[2017] IEHC 381

THE HIGH COURT

[2016 No. 256 MCA]

IN THE MATTER OF SECTION 160 OF THE PLANNING

AND DEVELOPMENT ACT 2000 AS INSERTED BY

SECTION 13 OF THE PLANNING AND DEVELOPMENT

(STRATEGY INFRASTRUCTURE) ACT 2006

BETWEEN

STRATEGIC CAPITAL INVESTMENT FUND PLC

APPLICANT

AND

MICHAEL NAUGHTON, SHANE SCOTT

AND

FARNAN SCOTT

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 12th day of May, 2017

1. In the within proceedings, the applicant seeks:

> (1) An order pursuant to s. 160 of the Planning and Development Act 2000 ("the 2000 Act") requiring the respondents, their servants or agents, or all persons acting in concert with them, to cease all unauthorised development of lands at the Diamond Coast Hotel, Enniscrone, Co. Sligo; and
>
> (2) An order directing the respondents their servants or agents, or all persons acting in concert to them, to restore the lands to their condition prior to the commencement of the unauthorised development.

2. The applicant is the owner of the Diamond Coast Hotel ("the hotel") located in Enniscrone, Co. Sligo. It was previously owned by Mr. Liam Scott, father of the second and third named respondents herein. The applicant purchased the hotel from David Hughes ("the Receiver") who was appointed by virtue of Deeds of Appointment dated 7th January, 2009 and 9th April, 2009, by ACC Loan Management Limited (formerly ACC Bank Plc) to be a Receiver of all assets referred to and comprised and charged by the mortgage/charge dated 6th April, 2005, between Liam Scott and the Bank, being the hotel, holidays homes and adjoining lands. The contract for the sale of the Hotel by the Receiver to the applicant was executed on 23rd December, 2015 and the sale was completed on or about 16th March, 2016.

3. The hotel is adjacent to lands comprised in folio SL9442 ("the adjacent lands") which were historically owned by a Mr. James Cawley. The adjacent lands are now owned by the respondents to these proceedings.

4. It is not in dispute in the present proceedings but that portion of the car park of the hotel is situate on the adjacent lands. It appears that this was not a matter of any great controversy between 2005 and 2012; the evidence suggesting that Mr. Liam Scott had entered into an agreement with Mr. James Cawley in 2005 that portion of the car park would be built on the adjacent lands. However, on 24th January, 2013, solicitors for Mr. Fergal Cawley, son of Mr. James Cawley and the successor in title to the adjacent lands, wrote to the Receiver to the effect that the hotel's encroachment on the adjacent lands would have to be resolved and that "there should be a full and proper consideration paid by the hotel" to Mr. Cawley on foot of a transfer by him of the adjacent lands to the appropriate entity.

5. Accordingly, upon learning that the car park was partly situate on lands not comprised within the hotel lands, and prior to any sale of the lands, the Receiver sought to purchase the adjacent lands and apparently reached an informal agreement with Mr. Fergal Cawley to purchase the adjacent lands for the sum of €50,000. The applicant claims that Mr. Cawley subsequently refused to complete the transaction and that he sought a sum of €250,000 for the lands, which was not agreed to by the Receiver.

6. According to the replying affidavit sworn on 6th October, 2016, by the first named respondent, Mr. Michael Naughton, the respondents' ownership of the adjacent lands came about in the following circumstances: Mr. Naughton, who is the General Manager of the McGettigan Hotel Group based in Letterkenny, was originally employed by Mr. Liam Scott, the developer of the hotel, when it was first built in or around the year 2005. On that basis he was familiar with the layout of the hotel, albeit he had no active role in the hotel since the time of its construction. According to Mr. Naughton, he first became aware that the hotel was being offered for sale by the Receiver in or about October, 2015. He was interested in acquiring it. He was also aware of the issues surrounding the title to the hotel grounds, namely that part of the car park was situate on the adjacent lands. Accordingly, he duly approached Mr. Fergal Cawley to ascertain whether he would be interested in purchasing the hotel jointly with Mr. Naughton, on the basis that Mr. Cawley's ownership of the adjacent lands would reduce the price that the Receiver would accept. Mr. Cawley was not interested in purchasing the hotel. He advised Mr. Naughton of the offer that the Receiver had made to him to purchase the adjacent lands. Ultimately, Mr. Naughton reached agreement with Mr. Cawley to acquire the adjacent lands for €120,000.

7. It is common case that the adjacent lands were purchased in trust by Mr. Naughton's then solicitor Mr. Thomas Kelly. The identity of the beneficial owners of the adjacent lands was not disclosed to the applicant, either for the purpose of the within proceedings (or indeed earlier injunction proceedings) or otherwise, until in or about October, 2016. I do not believe that anything in particular turns on this.

8. As deposed to by Mr. Naughton on affidavit, he purchased the adjacent lands as a "strategic move" with the aim of securing the purchase of the hotel from the Receiver. While Mr. Naughton believed the purchase of the adjacent lands left him in the "driving seat" as far as the purchase of the hotel was concerned, ultimately his efforts to acquire the hotel from the Receiver were unsuccessful.

9. Mr. Naughton further confirms that he considered the adjacent lands to be a "ransom" insofar as they impacted on approximately forty six car parking spaces used by the hotel, and Mr. Naughton "did not believe that the hotel could be sold and good title obtained without" ownership of the adjacent lands vesting in the hotel. Mr. Naughton's belief in this regard was not borne out, as the sale to the applicant evidences.

10. The genesis of the present proceedings is set out in the affidavit sworn on 16th July, 2016, by Mr. Brian Pierson, General Manager of the hotel. He avers that on Wednesday 27th January, 2016, workmen entered the hotel lands, without permission, in order to commence works on the adjacent lands. It is averred that a JCB digger and a van carrying machinery proceeded to paint a "boundary line" across the hotel car park and flower beds while another van crossed into the hotel lands with a delivery of wooden frames and steel fencing. Mr. Pearson avers that the fencing works that were carried out in January – February, 2016 had a significant negative effect on the business of the hotel. It is his belief that the work which was carried out, on behalf of the respondents, was with a view to maximising visual damage and interruption to the orderly access and convenience of the hotel. He avers that two types of fences were erected: the first was a galvanised steel fabrication and the second a timber post structure with timber posts anchored in concrete. Mr. Pierson avers that the fencing gave the impression that the hotel was closed for business. According to Mr. Pierson, this led the speculation at the time among customers and staff that the hotel would be closing in the near future.

11. On 28th January, 2016, (prior to the completion of the purchase of the hotel by the applicant), the Receiver instituted proceedings by way of plenary summons seeking an injunction compelling Mr. Kelly (the then named purchaser of the adjacent lands) to vacate the hotel lands and to immediately remove the fencing erected on the hotel lands and/or the adjacent lands. In light of the urgency of the matter and the potential threat posed by the works for the trade of the hotel, the Receiver sought an interlocutory injunction before Gilligan J. on 19th February, 2016. Following the partial hearing of the interlocutory application in the Receiver's proceedings, the proceedings were adjourned with a view to allowing the parties to conclude an arrangement without the necessity for further steps in the legal proceedings. Mr. Kelly gave certain undertakings to the court that there would be a cessation of interference with the lands and that the fence would be removed and the harm remedied. Following the purchase of the hotel by the applicant, the Receiver agreed to have the proceedings struck out with no order on the basis that his interest in the matter had concluded.

12. In compliance with the undertakings given on behalf of Mr. Kelly to the court, the fence was removed. However, the fence foundations remain in situ and the remnants of the fence posts protrude above ground level. It is not in dispute but that approximately forty six car parking spaces and four to six coach parking spaces which had previously being available to the applicant are unusable as a result of the purchase by the respondents of the adjacent lands.

13. According to Mr. Pierson, subsequent to the aforesaid events, the respondents' agents constructed an access route between the hotel and the regional road R297. He also avers that a large area of grassland was covered by hardcore material in order to facilitate the construction of the vehicular access route and other works carried out on the hotel lands and the adjacent lands. He further avers that on or around 14th April, 2014, part of articulated lorry, branded with a "Dale Farm" logo was stationed on the adjacent lands. Mr. Pierson avers that this was facilitated by trespass on the hotel lands. He also avers that the truck was later placed on the hotel lands.

14. On 16th May, 2016, the applicant's solicitors wrote to Mr. Kelly advising that the creation of the vehicular access from the adjacent lands to R297, the placing of hardcore material on a previously grassed area to facilitate such access and other works and the continuing existence of the foundations of the wooden fencing (which by then had been removed), together with the extant remnants of the wooden posts, all constituted development for the purpose of the 2000 Act and that same did not constitute exempted development. Accordingly, the development in question required planning permission which had neither been applied for nor been granted. In this regard, the applicant had retained Mr. Declan Brassil, Chartered Planning Consultant, whose professional opinion was that the works undertaken by the respondents constituted development for the purposes of the 2000 Act and which was not exempted development. In their letter, the applicant's solicitors sought undertakings from Mr. Kelly that the truck would be forthwith removed from the hotel lands, that there would be no further acts of trespass and nuisance and that he would cease the disputed works and confirm that the adjacent lands would be restored to their pre-development condition within four weeks. That undertaking was not forthcoming, although on or about 22nd to 23rd May, 2016, the truck was removed from the hotel lands. A further letter issued on 4th July, 2016.

15. The within proceedings were issued on 19th July 2016. The applicant contends that the works undertaken by the respondents on the adjacent lands constitute development for which no planning permission has been secured and that none of the works is exempted development for the purpose of the 2000 Act. It is further contended by the applicant that the entire of the development carried out by the respondents is an orchestrated attempt by them to force the applicant to buy out their interest in the adjacent lands.

16. In his affidavit sworn 15th July, 2016, Mr. Brassil avers that the works carried out by the respondents do not have the requisite planning permission or retention permissions. He further avers that the works are not exempted development with the meaning of the planning legislation.

The relevant statutory provisions

17. Section 3(1) of the 2000 Act provides:

> *"In this Act, 'development' means, except where the context otherwise requires, the carrying out of any works on , in, or under land or the making of any material change in the use of any structures or other land"*

18. Statutory provision is made for exempted development under s. 4 of the 2000 Act and article 6 and Schedule 2 of the Planning and Development Regulations 2001 ("the 2001 Regulations").

19. Section 4 (1) (h) of the 2000 Act, the operative section for the purposes of the within proceedings, provides that the following shall be exempted development:

> *"development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure of which do not materially effect the external appearance of the structure so as to render the appearance in consistent with the character of the structure or of neighbouring structures".*

20. Article 6(1) of the 2001 Regulations provides:

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

21. With regard to article 6 exemptions, article 9(1) of 2001 Regulations provides that:

"Development to which article 6 relates shall not be exempted development for the purposes of the Act –

(a) if the carrying out of such development would –

…

(ii) consist of or comprise the formation, laying out or material widening of a means of access to a public road the surfaced carriage way of which exceeds 4 metres in width.

…".

22. It is not in contention between the parties that the disputed works constitute development for the purposes of the 2000 Act. The disputed works will thus be considered by the court for the purpose of establishing whether there is any valid planning permission for the works or whether they constitute exempted development for the purposes of the 2000 Act or the 2001 Regulations, as contended for by the respondents.

23. In his replying affidavit, Mr. Naughton addresses the issue of the access road as follows:

"I … say that during my discussions with Mr. Cawley he made a reference to an agreement regarding the construction of a roadway, this agreement had been reached with Mr. Liam Scott, the previous owner of the hotel. This related to the construction of a new access road connected with Enniscrone Golf Club

…

Whilst my initial plan was to simply box off [the adjacent lands], I was aware of my obligations which I had reached agreement with Mr. Cawley to construct a roadway for the Golf Club and this is the development which is averred at para. 25 of the Affidavit of Mr. Pierson. I say I am surprised given his involvement in the hotel since 2009 that Mr. Pierson would not have been acutely aware of this proposed development. This is especially so in light of its proximity to the hotel and its boundaries. As my business partner is a builder by trade he agreed to carry out the works and it was agreed that they would erect a fence clearly separating our lands from those owned by the hotel …

I say that inadvertently my business partner erected a fence which was deemed too high, this was the subject of litigation and was instantly removed.

…

I say that the Cawley family have always had a right of way and a road access to the R297 and this is what is being referred to at para. 25 [of Mr. Pierson's affidavit]. I say that this is purely in keeping with the Planning Permission granted [in] 2007. I say that any works carried out by us are in keeping with Planning Permission P1700/07."

24. With regard to Mr. Naughton's averment that the construction of the roadway was for the purpose of implementing the planning permission granted for the hotel, it is common case, as averred to in Mr. Brassil's second affidavit sworn 20th October, 2016, that the planning permission which had been granted on 31st January, 2008, lapsed on 14th February, 2013. It is also the case that there was no application made to extend the duration of that permission. Accordingly, I am satisfied that at the time of the carrying out of the disputed works there was no extant planning permission for any vehicular access to or from R297, albeit that the previous planning permission allowed for the "construction of a new vehicular entrance and access road onto R297 road and carrying out all associated site works."

25. It is also averred by Mr. Brassil that even if the planning permission had not lapsed, the works undertaken by the respondents were not consistent with the permission which had been granted.

26. As set out in his affidavit, Mr. Naughton's position with regard to the fence foundation and the hard standing is that such development is exempted development under s. 4 (1)(h) of the 2000 Act. Alternatively, Mr. Naughton maintains that same is de minimis or trivial, a position he also adopts with regard to the new access road. He also maintains that works do not constitute an impediment to the operation of the hotel. He avers that the dispute between the parties is of a commercial nature and that the applicant is using the planning code to further its commercial interests rather than in the interests of proper planning or sustainable development. He also avers that Mr. Brassil had inspected the site as far back as 12th May, 2016 and that Sligo County Council, the Statutory Planning Authority, had closed an Enforcement File (which they had opened) on the matter by 16th June, 2016. Mr. Naughton thus avers that in light of these circumstances, he is at a loss as to how the applicant alleges that there was any planning breach, especially since the Enforcement File had been closed.

27. In his second affidavit, Mr. Brassil avers that the Enforcement File only pertained to the fence which had been erected by the respondents, which was deemed both by Mr. Brassil and Sligo County Council as an unauthorised development. On balance, I accept this to be the case.

28. Mr. Brassil also restates his view that the entrance to R297 and the associated hard standing constitute an unauthorised development. He maintains that these works were never the subject of the Enforcement File and that it is incorrect to infer from the fact that the Enforcement File was closed, that these developments are other than unauthorised. He further avers:

"I do not consider that the provision of foundations and hardstanding can be separated from the development they are intended to facilitate for the purposes of claiming an exemption. Irrespective of this, I do not consider that the foundations, hardstanding, fence or entrance, whether considered separately or cumulatively, can be considered to constitute '*works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure of which do not material effect the external appearance of the structure*'."

29. With specific reference to the access road, Mr. Brassil states:

> "The works undertaken include the formation of an access to the R297, a Regional Road significantly in excess of 4 meters in width. Accordingly, those works cannot avail of any exceptions under article 6 of the 2001 Regulations. In my opinion, the purpose of the article 9 (a) (ii) provision is to preclude the creation of an access to a road exceeding 4 meters on the basis that any such entrance would have the significant potential to create a traffic hazard. For this reason, any such proposed entrance is required to be designed in accordance with national standards and assessed through the planning application process. Therefore, to suggest it is trivial or *de minimis* and on that basis does not require permission, is, in my opinion, incorrect."

30. In his affidavit sworn 14th November, 2016, Mr. Patrick Gallagher, Consultant Engineer retained by the respondents, avers as follows:

> "I say that I have recently inspected the works and I fully concur with the position as averred to by Mr. Naughton in that works in question are either exempted and/or in trivial in nature. I further state that even based upon the most cursory examination of the site and the file plan attaching to it, it is clear that Mr. Naughton has merely carried out works on his own lands. Whilst I do not believe that Mr. Brassil is trying to suggest that the works had been carried out on the Hotel lands, for the purposes of certainty I can confirm that they have not and that all works and associated materials are enclosed entirely within the curtilage of [Mr. Naughton's] lands only. I further say that it is clear the excavated material currently contained on the site, is material required to back fill the holes left as a result of the erection of the initial hoarding and that the exposed foundations are required for the purpose of supporting the new 1.2 m wall that Mr. Naughton intends to build. I am instructed by Mr. Naughton that he and his advisors have consulted with Sligo County Council in connection with same and I am instructed that he has also put the Applicant on notice of his intentions to construct the wall. I would respectively suggest that notwithstanding what has been averred to by Mr. Brassil, the Local Authority do not consider these works as being an Unauthorised Development and if they did, then surely a further Enforcement Notice would have issued in relation to these works."

He goes on to state:

> I would also refer to paras. 15 &16 of [Mr. Brassil's] Second Affidavit where he states the reasons why Mr. Naughton was not entitled to rely on the exemption status provided to certain works under S. 4 (1) (h) of the 2000 Act. I disagree with Mr. Brassil's averments on the basis, that as the owner of the land Mr. Naugthton is perfectly entitled to restore his land to its original use prior to development which was that of a green area. It should be remembered that the lands are owned by Mr. Naughton and his predecessors in title and they have never been owned by the Hotel. There can be no dispute but s. 4 (1) (h) therefore applies in the current case…
>
> …
>
> Notwithstanding to what is averred to by Mr. Brassil at [paras.] 17& 18 of his Second Affidavit, it is clear from an inspection on the ground that the entrance in question was only a temporary one, which was put in place in order to get material onto the site. This temporary entrance became necessary whereby the Hotel Management refused access [to] my clients access to their site via their entrance. As the temporary entrance does not exist at this time, it is absolutely reasonable to state that the *de minimis* rule easily covered its existence for the limited period it was required as a material access route."

31. Insofar as Mr. Gallagher suggests that the access constructed by the respondents was a temporary entrance, this stands in contrast to the averment by Mr. Naughton at para. 17 of his first affidavit where he states that "any works carried out by us are in keeping with Planning Permission P1700/07". I am satisfied that that averment by Mr. Naughton is intended to convey that the construction of the access was in pursuance of a planning permission which had been granted by Sligo County Council (albeit that same had lapsed) and that the access was therefore a permitted development. Accordingly, the explanation put forward by Mr. Gallagher is not accepted by the court.

32. Furthermore, insofar as there are references in Mr. Gallagher's affidavit to the respondents being in the process of consulting with Sligo County Council in relation to the 2007 planning permission, these are vague references and without detail, and put forward on behalf of the respondents in circumstances where the process of seeking to extend the 2007 planning permission was required to be engaged on prior to the expiry of that permission. I also agree with the view expressed by Mr. Brassil (as set out in his third affidavit sworn 9th December, 2016) that Mr. Gallagher's contention that the works fall within the exemptions contained in the 2001 Planning Regulations is of such a vague and general nature such as not to be of any great benefit to the court for the purpose of determining whether the development in question is exempted development or alternatively of such a trivial nature as not to warrant intervention by the court.

33. From a consideration of the evidence on affidavit, I am satisfied that the primary purpose of the works which were undertaken by and on behalf of the respondents was for the formation of an access route to the R297, a regional road that is in excess of four metres in width. In the course of his submissions, counsel for the respondents contended that the opening which was developed by the respondents opened onto the hard standing and not the public road. Accordingly, it was submitted that it was not caught by the provisions of article 9 of the 2001 Regulations. However, I am persuaded, on the evidence overall, that Mr. Brassil's opinion, namely that the hard standing cannot be separated from the access route, should be preferred by the Court. *Prima facie*, therefore, the works carried out in respect of the access route cannot be exempted development pursuant to article 9(a) (ii) of the 2001 Regulations. It cannot be credibly contended by the respondents that the purpose of the works is other than to create an access to R297. This is the explanations offered at paras. 13 and 17 of Mr. Naughton's first affidavit, where it is explained that the works are related to an agreement entered into by him with Mr. Cawley to construct a roadway to access the adjacent Golf Club. At para. 17, he specifically links the works in question to the issue of a road access to R297 (howsoever the access to the Golf Club was to come to fruition). This is also consistent with the claim that the works were carried out in keeping with the 2007 planning permission, which permitted the creation of a new vehicular entrance and access to the R297. Accordingly, I am satisfied that the respondent cannot rely on article 6 of the 2001 Regulations. I am also satisfied that there is no basis for the respondent's reliance on s. 4 (1)(h) of the 2000 Act as the basis of an exemption in respect the access works. This section provides for development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure. No attempt has been made by the respondents to explain how the works relating to the fence foundations or the hard standing or the access road constitute works "for the maintenance, improvement or other alteration of any structure". Accordingly, there is no evidence to sustain a conclusion that s. 4 (1) (h) of the 2000 Act has any application to the within proceedings. In particular, there is no evidence before the court to identify the structure which is sought to be maintained, improved or altered or how the fence foundations, hard standing or access road did actually maintain, improve or alter a particular structure. Furthermore, the claim that the works were carried out for the purpose of effecting the maintenance, improvement or other alteration to a structure is entirely inconsistent with the admission by Mr. Naughton

that the works were carried out for the purposes of giving effect to an agreement between himself and Mr. Cawley to construct a roadway for access to the Golf Club.

34. Notwithstanding the foregoing findings, it is nevertheless necessary to consider whether any aspect of the disputed works can be isolated from the disputed works over all for the purposes of establishing whether any aspect of the works constitute an exempted development.

35. In his affidavit, Mr. Gallagher avers that the excavated material currently contained on the adjacent lands is for the purpose of back filling holes that were left as a result of the erection of initial hoarding and that the current exposed foundations are for the purpose of building a wall and that such a wall is exempted development as provided for in Schedule 2, Part 1 Class 11 of the 2001 Regulations.

36. The applicant contends that the claim of entitlement to rely on the aforesaid exemption was never articulated prior to the swearing of Mr. Gallagher's affidavit on 14th November, 2016. It is contended that the respondents are attempting to retrospectively validate the works in question by reference to exemptions not contemplated by them at the time the works being carried out.

37. Class 11provides an exemption for the following works:

> *"The construction, erection, lowering, repair or replacement, other than within a bounding the curtilage of a house, of –*
>
> *(a) any fence (not being a hoarding or sheet metal fence), or*
>
> *(b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete".*

38. This exemption is subject, inter alia, to the limitation that the height of any new structure shall not exceed 1.2 metres or the height of the structure being replaced, whichever is the greater, and shall in any event not exceed 2 metres. I will return to the issue of the wall in due course.

39. It is also the applicant's contention that as the overall works are related to the creation of access to R297, as admitted to by Mr. Naughton in his affidavit, it would be wholly inappropriate to create an artificial distinction between the creation of the access route and the construction of the wall so as to enable an exemption to apply to part of the disputed works. The applicant contends that as all of the works are related to the creation of an access route, article 9 (1) (ii) of the 2001 Regulations is therefore the over arching statutory provision which precludes the development from being an exempted development.

40. From a consideration of the evidence overall, and by reason of the findings made above, the court is not persuaded by the respondent's arguments that the development of the access road or the hard standing is exempted development for the purposes of the 2000 Act or the 2001 Regulations. Accordingly, the court finds that the respondents have breached the provisions of the 2000 Act. The court rejects Mr. Gallagher's suggestion that the entrance constructed to R297 was somehow a temporary structure so as to allow the respondents to construct a fence or wall on the adjacent lands. As already stated, Mr. Naughton's first affidavit belies this suggestion. Furthermore, in his second affidavit sworn 21st November, 2016, he does not resile from his previous averment that he had agreed with Mr. Cawley to construct an access road to the Golf Club. The reality of the situation is that the respondents have created an access onto a public roadway which is not exempted development.

41. Having found the respondents to be in breach of the 2001 Act as far as the access road and hard standing is concerned, the question now to be determined is whether the court should exercise its discretion in favour of granting the applicant relief under s. 160 of the 2000 Act.

42. The nature of the discretion vested in the court was described in *Morris v. Garvey* [1983] I.R. 319 by Henchy J. as follows:

> *"Section 27, sub-s. 2, is one of the most important and least understood or used provisions of the planning code. The section expressly recognized for the first time that a member of the public (as well as the planning authority), regardless of his not satisfying any of the qualifications based on property or propinquity or the like (which are usually required to justify bringing proceedings), once he discovers that a permitted developer is not complying with, or has not complied with, the conditions of the relevant development permission, may apply in the High Court for an order compelling the developer "to do or not to do, or to cease to do, as the case may be, anything which the Court considers necessary to ensure that the development is carried out in conformity with the permission and specifies in the order." The jurisdiction thus vested in the High Court is extremely wide. It recognizes the fact, which has been stressed in other decisions of this Court, that in all planning matters there are three parties: the developer, the planning authority (or, in the case of an appeal, the Planning Board) and the members of the public. Compliance with the statutory conditions for development is expressly recognized in sub-s. 2 of s. 27 to be the legitimate concern of any member of the public. We are all, as users or enjoyers of the environment in which we live, given a standing to go to court and to seek an order compelling those who have been given a development permission to carry out the development in accordance with the terms of that permission. And the High Court is given a discretion sufficiently wide to make whatever order is necessary to achieve that object."*

43. On the evidence before the court, and particularly in the context of the purpose of the works as set out in Mr. Naughton's first affidavit, the court does not find that the unauthorised development is trivial or *de minimis* in nature. While the court recognises that there is a jurisdiction to exercise discretion against the grant of injunctive relief where there have been slight or immaterial breaches of a planning permission, this normally operates in the context of a planning permission which is the process of being implemented. The jurisprudence does not suggest that such discretion should be exercised in respect of developments for which where there is no planning permission, at least not in respect of the nature of the access/hard standing works in the present case. In this regard, the court refers to the decision of Peart J. in *Mountbrook Homes Limited v. Oldcourt Development Limited* [2005] IEHC 171 and the decision of Dunne J. in *Conroy v. John Craddock Limited & Kildare County Council* [2007] IEHC 336. It seems to me that in circumstances where the works have not being carried out in reliance on the planning permission, the respondents cannot expect the court to treat them as "trivial" or "*de minimis*". In any event, I do not find that the works fall into these categories.

44. I am satisfied to grant relief to the applicant under s. 160. I am satisfied that the present case is not one where the exercise of the discretion in favour of granting relief would cause significant hardship for the respondents. I also bear in mind that it is "*the duty of the court to uphold the principle of proper planning for developments under clear statutory rules*", as per Charleton J. in *Wicklow County Council v. Forest Fencing* [2007] IEHC 242.

45. In the circumstances of this case, I am also satisfied that the fact, as relied on by the respondents, that the hotel itself was not constructed in compliance with its own planning permission is not a bar to relief. In this regard, I note the *dictum* of Birmingham J. in *Dublin Airport Authority PLC v. J.D. Motorline Limited* [2013] IEHC 510 that "*the fact that an applicant is in breach of a planning obligation does not, without more serve to disentitle it to relief*". Counsel for the applicant submits that since the hotel is now in existence for in excess of twelve years, any breach on its part is immune from the strictures of the planning legislation.

46. The argument is also made on behalf of the respondents that the applicant's motive in bringing the within application is entirely to further their commercial interests in that the applicant is intent on exerting pressure on the respondents to come to an arrangement whereby the applicant can regularise the car park issue. That may well be the case. However*, Dublin Airport Authority PLC v. J.D. Motorline* Limited is also authority for the proposition that commercial considerations on the part of an applicant are not a bar to s. 160 relief. I also note that in this case, as far as the respondents' are concerned, their actions in acquiring the adjacent lands in the first place were similarly motivated by commercial considerations, as conceded by Mr. Naughton on affidavit. When it comes to the question of commercial considerations therefore, neither side should expect this to be the deciding factor. Counsel for the respondent also relies on the decision of Hedigan J. in *Smyth v. Dan Morrissey Limited* [2012] IEHC 14 in aid of his submission that the Court should exercise its discretion and refuse relief to the applicant. However, I am satisfied that as far as that case is concerned, there were more pressing factors to warrant not granting relief than arise in the present case.

47. I am however in agreement with the argument put forward by the respondents with reference to the fence foundations. While I refrain from making a finding that any fence or wall which the respondent may build will be exempted development pursuant to Schedule 2, Part 1 Class 11 of the 2001 Regulations (since there is no such wall of fence), I am satisfied that the court should not exercise its discretion and require the respondents to remove the erstwhile fence foundations or reinstate the particular portion of the adjacent lands upon which the fence foundations lie. This is so because no case is made but that the fence foundations are on the adjacent lands, and in circumstances where the respondents, as the owners of the adjacent lands, are at liberty to construct a fence or wall on their lands, provided always that same complies with the provisions of the 2000 Act and/or the 2001 Regulations.

48. Accordingly, the order that the court proposes to make is to direct the respondents to cease all works pertaining to the construction of a vehicular access to R297 and that the respondents restore the hard standing area to its pre-development condition. I will hear submissions on the exact substance of the orders which the court proposes to make.