivated by anything other than planning concerns in issuing proceedings against the defendant.

Updating of the Affidavits

92. The defendant makes a further complaint which frankly I find difficult to understand. This is the assertion that the plaintiff failed to update its affidavits in the current proceedings

from those filed in the 2017 proceedings referred to above. For unexplained reasons, the defendant takes issue with the fact that the grounding affidavits in the instant case were effectively identical to those sworn in the previous case and seeks to rely on this as evidence of bad faith on the part of the plaintiff in bringing these proceedings. The evidence was in fact updated in this case, as further site visits took place in 2020 and photographs and reports from same are exhibited in affidavits filed in 2020.

93. At its highest, the complaint appears to be that there was no reference in Mr Van Schoor's affidavits to Mr McElligott marking out spaces in December 2017 and April 2018 with thermoplastic paints. That seems to be of little significance, particularly where it is not accepted by the plaintiff that the spaces that were marked out were in fact the spaces identified on the planning permission. In any case, the defendant has not identified any facts that are relevant to the current appeal that ought to have identified by the plaintiff.

94. Accordingly, I reject entirely this argument as being quite irrelevant to an allegation of bad faith. Where the defendant choses to take a highly technical service point that necessitates fresh proceedings being brought in almost identical terms, he cannot complain about the fact that those proceedings remain unchanged in substance.

Unreasonable

95. The defendant has also proffered a defence to the effect that the relief sought is impracticable, unreasonable and irrational and would impose an impossible burden on the defendant given the inaccurate measurements that formed the basis of the planning permission. However, it is fair to say that this defence is focused largely on the remediation of the parking spaces and is not referable to the relief in respect of the gates. There is no averment by the defendant stating that it would be onerous or impossible to remove the gates.

Discretionary nature of section 160

96. The defendant points to the *dicta* of Meenan J. in *Urban Entertainment Limited t/a Baggot Hutton v. Monteco Holdings Limited* [2019] IEHC 620 where he stated that first it must be ascertained whether there is a breach of s. 160, and second, whether relief ought to be given. The various factors that should be considered in this regard were identified by the Supreme Court in *An Taisce v. McTigue Quarries Limited* [2016] IEHC 620. I fully accept that the s.160 analysis does not end with a finding of unauthorised development and that I must consider whether relief should be granted taking into the factors identified by the Supreme Court, although I do bear in mind the cautionary words of Clarke J. in *Fingal County Council v Kennedy* as follows:

> *While it is true that a court, in deciding whether to exercise the jurisdiction conferred by s.160 of the 2000 Act, has a discretion which requires the Court to adjudicate on whether it is appropriate to make an order having regard to a wide range of factors, it nonetheless remains the case that it would require extraordinary circumstances for it to be appropriate for a court to exercise that discretion against requiring the demolition or removal of a structure where there was a flagrant breach of planning laws".*

97. Taking each of those factors in turn, I identify why I consider it appropriate to provide the relief sought in this case.

98. First, the nature of the breach in this case is a serious one. Indeed, I would characterise it as a flagrant one. Gates have been erected without planning permission. The gates make it impossible for the residents of the four houses, the subject of the planning permission, to park their cars in the designated car parking spaces identified in the 2008 planning permission. It undermines entirely the requirement in condition 12 that vehicular access be only by Church Street. It has had the result that the residents park their cars on Chapel Lane, which was only ever intended to be used for pedestrian access as per condition 12. That in turn has the effect of impeding traffic in that lane and in particular, has an adverse impact on the users of Tarbert GAA club, who use the lane to access the GAA grounds.

99. On one view there is already an obligation on the defendant to remove the gates pursuant to the Order of the Circuit Court of 13 November 2020 to comply with condition 12. I do not have to decide that question since I am only being asked to grant relief pursuant to paragraph (c) of the Notice of Motion. However, if the Order of the Circuit Court of 13 November 2020 does not encompass an obligation to remove the gates, then the Order sought in this appeal is also necessary to ensure that the Order of 13 November 2020 has not been made in vain, since, if the gates remain in place, vehicles will not be able to access the parking identified by condition 12 as the designated parking for the development.

100. In relation to the conduct of the infringer, I consider that there is nothing in the defendant's conduct that would persuade me that an Order should not be made. The defendant has made complaints that I have found to be unwarranted about the motivation of the plaintiff in proceeding against him, he has never explained why the gates are required and he has never explained how the tenants of his houses can access the parking identified in condition 12 despite the presence of the gates. Despite asserting that the gates were not unauthorised development, he did not identify any exemption or any other basis for his assertion in this regard. His conduct does not indicate to me he takes seriously his obligations either under the 2008 planning permission, specifically condition 12 or under the planning legislation in general. There is nothing in his conduct that would warrant a decision not to make an order under s.160, despite the existence of unauthorised development.

101. In relation to the reason for the infringement, as noted above, no explanation has been given as to why the gates were erected and the purpose of same. The defendant does not seek to justify or explain their erection.

102. In relation to the attitude and conduct of the planning authority, I have already found that the planning authority has acted appropriately and consistently in seeking to bring the breaches to an end and there is no nothing in their conduct that would disentitle them to the relief sought.

103. In relation to the public interest, there is a strong public interest in upholding the integrity of the planning and development system. Here, the presence of unauthorised development in the form of gates blocking access to parking has resulted in the defendant's tenants being obliged to park on Chapel Lane. This has adverse consequences in terms of traffic management, which is not in the public interest.

104. Finally, no personal circumstances of the defendant are identified suggesting that the relief sought ought not to be granted.

105. In the circumstances it appears to me that it is appropriate that I exercise my discretion in favour of granting the Orders sought.

Costs

106. The appeal included a challenge to the decision of the Circuit Court judge to make no order as to costs. However, there is no written decision or a transcript from which I might glean the reasons for this decision and I do not therefore know the basis upon which this decision was made. Nor has any substantive basis been identified by counsel for the plaintiff to justify interfering with this decision.

107. Costs are a matter for the discretion of the trial judge, such discretion to be exercised within the parameters of Order 99 RSC and sections 168 and 169 of the Legal Services Regulation Act 2015.

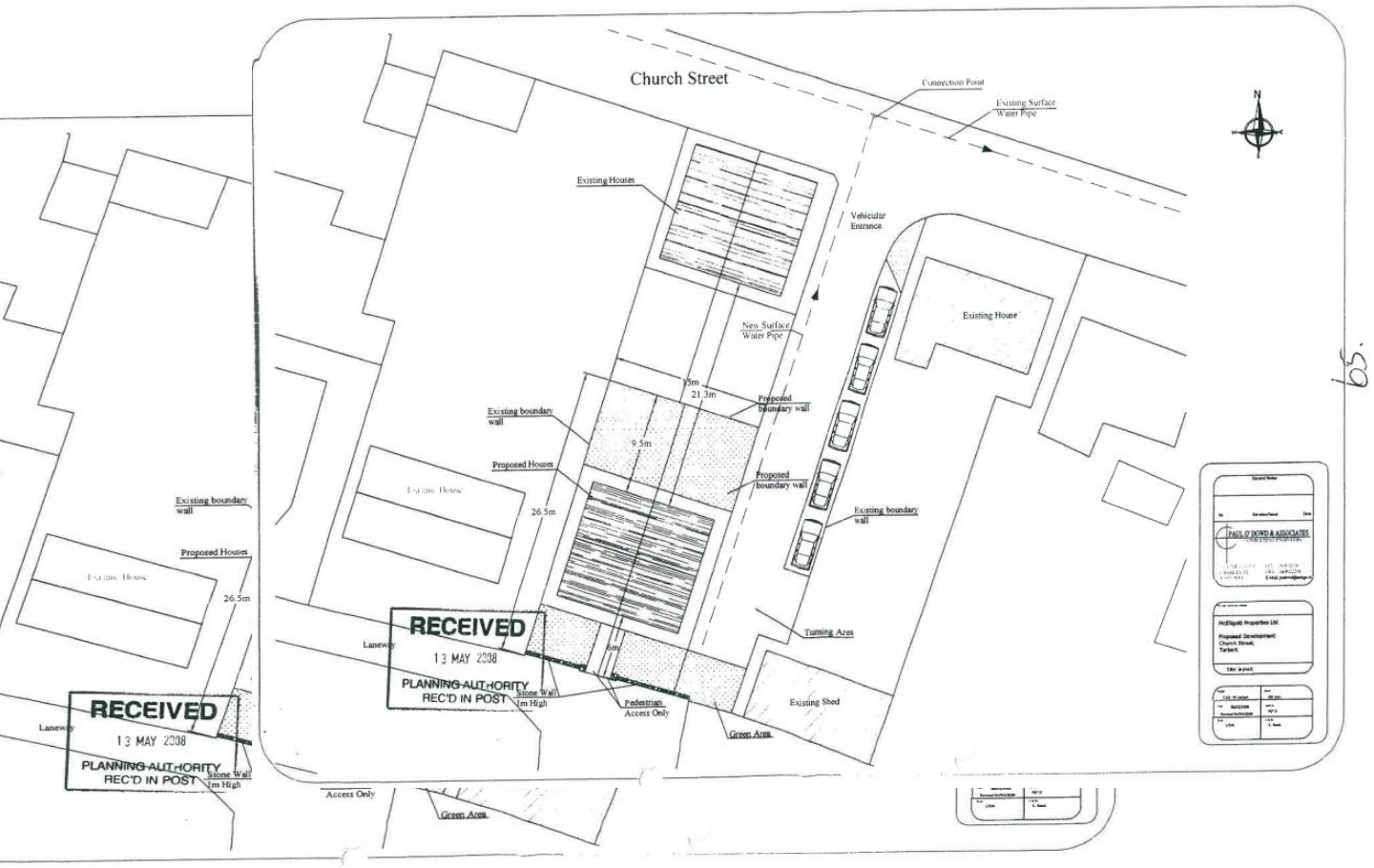
108. I can only interfere with the exercise of that discretion if I am satisfied that it has been wrongly exercised. The plaintiff has not discharged the burden of demonstrating to me that the discretion has been wrongly exercised. The mere fact that the plaintiff succeeded at least in part in its application, and that the costs normally follow the event, is not enough for me to conclude that the discretion must have been wrongly exercised. In those circumstances I refuse that ground of appeal.

Conclusion

109. For the reasons identified in this judgment, I uphold the appeal insofar as paragraph (c) is concerned and make an Order in the terms of paragraph c(i) and (ii) of the Notice of Motion of 14 June 2018.

Appendix A

Site Layout


Church Street
Connection Point
Existing Surface Water Pipe
Existing Houses
Vehicular Entrance
Existing House
New Surface Water Pipe
21.3m
Proposed boundary wall
Existing boundary wall
9.5m
Proposed Houses
26.5m
Proposed boundary wall
Existing boundary wall
Existing boundary wall
Proposed Houses
26.5m
Turning Area
Existing Shed
Pedestrian Access Only
Stone Wall 1m High
Green Area
Laneway
Access Only
Green Area
RECEIVED
13 MAY 2008
PLANNING AUTHORITY
REC'D IN POST
RECEIVED
13 MAY 2008
PLANNING AUTHORITY
REC'D IN POST
Stone Wall 1m High
PAUL O'DOWD & ASSOCIATES
McElligott Properties Ltd.
Proposed Development
Church Street,
Tarbert.

65.