APPROVED

THE HIGH COURT

Record No. 2016/259/MCA

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS 2000

(AS AMENDED)

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

[ ]

BETWEEN

DIAMREM LIMITED

APPLICANT

AND

CLIFFS OF MOHER CENTRE LIMITED AND CLARE COUNTY COUNCIL

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 20th day of November, 2018

1. This is an application pursuant to s. 160 of the Planning and Development Act 2000 (as amended) ("the 2000 Act") in which the applicant, in summary, seeks:

- An order compelling the respondents to comply with the terms of Planning Permission 01/333 granted by An Bord Pleanála ("the Board") to the first respondent for the development of a new Visitor Centre at the Cliffs of Moher, Co. Clare.

- An order requiring the respondents to comply with the requirements of Condition 3 of the Planning Permission which condition required the details of a proposed mobility management strategy to be submitted and agreed before the commencement of the development and which mobility management strategy provided for "the removal of the temporary car park which was to be retained only for a period after construction had been completed, and to allow time for the detailed consideration of a park and ride initiative for the site".

- An order requiring the removal of the temporary car park in accordance with the requirements of Condition 7 of the Planning Permission.

- An order prohibiting the use of the temporary car park in circumstances where that use is in inconsistent with the terms of Condition 3 and Condition 7 of Planning Permission 01/333.

2. In essence, the applicant is seeking, *inter alia*, orders prohibiting the use of a public car park at the Cliffs of Moher Visitor Centre ("the Visitor Centre") and requiring its removal, in order to facilitate a park and ride operation. It is the applicant's case that the public car park at the Visitor Centre is unauthorised development and the applicant says that the respondents have failed to comply with certain conditions attaching to planning permission granted to the first respondent for the purposes of developing the Visitor Centre.

Background

3. At the time of the original planning application in 2001 the then existing Visitor Centre comprised a small stone building located on lands to the east of the cliffs and to the south of a hill which stretches northwards along the cliffs. The Visitor Centre had a car park and coach park located on more level land to the south and south east of the Visitor Centre. The then car park had the potential to accommodate approximately 350 cars and 20 buses with 170 spaces demarcated on the car park.

4. The planning application which came before the second respondent/Planning Authority in 2001 proposed a larger Visitor Centre set into the southern slope of the existing hill in the northern portion of the site. A small ancilliary building was to be located to the immediate south of the old Centre. A new car park was proposed on lands to the south and south west of the proposed buildings. It was proposed to provide a total of 249 car parking spaces with coach spaces to be located adjacent to the northern and eastern boundary. The car parking layout and circulation areas were significantly changed from what was currently on the site. The planning application also proposed to provide temporary car parking on lands adjacent to the site, on the eastern side of the R478, during the construction period. Subsequent to the construction period, it was proposed to operate a support park and ride facility from villages and towns in the surrounding area during peak times.

5. On 21st January, 2002, the second respondent granted planning permission for the demolition of the existing Visitor Centre and the development of a new Visitor Centre, retail unit, public toilets, six casual trader's bays, waste treatment plant and revised car park and coach area, including new entrances.

6. The grant of permission was the subject of third party appeals by An Taisce and Shannon Development Limited to An Bord Pleanála ("the Board").

The Board's decision (01/333) issued on 17th December, 2002, granting permission for the development.

7. The Board's grant of planning permission followed an oral hearing in October 2002. The Inspector's report was published in November, 2002.

The Board's decision

8. As recited on the face of its decision, the appeal heard by the Board was against the second respondent's decision to grant subject to conditions a permission for development comprising:

"…the demolition of the existing Cliffs of Moher Visitor Centre and the development of a new Visitor Centre, retail unit, public toilets, six number casual trader's bays, waste treatment plant, revised car and coach park entrances and a revised car and coach parking arrangement including ancillary landscaping works at the site of the existing visitor centre and car park at the Cliffs of Moher, County Clare in accordance with plans and particulars lodged with the said Council."

9. The decision of the Board was expressed as follows:-

"…it is hereby decided, for the reason set out in First Schedule hereto, to grant permission for the said development in accordance with the said plans and particulars, subject to the conditions specified in the Second Schedule hereto, the reasons for the imposition of the said conditions being as set out in the said Second Schedule and the said permission is hereby granted subject to the said conditions."

10. The Board's grant of permission was subject to 19 conditions set out in the Second Schedule. The relevant conditions for the purposes of the within application are as follows:-

"1. The development shall be carried out in accordance with the plans and particulars lodged with the application, as amended by the drawings received by the planning authority on 12th March, 2001, 23rd November, 2001 and 30th November, 2001, except as may otherwise be required in order to comply with the following conditions.

Reason: In the interest of clarity.

2. The proposed free-standing ancillary building shall be omitted from the development and the relevant area shall be landscaped. Details of the landscaping of this area shall be agreed with the planning authority prior to the commencement of development.

Reason: In the interest of visual amenity and to limit the scale of overall development at this sensitive location.

3. Details of the proposed mobility management strategy shall be submitted to the planning authority for written agreement prior to the commencement of development.

Reason: In the interest of traffic safety and visitor management.

…

7. Detailed proposals, including full particulars of the temporary car park to be provided during the period of construction and the storage of excavated materials from the site, shall be submitted to and agreed with the planning authority prior to the commencement of development.

Reason: In the interest of orderly development.

…

9. Details, including a site layout map and site section of the coach parking areas, of measures to mitigate the impact of parked coaches within the site, including proposals to lower the level of the parking surfaces and to increase the height of screen mounding, shall be submitted to and agreed with the planning authority prior to commencement of development. A photomontage aspect of the southerly aspect of the proposed development, taken from a point to be agreed with the planning authority, shall be submitted to the planning authority prior to commencement of development.

Reason: In the interest of visual amenity…"

Events subsequent to the Board grant of permission, as deposed to on affidavit

11. As outlined in the affidavit of Mr. Gerard Dollard, Director of Services with the first respondent, sworn 17th November, 2016, changes were made to development proposals in the aftermath of the Board's decision. A number of modifications to the design proposals for the permission were the subject of public consultation and permission pursuant to Part VIII of the Planning and Development Regulations 2001. This is explained by Mr. Dollard, as follows:

"…certain modifications to the design proposals for which permission had been granted by An Bord Pleanála were the subject of public consultation and permission under Part VIII of the Planning and Development Regulations 2001. The Council made an application in October 2003 in respect of proposed cliff edge improvement works, bearing reference LA 03-25, and an application in respect of other developments and modifications for the visitor centre, bearing reference LA 04-08. In the course of its submission dated 30th September, 2004 to the Council in respect of Part VIII application LA 04-08 …the appointed architects for the scheme confirmed that the proposed car parking area at the Visitor Centre Site '*be relocated outside of the Visitor Centre Site'*. The proposed remote temporary Car Parking facility is situated on the East side of the existing roadway away from the Visitor Centre and the Cliffs walks."

12. The submissions referred to by Mr. Dollard were those of Reddy O'Riordan Staehli Architects ("RORSA"), the architects employed by the first named respondent.

13. In their letter of 30th September, 2004, RORSA stated:-

"Planning permission was granted by An Bord Pleanála on 17th December, 2002, for the development at the Cliffs of Moher. Since the grant of permission, the design proposals have been modified for the following reasons.

- Compliance with the An Bord Pleanála's decision to omit the Ancillary building structure and Car Park in front of the Visitors Centre,
- To improve the visitor safety and protect and enhance the environment along the cliff edge,
- Provision of temporary car parking arrangements and access to the Cliffs during the visitors centre construction

works,

• Provision of Temporary Retail and Toilet Accommodation during the visitor centre construction works…

…

Temporary Car Park
In [complying with] An Bord Pleanála's decision, it was deemed [appropriate] that the proposed car parking area be re-located outside of the Visitor Centre Site. The proposed remote temporary Car Parking facility is situated on the East side of the existing roadway away from the Visitor Centre and the Cliff walks…

Status of the coach parking to the temporary car park will be revisited upon implementation of the Park and Ride arrangement…"

14. In an affidavit sworn May 2017, Mr. Dollard avers as follows:-

> "11. I say that it was never envisaged, proposed or accepted by the members of the Council, as the Planning Authority, that the proposal to provide a permanent car park for the Cliffs of Moher Visitor Centre be abandoned. I say and believe that it was proposed that such a car park would be re-located, as one of the modification stated in the RORSA submission dated 30th September, 2004. I say and believe that this was one of the modifications accepted by the members of Clare County Council in their resolution dated 13th December, 2004, in which they resolved that:-
>
> > 'pursuant to the Part VIII Planning and Development Regulations 2001, Clare County Council proceed with the development work/modifications to the Cliffs of Moher Visitor Centre project.'
>
> 12. I say and believe that it was at that time the Council's intention to re-locate the permanent car park and to continue the operation of the 'temporary' car park. I say and believe that references to the car park being temporary, after the Part VIII process reflected, an established description of the car park as such and related to its construction being unsurfaced and unlined, an absence of formal walkways and its presentation otherwise as being the nature of a temporary construction, rather than being references to its intended function since the approval of Part VIII planning submission in 2004.
>
> 13. I say and believe that the Part VIII applications permitted the continued function of the car park beyond the period of construction of the Visitor Centre and that the duration of the car park's function was not, therefore, limited to the duration of works on site."

15. On 31st March, 2005, on behalf of the first respondent, RORSA made submissions to the second respondent qua Planning Authority in relation to compliance with the 19 conditions which attached to the planning permission granted by the Board on 17th December, 2002. These submissions were set out in a document entitled "Basis of Compliance" which accompanied RORSA's letter of 31st March, 2005. It was said that the Compliance document "demonstrates that the [first respondent's] compliance with the 19 planning conditions attached to the An Bord Pleanála decision dated 17/12/05".

16. With regard to Condition 3 of the Board's permission, which required details of the respondents' proposed mobility management strategy to be submitted to the planning authority for written agreement prior to the commencement of development, RORSA advised as follows:-

> "The Council has given detailed consideration to the decision of An Bord Pleanála and the Inspector's report in relation to a mobility management strategy for the site. Through a Part VIII planning application, which was subject to a full consultation process, the car park on the Cliffs side of the road will not now form part of the development. There will be limited coach parking provided at this location as part of the overall development.
>
> In terms of implementing the mobility management strategy, it is the Council's intention to retain the temporary car park, across the road from the present location, for a period after construction has been completed. This temporary car park will accommodate cars and any overflow of buses from the main bus park. This approach is being adopted…to allow time for detailed consideration of a park and ride initiative for the overall site.
>
> In the course of preparing the North Clare Local Area Plan the Council had commenced a process of reserving lands to facilitate car parking associated with a future park and ride facility…
>
> A number of communities in North Clare area have expressed an interest in the park and ride proposal operating from particular locations.
>
> The strategy at this stage is to omit the permanent car parking at the Cliffs part of the site, retain the temporary car park pending the full assessment of a park and ride scheme, commence a feasibility study during construction as to the optimum arrangements for park and ride and proceed with implementation of a park and ride scheme when the centre has been completed and is operational."

17. With regard to Condition 7 of the Board's permission, which required that detailed proposals, including full particulars of the temporary car park, be submitted to and agreed with the Planning Authority prior to the commencement of development, the Compliance document stated:-

> "The layout of the temporary car park is shown on the Landscape Masterplan…the build-up of the car park is to the engineer's details- refer to ARUPS drawing…"

18. On 25th May, 2005, the second respondent's Planning Section wrote to RORSA confirming that the submission of 31st March, 2005 was "in satisfactory compliance" with the 19 conditions which the Board had imposed. The letter went on to state:

> "In relation to condition 3, the present position is noted. Details of proposed mobility management strategy shall be submitted to the Planning Authority prior to occupation of the development"

According to Mr. Dollard's 17th November, 2017 affidavit, the requested details were furnished to the respondent in December, 2006. In this regard, he exhibits a document.entitled "Submission regarding planning queries". The document reads as follows:-

> "Condition no. 3 of the planning permission requires as follows:
>
> > *"Details of a proposed mobility management strategy shall be submitted to the Planning Authority for written agreement prior to commencement of development."*
>
> As part of the overall development, the Council has been progressing visitor management strategies, which will form a component part of an overall mobility management strategy. Working with the various stakeholders, the following measures will be put in place on the opening of the development:
>
> - An advance booking system for coach traffic to both manage and regulate volumes of visitors arriving to the site;
> - Priority parking for coaches to encourage arrival by this mode of transport rather than individual vehicles;
> - Incentive pricing to promote off peak and low season visits;
> - On site management for the Centre and at the Cliff edge to control movement of visitors;
>
> A park and ride scheme may also form part of the mobility management strategy. As part of the North Clare Local Area Plan, Clare County Council zoned lands at the south of the Cliffs of Moher in the Liscannor area for a potential park and ride facility. Efforts to zone lands to the north of the Cliffs of Moher in the vicinity of Doolin did not prove successful. An outline planning application is currently before the Council..for the provision of a park and ride facility on the lands zoned in Liscannor for such purposes. The Centre management will be discussing with the developer, assuming a positive planning outcome, to work out the optimum arrangement for such a facility.
>
> Overall, the mobility management strategy will be reviewed and adjusted as the need arises. It is felt that the 2007 season will provide valuable data to assist in further developing overall strategy. This data will be utilised to build on mobility management approaches which form part and parcel of the overall development to add to these approaches through pilot initiatives such as a limited park and ride facility during the summer of 2007."

19. In his grounding affidavit sworn 19th July, 2016 for the purpose of the within proceedings, Mr. John Flanagan, a director of the applicant company, avers that RORSA's compliance submissions of 31st March, 2005 were an acknowledgment of the fact that the Board had not granted planning permission for a permanent car park at the Visitor Centre. I will return to this issue in due course.

Planning permission for park and ride facilities

20. At para. 9 of his affidavit, Mr. Flanagan makes reference to two planning permissions, bearing reference numbers 08/1133 (from Coogyualla, Doolin, Co. Clare to the Cliffs of Moher) and 08/1129 (from Liscannor to the Cliffs of Moher), which were ultimately granted by the Board for park and ride facilities. These permissions were granted to Atlantic Developments Ltd, a company of which Mr. Flanaghan is a director.

21. In a later affidavit sworn 3rd March, 2017, Mr. Flanagan describes the process leading to the grant of those permissions:-

> "13. I say that as part of the Park & Ride facility application to service the Cliffs of Moher Visitor Centre, An Bord Pleanála on 16th April, 2009, wrote to the applicant under a Request for Further Information stating:
>
> > *'The park and ride development is proposed to serve the Cliffs of Moher. It was a requirement of Condition No. 3 of the planning permission for the Cliffs of Moher Visitor Centre…granted by An Bord Pleanála 16th December, 2002… that details of a mobility management strategy be submitted to the Planning Authority for agreement. In the absence of such a strategy and of any evidence of the active participation or co-operation by the operator of the Cliffs of Moher Visitor Centre, it was not clear how this proposed Park & Ride facility might integrate with the existing undertaking at the Cliffs of Moher Visitor Centre. Therefore, the proposed park and ride facility might constitute uncoordinated, haphazard development contrary to the proper planning and sustainable development of the area.'"*

He goes on to state:

> "14. The applicant responded to An Bord Pleanála in respect of that letter by way of a detailed submission of Tom Phillips & Associates, dated Wed. 18th May, 2009 which confirms that the Park & Ride development proposed to serve the Cliffs of Moher was a requirement of Condition 3 of the Planning Permission for the Cliffs of Moher Visitor Centre, that the details of the mobility management strategy which were to be submitted to the Planning Authority for agreement and where at para. 2.1.1 that submission it was confirmed by the Council in view of the decision of An Bord Pleanala, that it was the Council's intention to retain the temporary car park across the road from the present location for a period after construction had been completed to allow for a detailed consideration of a Park & Ride initiative for the overall site, the designated lands as suitable for Park & Ride in the North Clare Local Area Plan 2005, and subsequently granted Planning Permission for this facility, that Clare County Council were reliant on the provision of a Park & Ride facility, as they have received a grant of Permission for the removal of the permanent car park and the temporary use of the construction car park until such time the Park and Ride facilities were operational thus giving the Visitor Centre no permanent car parking solution…
>
> 15. I say that in a response dated 8th June, 2009, Clare County Council wrote to An Bord Pleanála in respect of the construction of a Park & Ride facility to service the Cliffs of Moher Visitor Centre and stated that in particular Planning Authority refers to the submission from Tom Phillips & Associates of the 13th May, 2009, and would, in general concur with the conclusions set out therein. In those circumstances, therefore, the County Council were confirming to the Board specifically that the conclusion contained at paragraph 3.0 on page 8 of the Submission that the car park would remain in temporary use only until such time the Park and Ride facilities are operational."

22. Mr. Flanagan avers that on foot of the responses received from both the applicant and the second respondent, the Board were

satisfied that the need for a mobility management strategy "had been sufficiently addressed" and consequently the applicant was granted planning permission for park and ride facilities.

23. In his earlier affidavit of 19th July, 2016, Mr. Flanagan avers that in dealing with the planning applications for park and ride facilities made under 08/1129 and 08/1133, the Board had particular regard to the submission made by the first respondent to the Council dated 31st March, 2005 by way of compliance with Condition 3 of the Board's planning permission of 17th December, 2002.

24. The planning permissions granted to Atlantic Developments Ltd. for the park and ride facilities were subsequently extended on 25th November, 2014, and 18th November, 2015, upon the application of Lazarus Investments Ltd., of which Mr. Flanagan is also a director. The applicant was incorporated in the State on 2rrd May, 2014. Certificates of practical completion in respect of the planning applications 08/1129 and 08/1133 were made on 12th November, 2015 and 15th April, 2015, respectively. It is also the case that that a Customer Agreement was entered into between the applicant and the second respondent on 7th December, 2015, for the year 2016 in relation to the operation of a park and ride shuttle service from Doolin and Liscannor to the Visitor Centre.

25. At para. 13 of his affidavit sworn 19th July, 2016, Mr. Flanagan states:-

> "I say that the Planning Permission granted for the Cliffs of Moher Visitor Centre and initially implemented by the Cliffs of Moher Visitor Centre Ltd. is now the responsibility for all practical purposes of Clare County Council and they are responsible for its implementation. I say that they are obliged as part of the grant of Planning Permission to ensure the implementation of the Mobility Management plan in accordance with the Planning Permissions issued by An Bord Pleanála in respect of their lands and in particular to discontinue the use of the temporary car park which was explicitly identified only to remain in place to facilitate the Park & Ride facilities which are now ready to be implemented."

26. Mr. Flanagan avers that following the completion of the implementation of the park and ride facility, the applicant requested the second respondent to take steps to discontinue the use of the temporary car park so as to allow the park and ride facility to be implemented which request has not been acceded to the second respondent.

27. On 11th May, 2016, the applicant's solicitor wrote to the second respondent advising that the conditions attached to the Board's planning permission as granted to the first respondent:

> "required a mobility management plan and called for a Park & Ride facility which is now being implemented by our client and which facility is now operational subject only to the closure of the unauthorised carpark located on lands in the ownership of Clare County Council and managed and controlled by the Cliffs of Moher Centre Limited.
>
> This temporary carpark and so far as it was developed in association with construction works associated with the implementation of the conditions and requirements…of the relevant Planning Permission requires the carpark to be decommissioned once the Planning Permission is implemented.
>
> The continued existence of the carpark which is a structure for the purposes of the Planning & Development Act 2000 amounts to an unauthorised structure. The use of the carpark amounts to unauthorised use for the purposes of the Planning & Development Act 2000 and it is of particular concern that that this carpark, the status of which the County Council is well aware is being used for commercial purposes. As owner of the lands the County Council is jointly responsible under the enforcement provisions of the Planning & Development Acts with the occupier Cliffs of Moher Centre Limited."

28. The applicant wrote on the same date to the first respondent calling on them to confirm that the car park at the Visitor Centre would be "closed forthwith". The second respondent's solicitors replied on 19th May, 2016, advising, *inter alia*, that "there is nothing contained in condition 3 with regard to the Mobility Management Strategy or the contract for the provision of park & ride services which prevents [the applicant] from proceeding with the provision of those services."

29. In his affidavit sworn 17th November, 2016, Mr. Dollard takes issue with the applicant's contention that the respondents' current use of the car park located east of the R478 breaches or is inconsistent with Conditions 3 or 7 of the permission granted by the Board in December, 2002. He further avers that the planning permissions for park and ride facilities which were granted under record numbers 08/1129 and 08/1133 "were in no way conditional upon the cessation of provision of parking facilities for private motor vehicles adjacent to the Cliffs of Moher Visitor Centre". He states that the applicant's proceedings seeking injunctive relief in respect of parking at the Visitor Centre are misconceived. He goes on to aver:-

> "14. I note that the car park in respect of which the Applicant claims relief is in existence for more than eleven years. I say and believe that occupation commenced in February 2007. The permanent car park originally proposed was not then built out and the car park on the opposite side of the road, adjacent to the Visitor Centre, functioned in its stead from then. The life of Planning Permission…granted by An Bord Pleanála on 17 December 2002 expired on 16 December 2007. I say and believe and am advised, having regard to the provisions of section 160 of the Planning and Development Act 2000, that the time within which to bring enforcement proceedings under those provisions had passed by the time of the institution of the instant proceedings."

30. Mr. Flanagan's response to Mr. Dollard is set out in his affidavit sworn 9th December, 2016. He states:-

> "5. I say that I am deeply concerned that Mr. Dollard, who is a Director of Services for a County Council which is not just a local authority but also a planning authority, is seeking to retain what was described in the planning application for the Cliffs of Moher Visitor Centre as a temporary car park and even on the face of the application lodged, the car park [in] question as was originally applied for granted planning permission is only temporary in nature…
>
> 6. I say that…even more extraordinarily, Mr. Dollard seeks to resile from the very submission made by Clare County Council as I set out in my previous Affidavit at paragraph 7 where the Council undertook to omit permanent car parking at the Cliffs of Moher in the context of a Mobility Management Plan, and the temporary car park was only retained until the Park & Ride facility would be brought into effect. I say that this submission is in respect of a specific obligation which arises from the planning permission and was a submission made to comply with the obligations stated in that condition and I say therefore that insofar as Mr. Dollard asserts that the relief sought namely restraining the use of the car park for car parking is misconceived, is demonstrably incorrect…"

31. Mr. Dollard, in his affidavit of 19th January, 2017, responded in the following terms:-

"6. …The second Respondent, as owner of the property, has progressed with planning issues and development proposals at the overall site through the Part VIII process. I say that despite the Applicant referring to the mobility management plan agreement between the first and second Respondents as being a condition as to use, no such condition as to the use of the car park is contained in the grant of planning permission. I say that a Park and Ride solution was not *'required to be adopted'* as stated by the Applicant. I say that the Planning Permission was not conditional upon the provision of a Park and Ride facility and the conditions scheduled to the Permission make no reference to such a facility, instead permitting a 249 space car park immediately outside the Visitors' Centre to enable the public to have access to the Cliffs.

7. I say that the Applicant is factually incorrect in his assertion that there was no *'means of access prescribed by the Board'*. The means of access insofar as it was prescribed by the Board was to allow 249 cars access to the Cliffs of Moher by way of a permanent car park. The decision of An Bord Pleanála reflects a vision for direct car park access to the Cliffs by members of the public who wish to arrive in their own private cars, at their own designated time without reliance on the Applicant."

32. Mr. Dollard further avers:-

"…An Bord Pleanála rejected the recommendations made in the Inspector's report of November 2002 with regard to a Park and Ride Scheme. The Applicants seeks to attach significant but misplaced weight to the Inspector's report on this issue. Second, the Applicant has in fact been facilitated in the operation of its Park and Ride venture by the grant of separate planning permissions to do so. These subsequent separate permissions do not require any alteration of the existing parking arrangements at the Visitors' Centre. Finally, I say that the second Respondent entered into a customer agreement with the Applicant in order to facilitate his operation. I say that despite the facilitation of the Applicant's venture, the Applicant is now attempting to establish a monopoly operation at considerable inconvenience to the public and contrary to the development envisaged by An Bord Pleanála. I say that the Park and Ride venture has already commenced operating. I say the Applicant has publically stated that it has operated a very successful season from the Doolin Park and Ride Scheme." (at para. 8)

33. The Part VIII processes referred to by Mr. Dollard at para. 6 of his affidavit concern the modifications made in 2003/2004 to the car parking arrangements and an application 17th January, 2017 by the second respondent for permanent improvement works on the car park which proposed upgrading works to the Cliffs of Moher Visitor Car Park including "provision of new surfacing, kerbing, footpaths and paving, signage and lining, fencing, ducting, e-car charge point, raised uncontrolled internal crossing point, a defined overflow coach parking area and increased number of disabled parking spaces."

34. In affidavit sworn 3rd March, 2017, Mr. Flanagan refers to the second respondent's most recent application under Part VIII of the Planning and Development Regulations 2001 for permission to carry out works and to continue to maintain the car park as a permanent car park at the Visitor Centre site. He avers that this has been done "notwithstanding the previous determinations of An Bord Pleanála". He states:-

"This notice sets out the nature of the works that are proposed, will establish in perpetuity the use of this car park and will be such as to seek through a process which is entirely within the control of the Council, and in respect of which there is no appeal, to in effect interfere with and seek to render the Applicant's proceedings moot."

35. He goes on to aver:-

"9. The procedure that the Council have adopted is to proceed in respect of this car park to propose the carrying out of works and to continue to maintain the car park as a permanent car park and they are utilising the provisions of Part VIII of the Planning and Development Regulations 2001 which provide for a self-contained Planning process within the Local Authority whereby the Local Authority itself decide on the appropriateness or otherwise of its own developments.

10. The effect of the proposals which are now being proposed by the Council and which the Council intend if implemented, will render this car park a permanent feature at the Cliffs of Moher, is entirely contrary to and inconsistent with, the terms upon which An Bord Pleanála granted them Planning Permission for their own Visitor Centre and will render the Applicant's Park & Ride facility inoperable as nobody will use a park and ride facility if they can drive directly to the Visitor Centre and park in the car park which is contrary to the direction of An Bord Pleanála and the undertaking of the Respondent that ensured that the car park be removed soon as the Park & Ride was ready to be implemented."

36. In his May, 2017 affidavit, Mr. Dollard asserts that the January 2017 Part VIII process was "screened for appropriate assessment and in the opinion of the expert ecological consultants, Doherty Environmental, the *'screening for appropriate assessment has resulted in a finding of no significant effects to the Cliffs of Moher SPA and a stage 2 appropriate assessment is not required'*." He further states that the second respondent's Environment Assessment Officer has agreed that with the findings of the screening statement.

37. Mr. Dollard further avers:

" In all the circumstances, where planning has been properly obtained, a Part VIII process is being followed in respect of the permanent upgrading of the car park, the mobility management strategy continues to evolve and no adverse environmental issue arises with regard to the continued life of the car park, I say and believe that these proceedings are brought solely for the commercial advantage of the Applicant to obtain what can be best described as a monopoly on the provision of transport of car based visitors to the Cliffs of Moher. I say and believe that it would be contrary to the public interest to allow these Planning Enforcement proceedings to be used to facilitate the development of a monopoly, especially when the planning history of the site contains no condition whatever for such," (at para. 34)

38. In his subsequent affidavit sworn on 28th June, 2017, Mr. Dollard avers that when the Part VIII application came before the members of Clare County Council on 8th and 15th May, 2017 for consideration, the proposed works were agreed without amendment, in the following terms:

"That pursuant to Part XI, Section 179 of the Planning and Development Act, 2000 (as amended) and Part VIII, Articles 80 and 81 of the Planning and Development Regulations 2001-2010, Clare County Council proceed with the proposed upgrading of the Cliffs of Moher Visitor Centre Car Park."

By affidavit sworn 4th July, 2017, Mr. Flanagan avers that by letter of 3rd May, 2017 Mr. Dollard notified the members of Clare County

Council "in respect of progressing the matter without delay, notwithstanding that he had full knowledge and was on notice that the matter was before this Honourable Court."

Considerations
39. Section 160(1) of the Planning and Development Act 2000 provides:

> *"Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:*
>
> > *(a) that the unauthorised development is not carried out or continued;*
> >
> > *(b) in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;*
> >
> > *(c) that any development is carried out in conformity with—*
> >
> > > *(i) in the case of a permission granted under this Act, the permission pertaining to that development or any condition to which the permission is subject, or*
> > >
> > > *(ii) (ii) in the case of a certificate issued by the Dublin Docklands Development Authority under section 25(7)(a)(ii) of the Dublin Docklands Development Authority Act 1997 or by the Custom House Docks Development Authority under section 12(6)(b) of the Urban Renewal Act 1986, the planning scheme made under those Acts to which the certificate relates and any conditions to which the certificate is subject."*

40. As set out by Hedigan J. in *Ampitheatre Ireland Ltd v. H.S.S. Developments* [2009] IEHC 464, what the applicant has to do in s. 160 proceedings is to satisfy the Court that there has been unauthorised development and that if the development is unauthorised that the Court should exercise its discretion to make an order in the applicant's favour.

41. In the course of the within proceedings, issue was taken by the respondents to some extent with the applicant's *locus standi* to pursue the within application for relief. I am satisfied, however, by virtue of the history of the matter, as set out in this judgment, that the applicant has sufficient locus standi to maintain the within application.

The issues arising for consideration in this case
42. From the affidavit evidence that is before the Court and based on the parties' respective submissions, I consider that the following issues arise for consideration:

- Whether the Board's December 2002 permission include permission for a permanent car park, as contended by the respondents.
- Whether there has there been a failure to comply with Condition 3 and Condition 7 of the Board's permission.
- Is the applicant out of time to seek s.160 enforcement of Condition 7?
- Is the applicant out of time to challenge the manner of the respondents' compliance with the Condition 3?
- The respondents' contention that the development is exempted development for the purpose of the Act and therefore not amenable to s. 160 proceedings
- The January, 2017 Part VIII process
- If the Court were to find a breach of the planning conditions, whether the Court's discretion should be exercised in favour of the applicant

Did the Board's December 2002 permission include permission for a permanent car park as maintained by the respondents? Has there been a failure to comply with Condition 3 and Condition 7?
43. The first issue to be decided in this case is what permission was granted by the Board in December, 2002 regarding car parking at the Cliffs of Moher. Clearly, the first respondent's 2001 planning application sought permission for a permanent car park to accommodate 249 car parking spaces at the site. This car park was to be located east of the R 478, that is on the Cliffs side of the road. In essence, the applicant's case is that no such permission was ultimately granted by the Board and that the Board rejected permission for a permanent car park. It is argued that albeit the planning application submitted by the first respondent included a car park at the Visitor Centre, the idea of a permanent car park at the Visitor Centre was rejected by the Inspector and that, in fact, the Board did not grant permission for a car park at the Visitor Centre or the Cliifs of Moher site. Accordingly, an issue for determination in the within application concerns the interpretation of Condition 3 of the Board's permission.

As to how the Board's planning permission is to be construed, as set out in *Re X.J.S. Investment Ltd* [1986] 1 I.R. 750, planning documents are not *"Acts of the Oireachtas or subordinate legislation emanating from skilled [draftsmen] and inviting the accepted canons of construction applicable to such material".* Therefore, the Court has to look at the planning permission in its context to ascertain its common sense meaning.

44. Counsel for the applicant submits that that the contents of the Inspector's report are instructive with regard to how the Board's planning permission is to be construed.

45. In support of the submission that the Court can have recourse to planning documents to interpret the meaning of a condition of the planning permission, counsel cited *Kenny v. Dublin City Council* [2009] IESC 19, where Fennelly J. stated:

> *"28. A court, in interpreting a planning permission, may need to go no further than the planning document itself, or even*

than the words of a condition in issue within the context of the permission. The words may be clear enough. However, it will very often need to interpret according to context.

…

35. The principle does not resolve the problem which, as I explain later, arises in respect of Condition No. 2, namely that the condition is, itself, contradictory or, at least, ambiguous. The Gregory case shows that the court does not confine itself to a purely literal interpretation of a condition. It will seek to ascertain its true meaning from its context in the planning process.

46. Counsel also referred the Court to *Buckley v. An Bord Pleanála* [2017] IEHC 541 where Haughton J., in determining the extent of the planning permission granted in that case, had regard, *inter alia*, to the inspector's report.

47. Furthermore, in *Camiveo Ltd. v. Dunnes Stores* [2017] IEHC 147, Barrett J. considered the decision of the Supreme Court in Kenny and, at paras. 31 to 32 of his judgment, went on to state:

"31. For the purposes of the within proceedings, perhaps the key lesson to be drawn from Kenny is just how (very) far the Supreme Court was prepared to go in seeking to ascertain the true intent of the planning authority: the planning condition before the Supreme Court expressly required that the first floor be removed, yet the Supreme Court concluded that what was truly intended was the reduction in the height of the building and this was achieved by the removal of any floor. Notably, in pursuit of the true meaning of a condition, the Supreme Court was prepared not just to look beyond the literal wording of a condition but to allow the doing of something which was entirely contrary to the literal wording of a condition. It is perhaps difficult not to feel a sneaking sympathy for Mr. Kenny as regards the court's decision; but be that as it may, the decision in Kenny is binding on the court.

32. In passing, the court notes that in arriving at its decision in Kenny, the Supreme Court looked to the contents of a report of an inspector of An Bord Pleanála and took them into account in reaching its conclusions. So it is clear that this Court too can have regard to the report of an inspector of An Bord Pleanála when interpreting a planning condition."

48. It is thus well established that the Court can have regard to the Inspector's report as an aid to construing a planning condition. Furthermore, I accept that in construing a planning permission regard must be had to the decision of the Board, the manner in which the Board has expressed itself and the manner in which the conditions have been set out. In looking at the permission one looks at what was applied for, what was decided and the nature of any conditions imposed. All of these matters have to be examined in the round.

49. Albeit acknowledging that Condition 3 on its face is arguably a slightly opaque condition, it is the applicant's case that the management mobility strategy provided for in Condition 3 can only have been intended to refer to a park and ride system to be operated as the exclusive mode of car access to the site, subject only to direct coach access. The first respondent's mobility management strategy was to be submitted to the second respondent prior to the commencement of development. Counsel poses the question if Condition 3 does not have the meaning contended for by the applicant then what place had it in the schedule of conditions at all?

50. In the course of the within application much emphasis was placed on the Inspector's report by the applicant in aid of its argument that the import of Condition 3 was that the sole means of car access to the Cliffs of Moher (save coach access) was to be by means of park and ride.

51. The Inspector's report deals, *inter alia*, with the appeals lodged by Shannon Development Limited and An Taisce against the grant of planning permission. The grounds of appeal submitted by An Taisce included a submission that the proposal as permitted did not resolve car parking and park and ride issues, which should have been a fundamental consideration in any plan led approach to the provision of new facilities at the proposed new Visitor Centre.

52. Similarly, Shannon Development Limited had submitted that "all elements relating to the park and ride proposal are aspirational" and that "the operation of the park and ride facility in tandem with private car access is impractical and would not resolve the access issues arising from the proposal to expand visitor numbers at the cliffs".

53. The first respondent's response to these grounds of appeal were summarised by the Inspector, as follows:-

"With regard to park and ride, the applicant, together with the Planning Authority being the competent road authority, can ensure effective traffic management. Although not essential for the proposed development, the application does include an outline proposal to establish off-street parking at two locations outside the Cliffs of Moher Environmental Zone which will be used for park and ride purposes…

…

With regard to the park and ride scheme, it is stated that the feasibility and operation of the proposed park and ride scheme would be tested during the construction phase. Agreement has been reached with the Rock Shop, Liscannor, and the Falls Hotel Ennistymon, to utilise their car parks to test/operate the park and ride scheme. During the summer months, the park and ride scheme would operate in tandem with the main car park with differential charges making the park and ride facilities more attractive….As a result, the park and ride centres become the gateway access to the on site as well as the off-site parking and park and ride services. The park and ride locations will operate solely on occasions when the main car park is full. A frequent service will be provided during the peak season."

The Inspector's report also noted the Planning Authority's submission at the oral hearing:-

"…the Planning Authority is satisfied that the landscaping proposals to improve the visual amenity of the area and the proposals to reduce the number of parked cars and introduce a park and ride scheme are consistent with the proper planning and sustainable development of the area…"

54. The first respondent's engineer's submissions were also noted in the report, as follows:-

"The proposals include a phased approach to park and ride. The first phase during the construction period will utilise

existing infrastructure and facilities with minimal capital costs during which time a continual monitoring and survey system will be operated to record usage and visitor and community views. The second phase will be the implementation of the main scheme, the location, design and operation of which have been based on the results of surveys carried out during the construction phase."

55. The first respondent's closing submissions on the issue were noted in the following terms:-

> "The park and ride system will be an evolving process and the applicants [for the permission] do need to experiment on a practical basis within the framework of the mobility strategy."

56. The Inspector's assessment/analysis of the first respondent's proposals regarding park and ride facilities was that they were "sketchy and problematic". He stated:-

> "In the long-term I consider that it will be necessary to construct a purpose-built park and ride facility to provide access to the Cliffs of Moher…
>
> No concrete details of any business plan or operational plan for the park and ride element of this development is evident.
>
> Possibly the greatest problem associated with the park and ride scheme is its proposed co-existence with the existing car park on site. To try and run the two operations in tandem will lead to (a) an undermining of the viability and perhaps profitability of the park and ride system; and (b) lead to the inefficient use of car parking spaces on site.
>
> If 250 car parking spaces are to be provided, with each of the spaces being occupied for an average duration of one hour, I estimate that during peak periods approximately three to four cars would enter/exit the car park every minute. Therefore, within minutes of the car park reaching its capacity, the car park would be shut and reliance would subsequently be placed on bringing the park and ride system into operation. However, minutes after initiating the park and ride operation, the car park would begin to empty. This dynamic situation in relation to car park occupancy will ensure that the car park will not be full long enough to initiate a proper park and ride system…
>
> I consider it more appropriate that the applicant opt for either the parking on site or an exclusive park and ride operation in order to facilitate access to the cliffs. I am not aware of any instances where both park and ride and a private car park on site operate simultaneously. I consider the benefits of an exclusive park and ride system outweigh the provision of a car park on site…
>
> The question as to whether or not An Bord Pleanála could condition such Park and Ride facilities in the absence of detailed proposals needs to be explored in greater detail."

Ultimately, the Inspector recommended:

> "…that the Board give due consideration to eliminating the on site car parking and relying exclusively on park and ride facilities for those wishing to access the site with cars…I also have regard to Mr. Dollard's statement, which referred to the fact that it was Clare County Council's long-term objective to eliminate car parking at the site. I see no reason why this objective cannot be implemented in the more immediate term."

57. The Inspector's conclusions were, *inter alia*, that the proposed development was in principle "in accordance with the proper planning and sustainable development of the area". He stated:-

> "If the Board are disposed towards granting planning permission in this instance, I recommend that both the ancillary building and the car park be omitted from the proposed development in order to facilitate a viable and sustainable park and ride system and to ensure that visitor numbers can be controlled successfully. I also recommend that prior to the commencement of development the applicant be made implement the policies and objectives as contained in the Management Guide for the Cliff Edge…Such works are necessary to improve the carrying capacity and the safety aspects associated with the cliff edge. I have argued that both improvements to the cliff edge and the future park and ride facility can be implemented as separate entities but must however be a condition of any grant of permission. I, therefore, recommend that planning permission be granted for the proposed development."

58. The applicant points to the fact that the issue between the Inspector and the first respondent was whether there should be both a permanent car park and park and ride facility. The Inspector came to a definitive view that there could not be both.

Accordingly, it is the applicant's contention that given the contents of Conditions 3 and 7 which attached to the Board's decision of 17th December, 2002, the concept of a permanent car park was out of the equation. Counsel submits that even if this is not obvious from the face of the Board's decision, it is clear that it is reflected in the compliance stage of the planning permission given that the first respondent's own agents (RORSA) saw the temporary car park as temporary and given the first respondent's later decision to omit the permanent car park.

59. It is submitted on the applicant's behalf that the Inspector's report recommended a park and ride facility to provide access to the Visitor Centre which facility was to be remote from the Centre. It was the Inspector's view this would preserve the integrity of the site itself and that a park and ride scheme would ensure that the revenue streams from visitors to the Centre would be spread around the larger tourism area and not just the site itself. The Inspector's report also envisaged that a temporary car park would be allowed to continue to operate during the construction phase of the site. The applicants contend that the import of the Board's decision and the subsequent modifications provided for the temporary car park to continue during and also after the construction phase only while the question of park and ride was being investigated. The applicant also submits that the Board left the issue of how the park and ride element would operate to later engagement by the first respondent with the second respondent qua Planning Authority.

60. It is submitted that consequent on the planning permission granted by the Board, and once a park and ride mechanism was put in place, as has been done, the first respondent is no longer at liberty to continue to use the temporary car park which had been provided for in the Board's grant of permission. Essentially, it is the applicant's case from the time the park and ride system was put in place, there was to be no further access to the Visitor Centre site by cars, albeit there was to be access thereto by coaches.

61. It is submitted that the Inspector's report stated that it was not feasible to have a park and ride system if, independently, cars could access the site as this would deprive the park and ride system of its revenue strain. The applicant thus contends that the right

of the respondents to use the temporary car park ceased after the park and ride mechanism became operational

62. Insofar as the applicant relies on the Inspector's report in aid of their contention that the Board did not grant permission for a permanent car park at the Visitor Centre, in his affidavit sworn 17th November, 2016, Mr. Dollard, on behalf of the respondents, avers as follows:

> "I say and believe and am advised that the Inspector's recommendations regarding (a) the omission of a car park from the development; and (b) the proposal of a condition providing for access to the visitor centre by way of a designated park and ride facility were rejected by An Bord Pleanála. I say and believe that An Bord Pleanála granted permission for a permanent car park at the Cliffs of Moher, as well as permission for what was then characterised as a temporary car park." (at para. 8)

63. Counsel for the respondents, by way of preliminary observation, submitted that the first matter the Court should take account of was that that the first respondent had sought and obtained planning permission for a new permanent car park for 249 cars.

64. The respondents argue that it is clear from the face of the Board's decision (and the Inspector's report) that the planning applied for by the first respondent included a permanent car park at the Visitor Centre. It is thus submitted that the Board granted such planning permission subject to a number of conditions as specified in the decision. Counsel contends that there is no ambiguity and that the planning permission granted included a permanent car park.

65. It is acknowledged by the respondents that the Inspector's report recommended the omission of a permanent car park and that car access to the development would be by park and ride. The report details why the Inspector made this recommendation. Counsel also acknowledges that the respondents' position in the planning application, namely that the park and ride facility would be supplemental to the applied for permanent car park, did not sit well with the Inspector for the reasons stated in his report. It is submitted, however, that the Board's decision reflects the Board's rejection of the Inspector's recommendation that the permanent car park be omitted.

66. It is further submitted on the respondents' behalf that insofar as one has to look at the Inspector's report (for context), it is clear that the Board did not adopt the Inspector's recommendation to omit the permanent car park and that the Board left the issue of a mobility management strategy to be submitted to the second respondent for written agreement prior to the commencement of the development. Counsel points to the fact that, specifically, Condition 3 of the Board's decision does not refer to park and ride or to car parking.

It is further submitted that insofar as the Inspector's report is available to the Court for guidance as to how to construe Conditions 3 and 7, the said report in fact assists the Court in concluding that the Board disagreed with the Inspector's recommendation to omit the permanent car park.

67. The respondents' argument is that on the face of its decision, the Board granted planning permission for a permanent car park, as had been applied for, without it being conditional on anything to do with park and ride facilities. Counsel argues that, as maintained by Mr. Dollard, the applicant's reliance on the Inspector's report is misplaced.

68. Looking at the Board's decision as a whole, I find no basis for the applicant's contention that permission for a permanent car park was not granted by the Board. Specifically, I do not find that the contents of Condition 3 (even when construed in the round) support the applicant's argument that the Board did not grant planning permission for a permanent car park.

Of particular note in this regard is the fact that the Board specifically adopted as part of its conditions that the free-standing ancillary building for which planning permission had been sought "shall be omitted from the development". (See Condition 2 of the Board's Conditions) The omission of this building was also recommended by the Inspector in his report at Condition 3 of his recommended condition.

69. Condition 2 of the Inspector's recommended conditions reads as follows:

> "Details of proposed mobility management strategy shall be submitted to the planning authority prior to the commencement of development. This mobility management strategy shall include the omission of the proposed car park adjacent to the visitor centre. Access to the visitor centre shall be by way of a designated park and ride facility, details of which are to be agreed in full with the planning authority prior to the commencement of the development.
>
> These details are to include:-
>
> (a) precise locations of the park and ride sites;
>
> (b) the number of car parking spaces to be provided within the park and ride sites;
>
> (c) Details of the operation of the park and ride sites, including frequency at buses to and from the park and ride centre and details of the proposed bus circulation routes;
>
> (d) Details of any agreed contract with private operators in relation to the operation of the park and ride facilities;
>
> (e) Details of revised park and ride and coach parking facilities to be provided on site to replace the existing car park;
>
> (f) Details of bicycle parking facilities to be provided on site."

70. In contrast to the foregoing, the Board's consideration of this issue, as contained in Condition 3 of the Board's Conditions, reads:

> "Details of the proposed mobility management strategy shall be submitted to the planning authority for written agreement prior to the commencement of development."

71. In all the circumstances, as matters stood in December, 2002, and particularly in light of the fact that planning permission for a permanent car park had been applied for, I am satisfied that the scope of the planning permission granted by the Board in December

2002 included permission for a permanent car park.

72. In arriving at its conclusions in the above regard, the Court took cognisance of the applicant's contention that because the Board, in Condition 3, referred to the requirement on the first respondent to submit details of the proposed mobility management strategy for written agreement prior to the commencement of the development, that had to be read as meaning that the Board had only ever contemplated (and directed) that, post construction, access to the Cliffs of Moher would be by means of park and ride facility only. I find, however, that I cannot agree with this submission. I am satisfied that the scope of Condition 3 was that the first respondent as the developer of the site would satisfy the second respondent *qua* Planning Authority as to what its mobility strategy was; the Board did not decree that the strategy had to include that car access to the site had be by means of a park and ride facility.

73. Notwithstanding the Inspector's conclusions as to the non-feasibility of park and ride facilities in conjunction with a permanent car park, it is clear that the mobility management strategy had not been finalised at the time of the Board's decision in December, 2002. Accordingly, I cannot accept that in December, 2012 the Board had in mind that car access to the site was to be by means only of a park and ride mechanism, particularly in light of the fact that Board's Conditions, unlike those of the Inspector, did not decree that there would be no permanent car park.

74. As part of his submissions that what was decreed by the Board in December, 2002 was car access to the Cliffs of Moher by means of park and ride only, counsel for the applicant points to Condition 7 of the Board's Conditions. He contends that as contemplated by the Board in Condition 7, the temporary car park referred to therein would be temporary in nature, which was also evidenced by the Inspector's report.

75. It is common case that the first respondent sought planning application for a temporary car park. This is referred to in the Inspector's report. Moreover, the Inspector's eighth recommended Condition was that the first respondent was to submit:

> "a separate planning submission containing full details of the temporary car park to be provided during the period of construction…shall be submitted to and agreed with the planning authority prior to the commencement of development. The storage of excavated materials shall be subject to any requirements of the Environmental Planning Agency."

76. In the Board's Conditions, the temporary car park was dealt with, as follows:

> "Detailed proposals, including full particulars of the temporary car park to be provided during the period of construction and the storage of excavated materials from the site, shall be submitted to and agreed with the planning authority prior to the commencement of development."

77. Counsel for the applicant submits that Condition 7 is the key condition in terms of the relief sought by the applicant. It is argued that Condition 7 relates to Condition 3. Condition 7 provides for a temporary car park to be provided during the period of construction. It is submitted that that Condition 7 can only be understood by reference back to the planning application itself which envisaged expressly a temporary car park. From this it follows that what the planning permission envisaged was that the ongoing use of that part of the lands designated in the planning application as a temporary car park would be for a defined period to enable those lands to be used as a car park during construction. It is submitted that the applicable time limit was defined by reference to the period of construction. The applicant thus argues that it was envisaged at all relevant times that a temporary car park would be used only for a temporary period of time.

78. The respondents' position is that Condition 7 is the Board's response to the Inspector's recommended condition that the first respondent submit a separate planning submission containing full details of the temporary car park to be provided during the period of construction, albeit the Board did not consider it necessary to direct that a specific planning permission be applied for in respect of the temporary car park.

79. The respondents contend that the Board said nothing about the use of the temporary car park into the future. Nor, it is submitted, could it be expected that the Board would do so given that the Board had already given permission for a permanent car park on the west (Cliffs side) of the R478, as had been applied for by the first respondent. As far as Condition 7 is concerned, it is submitted that the reason for that condition was to provide for a temporary car park in circumstances where the permanent car park had not yet been built. It is the respondents' case that the applicant has conflated Conditions 3 and 7 by reference to what transpired after the grant of planning permission in December 2002.

80. I am constrained to agree with the respondents' submission that certainly as of December, 2002 there was nothing to suggest that Condition 7 was in any way bound up with Condition 3 and that Condition 7 was a stand alone condition.

81. It is of course the case that the trajectory envisaged in the Board's decision and the Conditions attaching thereto was altered post the grant of the December, 2002 planning permission.

82. On 30th September, 2004, RORSA, the first respondent's architects, wrote to the second respondent advising, *inter alia*, that for the purpose of compliance with the Board's conditions, the first respondent had deemed it appropriate that the proposed car parking at the Visitor Cente "be re-located outside of the Visitor Centre Site". The relevant parts of this letter are set out earlier in this judgment.

83. As deposed to by Mr. Dollard in his affidavit of 17th November, 2016, and as noted in manuscript on the face of RORSA's document, RORSA's 30th September, 2004 submission was furnished to the second respondent in the context of applications which had been made by the second respondent under Part VIII of the Planning and Development Regulations 2001.

84. Counsel for the applicant submits that the contents of the 30th September, 2004 document shows that as of 30th September, 2004 the respondents shared the same view of the meaning of the planning permission granted by the Board in December, 2002 as is now contended for by the applicant, namely that the Board did not grant permission for a permanent car park. It is submitted that the 30th September, 2004 submission plainly states that the first respondent's proposals were modified "for the purposes of compliance with An Bord Pleanala decision to omit the ancillary buildings structure and car park in front of the Visitor Centre." Thus, counsel for the applicant argues that as far back as 2004, a decision was made by the first respondent to omit the ancillary building structure and the car permanent park. It is submitted that taking the planning application as a whole, what was envisaged by the Board in December, 2002 was the omission not only of the ancillary building but also the permanent car park, and that car access to the Cliffs of Moher site and Visitor Centre would be by park and ride only. It is submitted that this is the import of Condition 3 of the Board's conditions.

85. I find that I cannot agree with this submission. While certain modifications may have made to car parking arrangements at the Cliffs of Moher site between 17th December, 2002 and 30th September, 2004, that does not necessarily give credence to the applicant's submission that the Board did not grant permission for a permanent car park in December, 2002. Such changes as were made post December, 2002 were effected via and as a result of the 2003-2004 Part VIII processes described by Mr. Dollard in his affidavits.

86. The first respondent's response to the 19 planning Conditions imposed by the Board was set out in RORSA's Compliance submissions of 31st March, 2005. Again, the relevant parts of this document are set out earlier in this judgment.

87. Essentially, it is the applicant's contention that whether the modifications with regard to car parking at the Cliffs of Moher Visitor Centre were done in compliance with the Board's permission, or via a Part VIII mechanism, the fact of the matter is that the first respondent had resolved there was to be no permanent car park going forward. Counsel points to the fact that it was specifically stated in the Compliance document that it was the first respondent's intention "to retain the temporary car park across the road from the present location for a period after construction has been completed."

88. Counsel also points to what he says was the first respondent's key strategy as set out in the Compliance document of 31st March, 2005, namely "to omit the permanent car parking at the Cliffs part of the site, retain the temporary car park pending the full assessment of a park and ride scheme, commence a feasibility study during construction as to the optimum arrangements for park and ride and proceed with implementation of a park and ride scheme when the centre has been completed and is operational".

89. It is submitted that what was meant was that the first respondent/developer viewed the decision of the Board of 17th December, 2002 as meaning that the applied-for permanent car park would be omitted and that the first respondent intended to adopt a park and ride route as the sole means of providing car access to the Cliffs of Moher site. It is submitted that that is why Condition 3 put in place a requirement for a mobility strategy.

90. In response to this submission, the respondents' counsel points to para. 10 of Mr. Dollard's 17th November, 2016 affidavit, wherein he avers:

> "I say and believe that certain modifications to the design proposals for which permission had been granted by An Bord Plenala were the subject of public consultation and permission under Part VIII of the Planning and Development Regulations 2001. The Council made an application in October 2003 in respect of proposed cliff edge improvement works, bearing reference LA 03-25, and an application in respect of other developments and modifications for the visitor centre, bearing reference LA 04-08. In the course of its submission dated 30 September 2004 to the Council in respect of Part VIII application LA 04-08, RORSA …confirmed that the proposed car parking area at the Visitor Centre Site *'be relocated outside of the Visitor Centre Site. The proposed remote temporary Car Parking facility is situated on the East side of the existing roadway away from the Visitor Centre and the Cliffs Walks'…"*

91. Counsel for the respondents contends that what occurred in the instant case was that as part of the mobility management strategy necessitated by Condition 3 of the Board's permission, a decision was made by the first respondent to put what had been temporary car parking for the period of construction to post construction use so as to allow the development of a mobility strategy. It is accepted by the respondents that the mobility strategy as of 31st March, 2005 was that the "car park on the Cliffs side of the road", for which the first respondent had obtained planning permission from the Board on 17th December, 2002, would no longer form part of the development, albeit there would be limited coach parking on the Cliffs side of the road, and that the temporary car part located east of the R478 road would be retained for a period of time after construction of the Visitor Centre "to accommodate cars and any overflow of buses from the main bus park."

The respondents' case is that, as referred to in RORSA's Compliace submission of 31st March, 2005, the aforesaid change had been put into effect by the second respondent via a Part VIII process in respect of which there had been a full consultation process, as deposed to by Mr. Dollard in his affidavit.

92. At para. 11 of his 17th November, 2016 affidavit, Mr Dollard avers:

> "I say and believe that the said compliance submission neither envisaged nor recommended vehicular access to the Cliffs of Moher Visitor Centre would be confined to coaches and a park and ride facility. On the contrary, the compliance submission indicted an intention to retain the temporary car park for an indeterminate period after construction of the Centre has been completed. The Council responded to the said compliant submission in a letter dated 25th May, 2005, indicating in respect of condition no. 3, *that 'the present position is noted. Details of proposed Mobility Management Strategy shall be submitted to the Planning Authority prior to occupation of the development*."

93. Counsel for the respondents argues that insofar as reliance is placed by the applicant on the mobility management strategy as set out in Condition 3 of the Board's Conditions, it was at all times a matter for the second respondent to satisfy itself as to whether or not the strategy proposed by the first respondent was or was not acceptable. Counsel submits that the second respondent's request of 25th May, 2005, namely, that details of the first respondent's mobility management strategy be furnished prior to the Visitor Centre becoming operational was complied with by the first respondent in December 2006. In this regard, counsel relies on the "Submission regarding planning queries" exhibited in Mr. Dollard's affidavit sworn 17th November, 2016.

94. It is submitted that this document demonstrates that the mobility management strategy remained aspirational in nature. It is also contended that the overarching consideration for the purpose of the within proceedings is that the strategy was one to be agreed between the first respondent and the second respondent qua Planning Authority. It was thus not a question of a third party saying that the time is now ripe for a park and ride facility. It is further submitted by the respondents that it is clear from the Inspector's report that when there was discussion about a park and ride scheme, it was a scheme to be developed and operated by the respondents, and not one imposed by a third party. It was for the respondents at all times to decide whether they were going to involve third parties in the strategy.

95. Thus, the respondents maintain that it is not correct for the applicant to request the Court to interpret Condition 3 as if the substance of first respondent's Compliance submissions of 31st March, 2005 were expressly required by Condition 3 of the Board's permission.

96. With regard to the respondents' reliance on the document entitled "Submission regarding planning queries" it is the applicant's contention that this document is of nil evidential value in the within proceedings. It is submitted that what Mr. Dollard exhibits in his affidavit of 17th November, 2016 is a document that was produced in response to queries which arose as part of the Part VIII

application for permanent improvement works on the temporary car park. It is submitted that without its specific context having been set out in Mr. Dollard's affidavit, the December, 2006 document cannot advance the respondent's defence in the within proceedings.

97. As regards the applicant's latter argument, I am satisfied from Mr. Dollard's affidavits that the context of the document in question has been adequately set out. Specifically, the document refers to Condition 3 of the Board's submission. Moreover, it specifically addresses the mobility management strategy in the context of the then imminent opening of the Visitor Centre, which is what the second respondent had requested be addressed in its letter of 25th May, 2005.

98. Overall, I accept the respondents' argument that if the Court were to read into Condition 3 the substance of what was put forward by the first respondent in the 31st March, 2005 Compliance document, and equate same to what the Board had ordained in December, 2002, that would be to retrospectively impose on the Board's grant of permission/Condition 3 a certainty regarding the mobility management strategy that did not exist at the time of the making of Condition 3. Nor indeed was such certainty sought by the Board in December, 2002. It is clear from the submissions made in the course of the planning process (as recorded in the Inspector's report) that the mobility management strategy was a fluid process, or to put it another way, a work in progress. That, however, does not impact on what Condition 3 provided for, which was that the first respondent was to submit a mobility management strategy to the second respondent for agreement. I accept, on balance, that that was done and, thus, to my mind, there was compliance by the first respondent with Condition 3.

99. I turn again to Condition 7 of the Board's decision. As regards this condition, the applicant's core submission is that the modifications made to the use of the temporary car in 2004 were done in the context that the life of the temporary car park was only to be extended until implementation of the park and ride scheme and that once the latter scheme was up and running the temporary car park was to cease.

100. In aid of his submissions in this regard, counsel referred to the Court to a map dated December, 2004 which attached to RORSA's Compliance document of 31st March, 2005. The map shows that the temporary car park was to be decommissioned and become a green field site. Counsel submits that this was to happen once the park and ride scheme was implemented. It is contended that the map makes it abundantly clear that it was envisaged that the temporary car park would only be used for a limited period. Counsel argues that it is thus clear as of 31st March, 2005, albeit some modification to the planning permission had been made where it was envisaged and agreed that the temporary car park would remain until after the park and ride facility was operational, that the respondents were of the view that the applied-for permanent car park would not proceed and that the temporary car park would remain *in situ* only until after the park and ride scheme was implemented and operational. It is the applicant's contention that given that the park and ride facility is now operational the use of the temporary car park must cease and that the respondents' continued use thereof is unauthorised.

101. It is further argued on the applicant's behalf that at the various stages of the planning applications bearing references 08/1139 and 08/1133 which were made to the second respondent and the Board for park and ride facilities, both the second respondent and the Board only envisaged a temporary car park at the Visitor's Centre until a park and ride facility was operational and running. Counsel submits that albeit that these planning permissions were the subject of a separate planning process the Court should have regard to them in construing the parameters of the Board's grant of permission to the first respondent of 17th December, 2002.

102. Insofar as the applicant relies on the park and ride planning processes in aid of its case, I am not overly persuaded that these planning processes can assist the Court in construing the Board's December, 2002 permission for the purpose of determining whether there has been compliance with the Conditions attached thereto. With regard to the applicant's reliance on the December, 2004 map, while it is the case that that document envisages a green space at the site of the temporary car park, the existence of that document, to my mind, cannot gainsay the decision made in 2003/2004 to relocate the car park for which planning permission was granted in December, 2002 to the site of the temporary car park.

103. As to how Condition 7 of the Board's December, 2002 permission is to be construed, I note that, essentially, the applicant does not criticise the second respondent's decision in 2004, made via the Part VIII process, to retain the temporary car park for which planning permission had been granted in December, 2002 beyond the period provided for in Condition 7. It is also of note that those Part VIII processes, which were subject to full public consultation, were not challenged at that time by Mr. Flanagan or any corporate entity associated with him or of which he was or is a director.

104. I am further satisfied that the Part VIII process which was undertaken in 2003/2004 was in no way underhand, given that, as stated by Mr. Dollard, it was subject to a public consultation process, and given that at the oral hearing before the Inspector in November 2002 it was specifically stated by Mr. Dollard that the mobility management strategy could be conducted under the Part VIII process.

105. What the applicant complains about is the respondents' retention of the car park at a time when the applicant wishes to implement its park and ride facility as the sole means of car access to the Cliffs of Moher Visitor Centre, a facility which is now operational and which the applicant now operates pursuant to an arrangement entered into with the second respondent. It is of course the case that this park and ride facility is currently being operated in tandem with the provision of car parking at the Cliffs of Moher site.

106. The applicant's core case is, effectively, that the Compliance submission of the 31st March, 2005 underscores the Board's requirement of a mobility management strategy as envisaging that car access to the Visitor Centre would be only by means of a park and ride facility.

107. Insofar as this is a key argument of the applicant, I agree with the respondents that there are a number of factors which serve to undermine this argument. Fundamentally, the applicant's argument proceeds on the premise that in December, 2002 the Board required that access to the Visitor Centre/Cliffs of Moher would be solely by way of a park and ride facility when in fact that particular recommendation of the Inspector was not one that found favour with the Board and was not adopted by the Board. I am satisfied for reasons already set out herein that no condition requiring that car access to the Cliffs of Moher be by way of park of ride was actually imposed by the Board. As found by the Court, as a matter of fact, the Board granted planning permission for a permanent car park on the Cliffs side of the R478. Secondly, the applicant's ignores the fact that in response to the required mobility management strategy the first respondent made submissions to the second respondent in December 2006 (prior to the opening of the Visitor Centre) wherein it set out its strategy and specifically highlighted that "a park and ride scheme may … form part of the mobility management strategy" (emphasis added) and advised that the mobility management strategy will be reviewed and adjusted "as the need arises". Thus, there was no certainty as to whether or when a park and ride facility would come into play. My finding in this regard cannot be influenced by the fact that a park and ride system is now being operated in respect of the site.

108. Furthermore, the applicant's arguments ignore the fact that the Board's requirement for a mobility management strategy was one for the second respondent to agree with the first respondent rather than for any third party to impose.

109. Moreover, I have had regard to the fact that by resolution of 3rd December, 2004, via a Part VIII process, the second respondent accepted the proposal, as referred to in the submissions dated 30th September, 2004, that the permanent car parking area proposed for the Visitor Centre at the Cliffs side of the R478 (for which planning permission had been granted in December, 2002) "be relocated outside of the Visitor Area Site. The proposed remote temporary Car Parking facility is situated on the East side of the existing roadway away from the Visitors Centre and the Cliffs Walks…"

110. While the language used in the 30th September, 2004 (and indeed the 31st March Compliance document) cannot by any means be described as elegant, and indeed gives rise to some ambiguity, at the end of the day, I accept Mr. Dollard's evidence that the 2004 Part VIII resolution permitted the continued function of the car park at the Cliffs of Moher beyond the period of construction of the Visitor Centre.

111. I am also satisfied that the import of the reference in the 30th September, 2004 document to the car park being re-located "outside of the Visitor Centre Site" was that it was being re-located to east of the R 478, and not to any site remote from the Cliffs of Moher/Visitor Centre.

112. I should say that in the course of his submissions, counsel for the applicant argued that the import of the 30th September, 2004 submission was that it had been deemed appropriate by the first respondent that the proposed car parking area be relocated somewhere entirely remote from the Cliffs of Moher site and that what was being contemplated was car access only by means of a park and ride facility. I do not accept, however, that the 30th September 2004 document can be read in this manner. In arriving at this conclusion, I have had regard to the Compliance document of 31st March, 2005 where it is clearly stated that the intention was to retain the temporary car park which was described as "across the road from the present location…" Thus, to my mind, there is nothing in the papers put before the Court which gives credence to the applicant's submission. This is particularly so in circumstances where the Court is satisfied that as of 2004/2005, no mobility management strategy, be it for a purely park and ride system or otherwise, had in fact crystallised.

113. Much was made by the applicant of the timing of the Part VIII process which commenced on 17th January, 2017 with regard to permanent improvement works at the car park in issue in the within proceedings. It is submitted by the applicant that the process was intended by the respondents to frustrate the within proceedings and render them moot.

114. Essentially, the applicant does not accept that there exists a Part VIII permission which permits use of the temporary car park as a permanent car park. It is argued that the January, 2017 Part VIII process relied on by the respondents has not been exhibited in the within proceedings. Counsel submits that the said process was embarked on post the commencement of the within s. 160 application and was commenced solely to get around the within application. Counsel also argues that the Part VIII process does not crystallise until the Manager signs an order approving it. This has not happened. In all the circumstances, counsel submits that the January, 2017 Part VIII process is contemptuous of the within application.

115. As I understand it, post the Part VIII process having been initiated on 17th January, 2017, on 30th January, 2017, the applicant lodged detailed observations in relation to the Part VIII application for permanent works on the car park. A report was also prepared by Doherty Environmental in which they considered the applicant's environmental report which was prepared by Ecofact Environmental Consultants. Observations submitted by the Department of Arts, Heritage Rural and Gaeltacht Affairs were received by the second respondent on 29th March, 2017. These observations noted no archaeological or natura objectives on Part VIII 17/8001.

116. According to Mr. Dollard, the second respondent's Environmental Assessment Officer duly reviewed the application and all the documents submitted and agreed that the proposed works would "not have the potential to result in likely significant effects to the future conservation status of the surrounding European Sites." The Part VIII application was approved by the second respondent on 15th May, 2017.

117. The respondents contend that if there was to be a challenge to that resolution, pursuant to s. 50 of the 2000 Act that challenge ought to have been brought within eight weeks of the resolution by way of application for judicial review. That did not occur. Accordingly, they submit that the decision of 15th May, 2017 cannot now be challenged. They also assert that at this remove, the Court cannot be asked by the applicant in s. 160 enforcement proceedings to determine whether or not an Environmental Impact Assessment or an Appropriate Assessment was required. I accept the respondents' submission in this regard. I also accept that the resolution of 15th May, 2017 cannot be challenged in the within proceedings under s. 160 of the 2000 Act.

118. Furthermore, I am not satisfied to accept the applicant's contention that the 2017 January Part VIII process was commenced solely to frustrate the within application. I am so satisfied in circumstances where a Part VIII process was engaged in by the second respondent in 2003/2004 and which involved the relocation of the permanent car park which had been provided for in the Board's planning permission to the site designated as the temporary car park. I do not believe, therefore, that the 2017 Part VIII process which concerned upgrading works to the car park can be said to be something which the respondents engaged in merely to somehow ring fence the issue of the first respondents' compliance with the December 2002 planning permission from scrutiny by the Court, as Mr. Flanagan seeks to suggest.

119. I also accept that there is no requirement for a Manager's order in respect of the January 2017 Part VIII process to be put before the Court. Section 179(4)((b) of the 2000 Act provides:

> *"Following the consideration of the manager's report under paragraph (a), the proposed development may be carried out, as recommended in the manager's report, unless the local authority, by resolution, decides to vary or modify the development, otherwise than as recommended in the manager's report, or decides not to proceed with the development."*

120. Since, in this case, the second respondent resolved to approve of the Manager's report, I am satisfied that the need for a Manager's order in order for this Court to take cognisance of the resolution of 15th May, 2017 does not arise.

121. In all the circumstances of the present case, and for the reasons set out above and in particular taking into account the various Part VIII processes with regard to the car park in question, I am not satisfied that the applicant has discharged the onus on it to show that the use of the present car park is unauthorised use for the purpose of s. 160 of the 2000 Act.

122. However, lest the Court is in error in its findings in this regard, and that the current car park constitutes unauthorised

development, I now turn to the question of whether, if the respondents' use of the car park is unauthorised use for the purpose of s. 160 of the 2000 Act, the applicant is out of time to bring the within proceedings, as argued by the respondents.

Is the applicant time barred?
123. It is the respondents' contention that insofar as s. 160 relief is sought on the basis of an alleged breach of Condition 7, the applicant is out of time for the purposes of s. 160(6)(a)of the 2000 Act, which is prescriptive of what the applicant is allowed to do.

124. In relevant part, s.160(6)(a) provides:

> *An application to the High Court or Circuit Court for an order under this section shall not be made-*
>
> *…*
>
> > *(ii) in respect of a development for which permission has been granted under Part III, after the expiration of a period of 7 years beginning on the expiration, as respects the permission authorising the development, of the appropriate period (within the meaning of section 40) or, as the case may be, of the appropriate period as extended under section 42…"*

125. The respondents submit that given the applicant's reliance on an alleged breach of Condition 7, at best, the planning permission granted by the Board in December 2002 expired in January 2008. It is submitted that on the applicant's own case (which is that planning permission has been granted and regulates the development of the car park) the within proceedings were required to have been commenced at latest by 17th February, 2015 (allowing for the Christmas period) Yet, the application was only brought in July 2016. Accordingly, it is out of time and on that basis the application insofar as it is based on an alleged breach of Condition 7 must fail. It is submitted that the onus of establishing that the application is time-barred, which is on the respondent, has been met in this case on the basis of the evidence before the Court.

126. It is submitted that irrespective of whether one relies on the expiry of the planning permission (at latest January/February 2008) or on the February 2007 date when the Visitor Centre opened (thereby necessitating proceedings to be brought at the latest by April, 2014) the applicant is out of time for the purpose of seeking enforcement in respect of Condition 7.

127. The respondents further contend that with regard to Condition 7, either it means that the temporary car park was to cease after the construction period or it did not mean that. It is not a complicated condition. The respondents contend that if it was wrong to have a continued existence of a temporary car park after the period of construction that was something that was known to the applicant from February 2007 and/or January 2008. The respondents' case is that the use of the temporary car park was altered from being a temporary car park for the period of construction to being a car park that was going to be used for an indefinite period while consideration was being given to issues concerning the mobility management strategy, in respect of which the second respondent was ultimately in control. Thus, a change of use occurred. A change of use is development. Accordingly, the second respondent carried out development at the end of the period of construction, altering the use of the temporary car park for use as a re-located car park to be used indefinitely. Thus, if the development is unauthorised, as contended by the applicant, then time has run in relation to Condition 7.

128. The applicant refutes the respondents' assertion that the within proceedings are statute-barred. While Condition 7, as attached to the Board's December, 2002 permission, prevented the use of the temporary car park after the relevant construction works had been completed, it is argued that by virtue of the modifications that were subsequently made to the planning permission the temporary car park was to subsist until after a park and ride scheme had been implemented. Thus, the applicant submits that it is only from the time that the park and ride arrangement had been implemented that a breach of Condition 7 could give rise to an entitlement to an order under s. 160 of the 2000 Act. It is the applicant's contention that the ongoing use of the temporary car park, in breach of Condition 7, did not arise until after the park and ride was ready to be implemented. It is submitted that the implementation of the park and ride scheme came to pass in 2015/2016 when the applicant entered a Customer Agreement with the second respondent. This Customer Agreement was part of the conditions which attached to planning permissions 08/1129 and 08/1133 which entitled the development of park and ride facilities.

129. It is further submitted that the affidavit evidence shows that in or about May 2016, the applicant wrote to the respondents indicating that it now intended to implement the park and ride facilities as it had obtained by then all relevant licences. It is thus argued that the temporal feature of the within application only came into focus in May 2016. It is the applicant's overall contention that time could not run in respect of Condition 7 until Condition 3 of the Board's December, 2002 planning permission had been complied with.

130. As far as the applicant's above submissions are concerned, I am not persuaded that they can be accepted by the Court. It seems to me that they are largely predicated on the Court accepting that a park and ride facility as the sole means of car access to the Cliffs of Moher/Visitor Centre was ordained by the Board in December, 2002 under Condition 3, or, alternatively, that the modifications made via the Part VIII process in 2004 had removed entirely the concept of car parking at the Cliffs of Moher site once a park and ride was implemented. However, for the reasons set out earlier in this judgment, I find neither of these arguments to be made out. In those circumstances, I do not find merit in the applicant's argument that time did not begin to run until 2016.

131. The applicant further contends, however, that Condition 7 concerns "the ongoing use of the land" for the purposes of s. 160(6)(b) of the 2000 Act. Section 160(6)(b) of the 2000 Act provides:

> *"Notwithstanding paragraph (a), an application for an order under this section may be made at any time in respect of any condition to which the development is subject concerning the ongoing use of the land."*

132. It is argued that in those circumstances, the temporal restriction provided for in s.160(6)(a)(ii) does not apply to the applicant. It is submitted that as Condition 7 was a condition concerning the ongoing use of the land, this has lasted beyond the lifetime of the development.

133. It is thus contended that no time limit applies regarding the respondents' failure to comply with Condition 7 of the planning permission granted by the Board on 17th December, 2002.

134. The respondents contend that there is no basis for the applicant's reliance on s. 160 (6)(b) of the 2000 Act by way of answer to the respondents' submission that the applicant is time-barred. The respondents say that Condition 7 does not fall into the type of

condition covered by s. 160(6)(b). They submit that Condition 7 is not a condition regarding "*the ongoing use of the land*" in the sense contemplated by s. 160(6)(b). It is argued that there are no conditions prescribing the day to day circumstances within which use of the car park is permitted. The respondents submit that a planning condition concerning the ongoing use of land, in respect of which exemption as provided for in s. 160(6)(b) is allowed from the general time bar otherwise provided by s. 160(6)(a)(ii), must be a condition as to the day to day terms upon which ongoing use is to be permitted. The respondents contend that this is implicit in the use of the word "*ongoing*". Examples proffered by the counsel for the respondents were conditions regarding hours of operation, noise levels, waste disposal and so forth. It is argued that such exemptions from s.160(6)(a)(ii) make sense otherwise developers might be minded only to abide by planning conditions for the duration of time limits, only to ignore them with impunity thereafter.

135. Overall, I agree with counsel for the respondents that the applicant's reliance on s. 160(6)(b) is misplaced. The planning condition on which the applicant relies is one relating to the provision of a "temporary" car park "during the period of construction" of the Visitor Centre. The grant of permission did not include any condition regarding the ongoing use of the car park during that construction period. Clearly, as per the permission, the life of the temporary car park was to be limited.

136. Condition 7 provided that the temporary car park was to survive as a car park for the period of the construction of the development. After the Visitor Centre opened, the temporary car park had no ongoing function consistent with s. 160(6)(b).

137. Thus, if the applicant were correct in its contention that a breach of Condition 7 has occurred (which the Court has rejected), the breach was in the very existence of the temporary car park after construction had been completed, not in its ongoing use. In those circumstances, s.160 (6)(b) cannot avail the applicant and I find that the applicant has not brought the within proceedings within the mandatory period prescribed by s. 160(6)(a)(ii) of the 2000 Act.

138. Counsel for the respondents also made the case that if the applicant's complaint concerns the first respondent's mobility management strategy, complaint in this regard also was not made in time. It is submitted that it is clear from Condition 3 that the submission on the mobility strategy was to be made prior to the commencement of construction of the Visitor Centre. Therefore, based on the applicant's own arguments that Condition 3 envisaged only a park and ride facility by way of mobility management strategy, for the purposes of any complaint, time would start to run from the time the Visitor Centre was operational, which was in February 2007. Thus, even if the applicant's complaint regarding Condition 3 had merit, it is argued that the applicant should have commenced proceedings by 2014/2015 at the very latest. I am constrained to agree also with this submission.

The respondents' contention that the development is exempted development

139. Without prejudice to their arguments that they were not in breach of the planning conditions imposed by the Board in December, 2002, and, even if there was a breach, that the applicant is out of time to bring s. 160 proceedings, the respondents argue that the development in question is development by a local authority within its functional area, or, alternatively, is development on behalf of, or jointly or in partnership with a local authority or a planning authority. It is thus submitted that the development is exempted development within the meaning of s. 4(1)(aa) and/or s.4(1)(f) of the 2000 Act and therefore not amenable to the provisions of s. 160.

140. Section 4 (1) of the 2000 Act provides:

> *"(1) The following shall be exempted developments for the purposes of this Act—*
>
> *…*
>
> *(aa) development by a local authority in its functional area,*
>
> *…*
>
> *(f) development carried out on behalf of, or jointly or in partnership with, a local authority pursuant to a contract entered into by the local authority concerned, whether in its capacity as a planning authority or in any other capacity;"*

141. The respondents contend that the first respondent is wholly owned by the Council and that its development of the Visitor Centre, including the retention of the car park, has been carried out on behalf of, in particular with or by the Council. It is submitted that s. 160 of the 2000 Act has no role in relation to exempted development. It is argued that this is clear from the provision of s. 160 which is directed solely and specifically to "unauthorised development".

142. Section 2 of the 2000 Act defines "unauthorised development" in the following terms:

> *"unauthorised development" means, in relation to land, the carrying out of any unauthorised works(including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use"*

"*Unauthorised works*" are defined in s. 2 as follows:

> *" Unauthorised works means any works on, in, over or under land commenced on or after 1 October 1964, being development other than—*
>
> *(a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or*
>
> *(b) development which is the subject of a permission granted under Part IV of the Act of 1963 F17[or under section 34, 37G or 37N of this Act], being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject"*

"*Unauthorised use*" is similarly defined:

> *"Unauthorised use" means, in relation to land, use commenced on or after 1 October 1964, being a use which is a material change in use of any structure or other land and being development other than—*
>
> *(a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or*

(b) development which is the subject of a permission granted under Part IV of the Act of 1963 F17[or under section 34, 37G or 37N of this Act], being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;"

"Works" is defined in s.2 of the 2000 Act as follows:

> *"works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure."*

"*Development*" is defined in the 2000 Act as:

> ""*development" has the meaning assigned to it by section 3, and "develop" shall be construed accordingly"*

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, over or under land or the making of any material change in the use of any structures or other land"*

143. The respondents contend therefore that exempted development occupies a different legal space in the planning regime and that exempted development cannot be challenged under s. 160 of the 2000 Act. If any challenge is to be brought, same has to be by way of an application for judicial review.

144. It is further submitted that the onus falls on the applicant to establish that the development is not exempted development. In this regard, counsel cites McKechnie J. in Meath County Council v. Murray [2017] 2 I.R. 297:

> "*The formal requirements of section 160 must be satisfied in the first instance…*
>
> *Those requirements can of course give rise to difficult issues, such as the quia timet point in Mahon v. Butler, and others might touch on whether the activity in question is unauthorised or is exempt or the like." (at para. 83)*

Counsel for the applicants contends, therefore, that *Meath County Council v.Murray* is determinative of where the onus lies in this regard: it is on the applicant to establish that the development is not exempted development.

145. In opposition to the respondents' contention that the development constituted exempted development, counsel for the applicant submits that nowhere on affidavit have the respondents stated that the development of the continued use of the temporary car park as a permanent car park amounts to exempted development. In aid of his submission that such evidence is required, counsel quotes Simons on Planning and Development Law (2nd Ed.):

> "A respondent should disclose the nature of any defence on which he proposes to rely in any replying affidavits filed. A respondent may not be entitled to raise at the hearing of the motion a point by way of defence not raised on affidavit."

146. The Court was also referred by counsel to *Dublin County Council v. Balfe* (High Court, 3rd November, 1995), where Costello J. opined:

> *"In my view a respondent is not entitled to raise at the hearing of the motion a point by way of defence not raised in the affidavit. That such must, in the interests of doing justice between the parties, be the legal situation is illustrated by this case. In none of the affidavits filed on behalf of the respondents was it suggested that permission to use the lands for business purposes was not required because they were so used in October, 1964. This point was first taken in counsel's closing submissions and obviously no opportunity to consider it and adduce evidence in relation to it was offered to the applicant."*

147. The applicant therefore submits that it was never ventilated save in the submissions of the respondent's counsel that the development was exempted and he argues that it is now too late for the respondents to make this case. It is further submitted that there is no basis on which the respondents can now assert that the use of a temporary car park, the use which was conditioned formerly in a decision of the Board, is, if converted into a larger permanent car park, exempted development.

148. Counsel also submits that basis on which the respondents now claim that the development is exempted development has not been explained. It is not clear whether it is being advanced as development under s. 4 (1) (aa) or s. (1) (f) of the 2000 Act. It is argued that this lack of clarity is fatal to the respondent's contention since in order to excuse the development or the use of the land, the Court must be able to identify the precise ambit of the excuse relied on.

149. Even if the Court does not accept the applicant's pleading point, it is submitted that the assertion that the development is exempted development should have been made as a matter of fact. However, there is no evidence that the development is exempted development. For the purposes of s. 4 (1)(aa) of the 2000 Act, the second respondent has not provided evidence that it developed the car park. Nor, for the purposes of s. 4 (1)(f), is there evidence put before the Court of any contract between the first respondent and the second respondent relating to the conversion of a temporary car park into a permanent car park.

150. Issue is also taken with the contention that the onus is on the applicant to establish that the development is not exempted development under the Act. In this regard counsel for the applicant cites *Moore v. Minister for Arts Heritage and the Gaeltacht* [2016] IEHC 150 where Barrett J. quoted the *dictum* of McKechnie J. in *South Dublin City Council v. Fallowvale,* as follows:

> *"In my opinion the stage presently reached is that there is a clear preponderance of authority in favour of the proposition that when the development complained of is sought to be excused under cover of either a S.4 of the Act of 2000, or under the exempted development provisions in the regulations, then the onus of establishing this point is upon he who asserts."*

151. Furthermore, insofar as the respondents rely on *The County Council of Meath v. Murray*, counsel for the applicant contends that the onus of proof in exempted development was not an issue at all in that case.

152. It is also submitted on behalf of the applicant that the use of a temporary car park as a permanent car park comprising 481 spaces cannot be an exempted development because the provisions of the EIA Directive provide that the construction of a car park exceeding 400 spaces requires an environmental impact assessment. He points to s. 4 (4) of the 2000 Act which provides:

> "development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required."

153. By way of response to the applicant's arguments, counsel for the respondents asserts that contrary to the applicant's arguments, the question of whether development is exempted development is not a matter for pleading points. He maintains that in a s. 160 application, there are no pleadings. There is an originating notice of motion and affidavits. Counsel submits that the facts as set out in the affidavit evidence made clear that the development in question was one undertaken by the second respondent and/or by the second respondent with the first respondent.

154. Counsel further submits that *Dublin County Council v. Balfe* can be distinguished from the present case in circumstances where the principal evidence on which it is said the present development was one conducted by the second respondent as local authority and/or with the first respondent is that which has been put before the Court by the applicant's own affidavits.

155. The respondents also dispute the applicant's contention that there is no evidence before the Court in relation to exempted development, arguing that the applicant ignores the affidavit of Mr. Dollard of the 5th May, 2017 which deals with the issue of there being no abandonment by the respondents of car parking at the Cliffs of Moher Visitor Centre and which refers to the decision taken in 2004 that car parking for the Visitor Centre would be re-located to the site of the temporary car park. This was one of the modifications set out in the RORSA submission of September 2004 furnished in the course of the 2004 Part VIII process and which was further articulated in the Compliance document of the 31st March, 2005.

156. In the first instance, with regard to where the onus lies, I accept the applicant's submission that insofar as exempted development is concerned, I am satisfied that the onus is on the respondents to establish that the development is exempted development. I find that there is nothing in *Meath County Council v. Murray* [2017] 2 I.R. 297 which suggests a departure from the principle set out by Barrett J. in *Moore v. Minister for Arts Heritage and the Gaeltacht* wherein he quotes the *dictum* of McKechnie J. in *South Dublin City Council v. Fallowvale*, as recited above.

157. The applicant's principal submission is that the defence that the development is exempted development for the purposes of the 2000 Act has not been pleaded by the respondents. While the respondents argue that no pleadings are involved in a s.160 application they acknowledge that any defence relied on must be capable of being distilled from the affidavit evidence that is before the Court.

158. As is clear from their respective submissions, the parties disagree as to the import of the affidavit evidence, and as to whether it is sufficient for the purpose of establishing exempted development for the purpose of either s. 4(10(aa) or s. 4(1)(f) of the 2000 Act.

159. To my mind, however, at the end of the day, given that the issue of exempted development was not specifically addressed in Mr. Dollard's affidavits, I accept the applicant's arguments and I find that there is no sufficient basis made out on which would entitle the respondents to maintain at this juncture that the provisions of s.4(1)(aa) or s.4(1)(f) have been met.

160. Moreover, I find merit in the applicant's argument that the respondents cannot now at this remove assert that the use of the car park, the use of which was conditioned in the Board's decision of 17th December, 2002, is in fact exempted development particularly where the Court has found that there is an insufficient evidential basis for that assertion.

161. Given, however, the findings which the Court has made elsewhere in this judgment, in particular with regard to the Part VIII processes which were engaged in by the second respondent concerning car parking arrangements at the Cliffs of Moher site, my conclusions on the issue of whether respondents can now assert that the development was exempted development cannot assist the applicant for the purposes of the within application. I have already determined that the respondents are not in breach of the Board's planning conditions. I have separately found that the applicant is out of time in which to bring proceedings under s. 160 of the 2000 Act.

The Court's discretion

162. In the course of their submissions, the respondents contended even if the Court were to find that the car park constitutes unauthorised use, and even if the applicant was not time-barred, that the Court should not exercise its discretion in favour of the grant of an order under s. 160 to the applicant. Counsel for the respondents referred to *The County Council of Meath v. Mur*ray, where McKechnie J. (at para, 90), following an analysis of the relevant case law, identified the following considerations which may influence whether an order under s. 160 is or is not in fact made.

> " *(i) The nature of the breach: ranging from minor, technical, and inconsequential up to material, significant and gross;*
>
> *(ii) The conduct of the infringer: his attitude to planning control and his engagement or lack thereof with that process:*
>
> - Acting in good faith, whilst important, will not necessarily excuse him from a s. 160 order,
> - Acting mala fides may presumptively subject him to such an order;
>
> *(iii) The reason for the infringement: this may range from general mistake, through to indifference, and up to culpable disregard;*
>
> *(iv) The attitude of planning authority: whilst important, this factor will not necessarily be decisive;*
>
> *(v) The public interest in upholding the integrity of the planning and development system;*
>
> *(vi) The public interest, such as:*
>
> - Employment for those beyond the individual transgressors, or

- The importance of the underlying structure/activity, for example, infrastructural facilities or services.

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

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

(ix) The personal circumstances of the respondent; and

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

163. In the course of the hearing of the within application, detailed submissions were made by the applicant and the respondent on the issue of the Court's discretion. However, as also set out by McKechnie J. in *The County Council of Meath v. Murray*:

> *"It is to state the obvious that the formal requirements of section 160 must be satisfied in the first instance: unless the moving party has discharged the onus of proof in this regard, the application must fail (Dublin Corporation v. Sullivan (Unreported, High Court, Finlay P, 21st December, 1984)… it is only once a case is made out that the issue of what order should be made arises, which of course in turn immediately brings into play the discretionary element of [s. 160]"* (at para. 83)

164. Given that the Court has found that the formal requirements of s. 160 of the 2000 Act have not been met, it does not therefore fall to be considered whether an order pursuant to s. 160 should be granted.

Summary

165. For the reasons set out in the judgment, the relief sought in the Notice of Motion is denied.