



THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 291

Court of Appeal Record No. 2019/53

High Court Record No. 2016/259 MCA

**Woulfe J.
Whelan J.
Pilkington J.**

**IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT, 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/APELLANT

-AND-

CLIFFS OF MOHER VISITOR CENTRE LIMITED AND CLARE COUNTY COUNCIL

RESPONDENTS

Judgment of Mr. Justice Woulfe delivered on the 5th day of November, 2021.

Introduction

1. This is an appeal against the decision of the High Court (Faherty J.) [2018] IEHC 654, which refused the applicant's application for various orders pursuant to s. 160 of the Planning and Development Act, 2000, as amended ("the 2000 Act"). The type of orders sought by the applicant, commonly referred to as "planning injunctions", were essentially 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, in which the applicant has an interest. The applicant contends that the public car park at the Visitor Centre is unauthorised development and that the respondents have failed to comply with certain conditions attaching to the planning permission ("the permission") granted to the first named respondent for the purposes of developing the Visitor Centre.

Background

2. The decision of An Bord Pleanála ("the Board") to grant the permission, the subject matter of these proceedings, issued on the 17th December, 2002. It was preceded by an Inspector's report which was published in November, 2002, and which described the site location at that time as follows (at p. 5 of 187):

"The existing visitor centre, comprising of a small stone building with a pitched slate roof, is located in the townland of Lislorkan North, on lands to the east of the Cliffs of Moher. The Cliffs of Moher are one of the most popular tourist destinations nationally: the Cliffs are described as an abrupt and dramatic termination of a rolling range of hills through County Clare at the Atlantic coast. The ceaseless wave erosion has resulted in the formation of dramatic and vertical cliff faces up to 200m in height which extend for approximately 8 to 10 kilometres along the western coast of Clare. The area in the vicinity of the existing visitor centre is sparsely populated and characterised by gentle undulating land which is largely under grass cover. The landscape adjacent to the Cliffs of Moher is generally devoid of tree and shrub cover. The elevated and exposed nature of the area adjoining the Atlantic ocean renders it unsuitable for such a vegetation cover. Small stone walls form the boundaries of the surrounding fields. The existing visitor centre is located to the south of a hill which stretches northwards along the cliffs. An existing car park and coach park is located on more level land to the south and the south-east of the visitor centre.

The site of the application for permission includes the existing facilities and car parking area and a substantial section of the hillside to the north extending almost to (but not including) the cliff edge path which leads to O'Brien's Tower to the north-west of the site...

The R478, a regional route linking the towns of Liscannor and Lisdoonvarna, runs along the eastern boundary of the site. This is the only public road which directly serves the existing visitor centre. The R478 is a relatively straight and narrow road between 5 and 6 metres in width. Access to the existing car park is located adjacent to the north-eastern boundary of the site. A paying booth is located at the entrance/exit of the car park. The car park can currently accommodate approximately 350 cars and 20 buses. Only 170 spaces are currently demarcated on the existing car park. However, twice this number of cars can be accommodated on site during peak periods."

3. In or about 2001, the second named respondent proposed to replace the existing facility with a larger Visitor Centre which would be set into the southern slope of the existing hill in the northern portion of the site. The main building was to comprise of a two-storey structure, with the main entrance located on the southern elevation fronting onto the car parking area. A new car park was proposed on lands to the south and south-west of the proposed building. It was proposed to provide a total of 249 car parking spaces (a reduction of approximately 100 spaces from that which was then capable of being accommodated) and 24 coach spaces. The coach spaces were to be located adjacent to the northern and eastern boundaries. The car parking layout and circulation areas were to be significantly changed from that which then existed on site. A new vehicular entrance, together with a pay kiosk, was to be located at the south-eastern boundary of the site. Landscaping was proposed by way of grassed berms and mounds in order to conceal the visual impact of the parked vehicles from the roadway. It was 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.

4. The first named respondent company was incorporated by the second named respondent for the development and operation of the new Visitor Centre, and is a company wholly owned by the second named respondent. This meant that the development would proceed by way of a full planning application enabling a full right of participation by all interested parties during the planning process, as opposed to it being local authority development in its own functional area which would have amounted to exempted development under s. 4 of the 2000 Act, and as such would not have required a grant of permission.
5. The first named respondent lodged an application for permission with the second named respondent, as it was legally obliged to do, on the 26th February, 2001. The supporting documents included a letter from the second named respondent consenting to the planning application being made by the first named respondent for the proposed development, and stating that the lands which were the subject matter of the application were either in the ownership of the second named respondent or part of a compulsory purchase order which had been confirmed by the relevant Minister in 1991. During the course of the planning application the planning authority sought further details as to how the proposed park and ride facility would operate. The first named respondent's response stated that the overall strategy was to reduce over time the level of off-street car parking at the site, and that the developer was confident that the park and ride facility would assist in achieving this objective. The park and ride scheme was to operate during the summer months and was to be in addition to the parking services already operating at the Cliffs of Moher. The main car park would remain in operation and would be the principal parking location for all coaches and the disabled. When the main car park was full, detachable signs would be attached to the park and ride signs at remote locations notifying visitors that the main Visitor Centre car park was full and that the only method of transport was now the park and ride service. On the 21st January, 2002, the second named respondent decided to grant permission, subject to conditions, for the proposed development, including the development of a new Visitor Centre and revised car and coach park entrances and a revised car and coach parking arrangement.
6. The decision of the second named respondent to grant permission was the subject of third party appeals by An Taisce and Shannon Development Limited to the Board. The appeal process included detailed grounds of appeal and responses by the first named respondent, together with an oral hearing conducted by a Board Inspector, Mr. Paul Caprani, in October, 2002. All of this process is helpfully summarised in a comprehensive Inspector's report published in November, 2002.
7. The Inspector's report noted the submission made by Shannon Development Limited that the operation of the park and ride facility in tandem with private car access would be impractical and would not resolve the access issues arising from the proposal to expand visitor numbers at the cliffs, and that it appeared that the park and ride would be subsidiary and would only be fully engaged when the main car park was already full, and that this

would put the viability of the park and ride system into question. During the course of the oral hearing the first named respondent proposed that, as a condition of any grant of planning permission, it would undertake a mobility management strategy which would be agreed by the planning authority. The Inspector questioned whether, as part of the mobility management strategy, the first named respondent had given any consideration to (a) having no parking whatsoever on site and depending completely on park and ride facilities for access to the Visitor Centre and cliffs, and (b) having park and ride facilities only during the summer months with no on-site parking. The answer given on behalf of the first named respondent was that no serious consideration had been given to either of these options.

8. At the end of his report the Inspector concluded that he considered the proposed development to be in accordance with the proper planning and sustainable development of the area, and he recommended that permission be granted. He also recommended, however, that the proposed 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 could be controlled successfully. He therefore recommended that the Board impose a condition whereby details of the proposed mobility management strategy should be submitted to the planning authority prior to the commencement of development, which strategy should include the omission of the proposed car park adjacent to the Visitor Centre, so that access to the Visitor Centre should be by way of a designated park and ride facility, details of which were to be agreed in full with the planning authority prior to the commencement of development.

The Board's Decision to Grant Permission

9. That brings us to the decision which lies at the heart of these proceedings, the Board's decision to grant permission which issued on the 17th December, 2002. Part of the reason for the decision, as set out in the first schedule thereto, was that the proposed development would be "acceptable in terms of traffic safety and convenience". The permission was granted subject to the conditions specified in the second schedule thereto, with the reason for the imposition of each condition being as set out in that schedule.

10. The relevant conditions for the purposes of this appeal are as follows:-

"1. *The development should 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 the 12th day of March, 2001, the 23rd day of November, 2001, and the 30th day of November, 2001, except as may otherwise be required in order to comply with the following conditions.*

Reason: *In the interest of clarity.*

...

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."*

11. It is clear, therefore, that the Board did not accept the Inspector's recommendations regarding the omission of the proposed car park and providing for access to the Visitor Centre solely by way of park and ride facilities. Instead, the permission as granted permitted the proposed car parking arrangements, with the additional requirement for the proposed mobility management strategy to be submitted to the planning authority for written agreement prior to the commencement of development, without however requiring the strategy to necessarily make provision for park and ride facilities.

Events Subsequent to the Board's Grant of Permission

12. The most significant event which occurred after the grant of permission by the Board, which event also lies at the heart of these proceedings, was a decision by the respondents to change the car parking arrangements from those which had formed part of the planning application as lodged, and thus part of the permission granted. This change was essentially to relocate the proposed car parking area, which had been proposed on lands to the south and south-west of the proposed new buildings on the western side of the R478, so that the proposed temporary car park on the eastern side of the R478 would instead continue on as the car parking area post-construction. It is necessary to consider how this change came about in some detail.
13. It appears from the affidavit evidence (see para. 10 of the affidavit of Mr. Gerard Dollard, Director of Services of the second named respondent, sworn on the 17th November, 2016), that the second named respondent first proposed the above change or "modification" to the design proposals in or about October, 2003. The second named respondent then went through the public consultation procedure set out in s. 179 of the 2000 Act and Part 8 of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001) ("the Part 8 procedure") in respect of proposed development by a local authority, or proposed development on behalf of, or in partnership with the local authority, pursuant to a contract with the local authority, as opposed to the first named respondent seeking a fresh planning permission to vary or modify what had been permitted in the permission as granted by the Board. During the course of this Part 8 procedure Reddy O'Riordan Staehli Architects ("RORSA"), the appointed architects for the development, made a submission to the second named respondent dated the 30th September, 2004. In the course of that submission RORSA stated that the design proposals had been modified since the grant of permission, and one such modification was that "the proposed car parking area be relocated outside of the Visitor Centre site".

14. As regards where it was intended that the car parking area was to be relocated to, the RORSA submission did not spell this out very clearly. The very next sentence in the document, however, did refer to the "proposed remote temporary car parking facility ... situated on the east side of the existing roadway away from the Visitor Centre and the Cliff walks". It was then stated that "due to this change" some modifications were required to the access and circulation arrangements to address these additional site constraints. I agree with the trial judge's comment that the language used in the 30th September, 2004 submission cannot by any means be described as elegant, and indeed gives rise to some ambiguity. I also agree, however, with her finding that the import of the reference in the 30th September, 2004 document to the car park being relocated "outside the Visitor Centre site" was that it was being relocated to the proposed temporary car parking area east of the R478, and not to any other site remote from the Visitor Centre.

15. In his affidavit sworn on the 5th May, 2017, Mr. Dollard states that this modification regarding the relocation of the car parking area was one of the modifications accepted by the members of the second named respondent in their resolution dated the 13th December, 2004, in which they resolved to proceed with the development work/modifications to the Visitor Centre project. At para. 12 of that affidavit Mr. Dollard continued as follows:-

"I say and believe that it was at that time the Council's intention to relocate 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 8 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 in the nature of a temporary construction, rather than being references to its intended function since the approval of the Part 8 planning submission in 2004."

16. The next item of significance is a compliance document issued by RORSA dated the 31st March, 2005. RORSA wrote to the second named respondent by letter of the same date enclosing what they described as "our Basis of Compliance Document", with accompanying drawings and documents, and stated that the enclosed information demonstrated their compliance with the 19 planning conditions attached to the Board's decision to grant permission.

17. As regards 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, the compliance document stated as follows:-

"The Council has given detailed consideration to the decision of An Bord Pleanala and the Inspector's report in relation to a mobility management strategy for the site. Through a Part 8 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. In some cases, significant opposition emerged to the designation of particular lands. Following the consultation process on the draft plan, the Council has decided that a feasibility study is required to assess the detailed requirements for a park and ride scheme, the locations for car parks required as part of the scheme, the frequency and routes of operation. A number of communities in the 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."

18. As regards condition 7, which required detailed proposals, including full particulars of the temporary car park during the period of construction, to be submitted to and agreed with the planning authority prior to the commencement of development, the compliance document stated as follows:-

"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...enclosed."

19. It might also be mentioned that one of the documents which accompanied the compliance document was a "Soil And Grass Reinstatement Plan", which suggested a plan by the developer for the temporary car park to be decommissioned at some future date and that the area was scheduled for grass reinstatement in the future.
20. The second named respondent, as the relevant planning authority, responded to the said compliance document by letter dated the 25th May, 2005. As regards the compliance submission made by RORSA in relation to condition 3, the response stated 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".
21. At para. 12 of his affidavit sworn on the 17th November, 2016 Mr. Dollard states that details of the proposed mobility management strategy were submitted to the second named

respondent, as required by condition 3, in December, 2006 in a document headed "Submission regarding Planning Queries". The document stated as follows:-

"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 advanced 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 land 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 (Ref. P06/2887) 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 arrangements 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 the overall strategy. This data will be utilised to build on mobility management approaches which form part and parcel of the overall development and to add to these approaches through pilot initiatives such as a limited park and ride facility during the summer of 2007."

22. It is somewhat unclear from the affidavit evidence precisely when development commenced, but it appears from an averment made by Mr. Dollard (at para. 14 of his affidavit sworn on the 17th November, 2016) that this occurred in or about 2005, as he says that the area described as the temporary car park, which was originally envisaged to be provided during the period of construction, had by then been in existence for more than eleven years. At para. 17 of his affidavit sworn on the 5th May, 2017, Mr. Dollard states as follows:-

"I say and believe that occupation of the Visitor Centre 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."

Events Subsequent to February, 2007

23. As set out at para. 17 above, the RORSA compliance document of March, 2005 spoke about the respondents proceeding with implementation of a park and ride scheme when the Visitor Centre was completed and operational. Two planning permissions were ultimately granted by the Board in 2009 for the construction of park and ride facilities to service the Visitor Centre, the first at Coogyualla, Doolin, Co. Clare and the second at Liscannor Townland, Liscannor, Co. Clare. These permissions were granted to a company named Atlantic Developments Limited, a company of which Mr. John Flanagan is a Director, Mr. Flanagan also being a director of the applicant company in these proceedings and the deponent who has sworn a number of affidavits on its behalf.
24. The two planning permissions granted to Atlantic Developments Limited for the park and ride facilities were subsequently extended in late 2014 and early 2015, upon the application of a company named Lazarus Investments Limited, a related company of which Mr. Flanagan is also a Director. Development was completed and certificates of practical completion were issued during the course of 2015. The applicant company was incorporated in the State on the 2nd May, 2014. The applicant entered into a customer agreement with the second named respondent dated the 7th December, 2015, for the operation of a park and ride shuttle service from their car parks at Doolin and Liscannor to the Visitor Centre, for the year 2016.
25. At the time this customer agreement was entered into the respondents were continuing to operate the car park on the eastern side of the R248, as they appear to have done since it was continued post-construction from the opening of the Visitor Centre in February, 2007. In March, 2014 the second named respondent initiated a new Part 8 procedure in respect of proposed development consisting of upgrade works to the car park and coach park areas. Planning consultants on behalf of Lazarus Investments Limited made a submission objecting to the proposed development and questioning the planning status of the car park. The proposal was subsequently amended so as to limit the development only to the construction of a new coach park attendant's cabin and associated works built into the grassed mound near the coach park entrance.
26. The solicitors for the applicant wrote to each of the respondents by letters dated the 11th May, 2016. The letter to the second named respondent referred to the 2002 permission as having required a mobility management plan and having "called for" a park and ride facility which was now being implemented by their client, "which facility is now operational subject only to the closure of the unauthorised car park located on lands in the ownership of Clare County Council and managed and controlled by the Cliffs of Moher Centre Limited". It went on to state that the continued use of the car park amounted to unauthorised use for the purposes of the 2000 Act and that as owner of the lands the second named respondent was jointly responsible under the enforcement provisions of the 2000 Act with the occupier, the first named respondent. It sought an unambiguous undertaking that the use of this car park would cease and detailed proposals for the reinstatement of this area, failing which legal proceedings would be commenced.

27. The respondents' solicitors replied by letter dated the 19th May, 2016. The reply noted that the applicant had agreed a contract with the first named respondent for the provision of park and ride services, and further noted that the applicant was anxious to proceed with the provision of those services. The letter argued that there was nothing contained in condition 3 with regard to mobility management strategy, or in the contract for the provision of park and ride services, which prevented the applicant from proceeding with the provision of those services. The letter suggests that it was clear from the letters received that the applicant's interest in the matter was purely commercial, albeit masked as an environmental concern. It stated that the respondents would avail of all defences open to them in respect of any application for an injunction or damages by the applicant, including the statutory time limits for the bringing of enforcement proceedings under s. 160 of the 2000 Act (as amended).

The High Court Proceedings

28. These proceedings were commenced by originating notice of motion dated the 20th July, 2016. The applicant sought various orders pursuant to s. 160 of the 2000 Act, including an order requiring the respondents to comply with condition 3 of the planning permission, in circumstances where it was stated that the required 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 overall site. It also sought an order requiring the removal of the temporary car park in accordance with the requirements of condition 7, an order prohibiting the use of the temporary car park in circumstances where it was alleged that such use was inconsistent with conditions 3 and 7, and a declaration that the continued use of the temporary car park was inconsistent with and contrary to the terms of the planning permission. A series of affidavits were exchanged between the parties during the course of the proceedings, with the affidavits on behalf of the applicant being sworn by Mr Flanagan and those on behalf of the respondents by Mr Dollard.
29. In his first affidavit sworn on the 19th July, 2016 Mr Flanagan argued that while the original planning application had proposed that the park and ride scheme would be carried out in conjunction with the existing car park, this was not an approach that was favoured by the Board, and he relied on the Inspector's report to support that argument. He also relied heavily on the mobility management strategy required by condition 3, which he claimed was implemented by the March 2005 RORSA compliance document, and he argued that the second named respondent had thereby agreed that they would discontinue the car park on the cliffs' side of the road which would no longer form part of the development, and furthermore agreed that there would be retention of the temporary car park only for a period after construction had been completed, and only for such time as to allow the park and ride initiative for the overall site to be implemented.
30. In his first affidavit sworn on the 17th November, 2016 Mr Dollard averred that the planning permission was not conditional upon the provision of a park and ride facility, and that the condition scheduled to the permission had made no reference to such a facility. The Inspector's recommendations regarding the omission of a car park from the development

had been rejected by the Board. He relied upon the Part 8 procedure undergone by the second named respondent in 2003/2004 regarding the relocation of the car park. As regards compliance with condition 3, he argued that the RORSA compliance document dated the 31st March, 2005 neither envisaged nor recommended that vehicular access to the Visitor Centre would be confined to coaches and a park and ride facility, but on the contrary indicated an intention to retain the temporary car park for an indeterminate period after construction of the Visitor Centre had been completed. In any event, the mobility management strategy required by condition 3 was the December, 2006 document headed "Submission regarding Planning Queries", and this document did not require a park and ride facility to form a part of the overall mobility management strategy, acknowledging merely that such a scheme might form a part thereof. Mr Dollard also noted that the car park in respect of which the applicant claimed relief had been in existence for more than eleven years by that time, occupation of the Visitor Centre having commenced in February, 2007, and he was advised that the time within which to bring enforcement proceedings had passed by the time these proceedings were instituted.

31. The exchange of affidavits also dealt with a further Part 8 procedure undergone by the second named respondent in 2017, in respect of a proposed development consisting of various permanent improvement works as part of the upgrading of the Visitor Centre car park. The second named respondent published notice of the proposed development on the 17th January, 2017, and this was followed by various consultation, screening and assessment. Ultimately the second named respondent agreed to proceed with the proposed development, by resolution of the members dated the 15th May, 2017.
32. In his third affidavit sworn on the 3rd March, 2017, Mr Flanagan complained strongly about this latest invocation of the Part 8 procedure by the second named respondent, and described it as seeking to circumvent the within proceedings. He stated that the procedure would 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". He argued that the proposed development was "entirely contrary to and inconsistent with" the terms upon which the Board had granted permission in 2002 for the Visitor Centre. It might be noted, however, that no separate challenge was brought by the applicant to the validity of the 2017 Part 8 procedure nor the outcome of same.

The High Court Judgment

33. Faherty J. delivered her reserved judgment on the 20th November, 2018. In her judgment she identified essentially three sets of issues arising for her consideration as follows:
 - I. Was the applicant out of time to bring the s. 160 proceedings?
 - II. Whether unauthorised development had been carried out by the respondents? This issue involved a number of different aspects including whether the 2002 permission included permission for a permanent car park, whether there had been a failure to comply with conditions 3 and 7, whether the development in question was exempted development, and what was the legal effect of the Part 8 procedures?

III. If the Court were to make a finding of an authorised development, should the Court exercise its discretion in favour of granting an order under s. 160?

34. As regards the first issue, the relevant provisions of s. 160(6) are as follows:-

(a) *An application to the High Court or Circuit Court for an order under this section shall not be made –*

(i) *in respect of a development where no permission has been granted, after the expiration of a period of 7 years from the date of the commencement of the development,*

(ii) *in respect of a development where 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 s. 40) or, as the case may be, of the appropriate period as extended under s. 42 ...*

...

(b) *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."*

35. Faherty J. first considered the time bar issue in relation to the alleged non-compliance with condition 7, which had required full particulars of the temporary car park to be provided during the period of construction to be submitted to and agreed with the planning authority prior to the commencement of development. The respondents submitted that if there was any breach of condition 7, arising from the continued use of the temporary car park after the period of construction, then this occurred at the latest in January, 2008 when the 2002 permission expired. As a result, the within proceedings were required by s. 160(6)(a)(ii) to have been commenced at the latest by the 17th February, 2015 (allowing for the Christmas period), yet the application was only brought in July, 2016. Accordingly, the application insofar as it was based on an alleged breach of condition 7 was out of time and must fail.

36. The applicant argued that any breach of condition 7, arising from the ongoing use of the temporary car park, did not arise until after the park and ride facility was ready to be implemented in May, 2016. The first limb of this argument was that by virtue of the modifications that were subsequently made to the planning permission by the 2003/2004 Part 8 procedure, the temporary car park was permitted to subsist until after a park and ride scheme had been implemented but for no longer. The second limb was that time could not run in respect of condition 7 until condition 3 had been complied with, and that such compliance required that a park and ride facility be the sole means of car access to the Visitor Centre, which only came into focus or became possible in May, 2016.

37. Faherty J. found that neither limb of the applicant's argument had been made out, for reasons set out elsewhere in her judgment. In those circumstances, she did not find merit in the applicant's argument that time did not begin to run until 2016.

38. The applicant made an alternative argument that s. 160(6)(a)(ii) did not apply, on the basis that s. 160(6)(b) was the operative provision. As set out above, s. 160(6)(b) allows an application to be made at any time in respect of any condition to which the development is subject "concerning the ongoing use of the land". The applicant submitted that condition 7 was a condition concerning the ongoing use of the land, which had lasted beyond the lifetime of the development, and that no time limit applied regarding the respondents' failure to comply with condition 7.
39. The respondents contended that condition 7 was not a condition "concerning the ongoing use of the land" in the sense contemplated by s. 160(6)(b), arguing that such a condition must relate to the day to day terms upon which ongoing use of land is to be permitted, this being implicit in the word "ongoing". Examples of such conditions were conditions regarding hours of operation, noise levels, waste disposal, and so forth.
40. Faherty J. agreed with the respondents' submissions that the applicant's reliance on s. 160(6)(b) was misplaced. Condition 7 related to the provision of a "temporary" car park during the period of construction of the Visitor Centre, but did not involve any condition regarding the ongoing use of the car park during that construction period. If any breach of condition 7 had occurred (which the trial judge 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 Faherty J. felt that s. 160(6)(b) could not avail the applicant, and she found that the applicant had not brought the within proceedings within the mandatory period prescribed by s. 160(6)(a)(ii) of the 2000 Act.
41. As regards that part of the application based on alleged non-compliance with condition 3, the respondents submitted that this condition required submission of the proposed mobility management strategy "prior to the commencement of development". For the purposes of any complaint about non-compliance, time would start to run from at the latest the time the Visitor Centre became operational, which was in February, 2007. The respondents argued that the applicant should have commenced any s. 160 proceedings by 2014/2015 at the very latest, and Faherty J. felt constrained to agree also with this submission.
42. As regards the second and substantive issue, as to whether the respondents were carrying on unauthorised development, the trial judge first considered whether the 2002 permission included permission for a permanent car park. The 2001 planning application had clearly sought permission for a permanent car park on lands to the south and south-west of the proposed building on the western side of the R478, to accommodate 249 car parking spaces at the site. The applicant argued, however, that the effect of the Inspector's report and of conditions 3 and 7 meant that no permission for a permanent car park had been granted, and 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.
43. Looking at the Board's decision as a whole, the trial judge could find no basis for the applicant's contention that permission for a permanent car park was not granted by the Board. Specifically, she did not find that the contents of condition 3 (even when construed in the round) supported the applicant's argument that the Board did not grant planning

permission for a permanent car park. She noted the difference between the version of the condition recommended by the Inspector, which provided that the mobility management strategy should include the omission of the proposed car park adjacent to the Visitor Centre, and condition 3 as actually imposed by the Board. She was satisfied that the scope of condition 3 was that the first named respondent, as the developer of the site, would satisfy the second named 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 to be by means of a park and ride facility. What condition 3 provided for was that the first named respondent was to submit a mobility management strategy to the second named respondent for agreement. Faherty J. accepted, on balance, that that was done, and thus to her mind there was compliance by the first named respondent with condition 3.

44. As regards condition 7, the trial judge felt 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 condition 7 was a standalone condition. She accepted that it was 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". Faherty J. stated that while certain "modifications" had been made to car parking arrangements after December, 2002, in terms of the relocation of the permanent car park, that did 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 8 procedure described by Mr Dollard in his affidavit. The 2004 Part 8 resolution had permitted the continued function of the car park at the Cliffs of Moher beyond the period of construction of the Visitor Centre. She felt that it was of note that this Part 8 procedure, which was subject to full public consultation, was not challenged at the time by Mr Flanagan or any corporate entity associated with him or of which he was or is a director.
45. In all of the circumstances of the case, and for the reasons set out by her and in particular taking into account the various Part 8 procedures with regard to the car parking question, Faherty J. was not satisfied that the applicant had discharged the onus on it to show that the use of the present car park was unauthorised use for the purposes of s. 160 of the 2000 Act.
46. The respondents also ran an alternative argument that the development in question was development by a local authority within its functional area, or, alternatively, was development on behalf of, or jointly or in partnership with, a local authority or a planning authority. It was thus exempted development within the meaning of s. 4(1)(aa) and/or s. 4(1)(f) of the 2000 Act. If it was exempted development then it could not be unauthorised development within the definition of unauthorised development in s. 2 of the 2000 Act, and if not unauthorised development then it was therefore not amenable to the provisions of s. 160 which is directed solely to unauthorised development. The applicant submitted that nowhere on affidavit had the respondents stated that the development, consisting of the continued use of the temporary car park as a permanent car park, amounted to exempted development. They argued that there was a lack of evidence that the second named

respondent had developed the car park, and an absence of evidence put before the court of any contract between the first named respondent and the second named respondent relating to the conversion of a temporary car park into a permanent car park.

47. Faherty J held that the onus was on the respondents to establish that the development was exempted development. Given that the issue of exempted development was not specifically addressed in Mr. Dollard's affidavits, she accepted the applicant's arguments and found that there was not a sufficient basis made out which would entitle the respondents to maintain at this juncture that the provisions of paras. (aa) or (f) of s. 4(1) had been met. Moreover, she found merit in the applicant's argument that the respondents could not now at this remove assert that the use of the car park, the use of which was conditioned in the Board's decision of December, 2002, was in fact exempted development particularly where the court had found that there was an insufficient evidential basis for that assertion.
48. As regards the court's discretion to grant relief under s. 160, Faherty J. cited a passage from the judgment of McKechnie J. in giving judgment for the Supreme Court in *Meath County Council v Murray* [2018] 1 IR 189. At para. 85 McKechnie J. stated as follows:-

"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 ... 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 the section."

49. Given that Faherty J. had found that the formal requirements of s. 160 had not been met, in terms of the applicant establishing unauthorised development, it did not therefore fall to be considered by her whether an order pursuant to s. 160 should be granted.

The Appeal Proceedings

50. The applicant filed a notice of appeal dated the 18th February, 2019. The applicant pleaded, *inter alia*, that:

- The learned trial judge erred in fact and in law in finding that the applicant's action is statute barred by virtue of the provisions of s. 160(6)(a)(i) or (ii) of the Act of 2000.
- Further, in the alternative, the learned trial judge erred in fact and in law in finding that the provisions of s. 160(6)(b) of the Act of 2000 do not apply to the within proceedings, where the subject matter of the proceedings concerns the breach of condition 7 which provided for the ongoing use of the car park on a temporary basis only while the development was under construction.
- The learned trial judge erred in fact and in law in finding that the car park, the subject matter of the proceedings, is not unauthorised development where the car park development is carried out other than in compliance with the terms of the planning permission granted under An Bord Pleanála Reference 03/128695 and conditions 1, 3 and 7 to which that permission is subject.

- The learned trial judge erred in fact and in law in concluding that the Part 8 process and/or any decision made thereunder by the second named respondent (and, in particular, the decision under File No. LA 03/25 and/or LA 04/08) was capable of modifying the obligations of the respondents or either of them pursuant to the permission, which was granted by An Bord Pleanála.
51. The respondents filed a respondents' notice, dated the 12th March, 2019, opposing the entire appeal, and pleading that the main findings of the trial judge were all correct, in particular as regards the action being statute barred, the car park not being unauthorised development, and the legal effect of the 2003/2004 Part 8 Procedure. The respondents also sought to cross-appeal the trial judge's finding that the car park, the subject matter of the proceedings, was not an exempt development.

Discussion

52. This case potentially raises novel and interesting legal questions regarding the relationship and interaction between a planning permission granted by the Board for a development to be carried out by a local authority through the vehicle of a wholly owned company, and subsequent modifications to that development, in circumstances where the local authority then sought to carry out that part of the development as modified on the basis that the modifications constitute exempt development and have undergone the Part 8 procedure, as opposed to the vehicle company seeking a fresh planning permission, or an amendment to the existing permission, assuming that were possible under s. 146A of the 2000 Act.
53. It seems to me, however, that the correct approach for the Court in determining this appeal is to focus first on the time limit issue, as the Court's decision on that issue has the potential to be dispositive of the entire appeal.
54. As regards the time limit issue, the applicant submitted that the trial judge erred in finding that s. 160(6)(a)(ii) applied, and that the applicable section is either s. 160(6)(a)(i) or s. 160(6)(b). The continuing use of a car park in the area where permission had been granted only for a temporary car park, to be provided during the period of construction, made this a development "where no permission had been granted", and accordingly sub-para. (i) of s. 160(6)(a) applied. The difficulty for the applicant was that any such unauthorised use would appear, on the face of it, to have commenced when the car park ceased to be temporary, *i.e.* at the end of the construction period and the 7 year time limit would run from then. To counter this difficulty, the applicant submitted that the car park did not cease to be temporary until a later date, as a result of the statement in the RORSA March 2005 compliance document that the developer would "retain the temporary car park pending the full assessment of a park and ride scheme". In the circumstances, it was submitted that the car park did not cease being "temporary" until either the 7th December, 2015, when the customer agreement for the park and ride facility was entered into, or, alternatively, the 19th May, 2016, when the respondents refused to give an undertaking that the use of the car park would cease.
55. The applicant also floated an argument that the period of construction ended not only when the temporary use became more than temporary, but only when the temporary car park

area was reinstated. Their counsel did not appear to press this argument, perhaps because it may relate more to the meaning of development than construction, and perhaps also because the ultimate logic of that argument might appear to be that the use of the car park is still temporary and there has been no unauthorised use which could trigger the application of s. 160.

56. The applicant argued, in the alternative, that the respondents could not resile from the above statement in the compliance document in order to rely on the limitation period in s. 160, and the applicant relied by analogy on the doctrine of estoppel to defeat the limitation period. It was submitted, on the authority of *Murphy v. Grealish* [2009] 3 I.R. 366, that an estoppel by representation arose because a clear and unequivocal representation was made in the compliance document, which was relied upon by the applicant.
57. The applicant also submitted that the trial judge had erred in law in finding that s. 160(6)(b) of the 2000 Act did not apply, on the basis that conditions 3 and 7 did not concern “the ongoing use of land”. They argued that, as condition 7 expressly refers to the temporary nature of the car park and requires that use to effectively cease at the end of the period of construction leaving a nil use, this was, therefore, a condition concerning the ongoing use of the land. Condition 3 also concerned the ongoing use of land as it concerned the ongoing mobility management strategy for the proposed development. Further, condition 1 also concerned the ongoing use of the land, as it imposed an obligation to carry out the development in accordance with the plans and particulars lodged, which clearly indicated the temporary nature of the car park. The within proceedings, therefore, related to compliance with conditions 1, 3 and 7, which concern the ongoing use of land, and, in those circumstances, the within proceedings could be brought “at any time”, pursuant to s. 160(6)(b).
58. In reply, the respondents submitted that, if the use of the car park area is alleged to be an unauthorised use of the land, and thereby an unauthorised development, such that s. 160(6)(a)(i) applies, then this material change in use, from a temporary car park to a permanent car park, must have occurred when the construction of the development was completed. They argued that it makes no sense that either a customer agreement for the park and ride facilities, or a response letter from a solicitor, could somehow change the temporary status of the car park. If it is alleged, alternatively, that the continuing use of the car park is not in conformity with condition 7, then s. 160(6)(a)(ii) applies. In either scenario the proceedings are out of time.
59. As regards s. 160(6)(b), the respondents submitted that the applicant’s construction of the phrase “concerning the ongoing use of the land” is misconceived, as there are no conditions in the permission as to the ongoing use of the car park. Condition 7 did not include any condition regarding the ongoing use of the car park during the construction period, and is of no relevance after construction. Condition 3 required that a mobility management strategy be submitted for prior agreement “prior to commencement of development”. This was clearly a once-off condition, and once the requirement was met (or not met), the operation of the condition was concluded. Condition 1, which provides that the development

of the planning permission was to be carried out in accordance with the plans and particulars lodged, except as may otherwise be required in order to comply with the following conditions, could not assist the applicant. The plans and particulars lodged with the application showed the proposed use of the area in question as a temporary car park, and this was not a condition concerning the ongoing use of the land.

Decision

60. I am satisfied that the trial judge was correct in finding that this application is time barred by virtue of s. 160(6)(a) of 2000 Act, irrespective of whether sub-para. (i) or (ii) is the applicable provision. It appears that the oral submissions of both parties before the High Court focused on the provisions of sub-para. (ii), and it is, therefore, understandable how the trial judge also did so. However, the applicant may well be correct in now arguing that sub-para. (i) applies, and it is, therefore, necessary to consider how it applies at the outset.
61. Section 160(6)(a)(i) governs an application for relief "in respect of a development where no permission has been granted". While the Board granted permission in December, 2002 for the overall development, as proposed in the 2001 planning application, the applicant's complaint in this application appears to me to be in respect of an alleged unauthorised development outside the scope of the permission as granted. The applicant's complaint relates to an alleged unauthorised use, being a material change in the use of the land on the eastern side of the R478, which was previously permitted to be used as a temporary car park during the period of construction, but which land the respondents have continued to use as a car park on a continuing or permanent basis.
62. Section 160(6)(a)(i) provides that an application for relief in respect of any such alleged unauthorised development shall not be made "after the expiration of 7 years from the commencement of the development". In the present case, the alleged unauthorised development, involving the material change of use, must have commenced at the end of the period of construction, *i.e.* in or about February, 2007, when occupation of the Visitor Centre commenced, or at the latest in late January, 2008, after the 2002 permission expired on the 16th December, 2007 and allowing an additional 45 days to cover the Christmas periods by virtue of s. 251 of the 2000 Act. Therefore, any application should have been made not later than 7 years from late January, 2008, and again by virtue of s. 251 allowing an additional 63 days to cover the Christmas periods, *i.e.* should have been made by April, 2015. In the present case, the application was not made until the 20th July, 2016, and, therefore, appears out of time by virtue of s. 160(6)(a)(i).
63. The applicant seeks to avoid the above result by arguing that the unauthorised development did not commence until a much later date, on the basis that, while the temporary period was initially envisaged to be the construction period, the car park did not cease to be temporary until a later date, as a result of the statement in the compliance document, as set out at para. 54 above. While this is a very clever, if not ingenious, argument, I do not think it is ultimately a sound one. The planning status of the temporary car park as temporary "during the period of construction" is dictated by the Board's permission and, in particular, by conditions 1 and 7 of that permission, and the length of the temporary period could not be extended unilaterally by a statement in a developer's compliance document.

64. The applicant also relies, by analogy, on the doctrine of estoppel, which is sometimes used to mitigate the effect of the Statute of Limitations, and relies on the authority of *Murphy v. Grealish* [2009] 3 I.R. 366. In that case, the plaintiff was injured in a road traffic accident on the 12th May, 2000. The plaintiff commenced proceedings outside of the 3 year period then allowed under the Statute of Limitations, 1957, as amended. The defendant sought to have a preliminary issue tried as to whether the proceedings were statute barred. In reply, the plaintiff claimed that from an early stage, prior to the expiry of the limitation period, the defendant admitted liability, and that negotiations proceeded with a view to establishing quantum, and continued even after the 3 year period had expired, and that the defendant, by his actions and representations, was estopped from raising the statutory period in order to evade liability. In the High Court, MacMenamin J. held that an equitable estoppel arose in the circumstances, and refused to dismiss the plaintiff's action. In dismissing an appeal, the Supreme Court, per Geoghegan J., referred to the basic approach in such a case "which was essentially to consider whether there was an equitable estoppel by reason of the general surrounding circumstances, those circumstances constituting an implied representation rendering it unconscionable to allow the reliance on the statute" (at 374).
65. In the present case, the applicant argues that an estoppel by representation arises because a clear and unequivocal representation was made in the compliance document that the developer "would retain the temporary car park pending the full assessment of a park and ride scheme", which representation was relied upon by the applicant. In my opinion, this statement in the compliance document was not the type of clear and unequivocal representation necessary to give rise to an estoppel which would prevent the respondents invoking the time limits in s. 160(6), similar to the type of representation which arose in the *Murphy* case, and earlier cases, preventing reliance upon the Statute of Limitations. It is important to note that the statement in question is to be found in a paragraph in the compliance document which commences with the words "the strategy at this stage", and I agree with the trial judge's comment, at para. 98 of her judgment, that it is clear "that the mobility management strategy was a fluid process, or to put it another way, a work in progress".
66. The applicant also submits, that even if an estoppel does not arise, the Supreme Court in the *Murphy* case left open the question of whether a plea of statute bar can be defeated in some situations by unconscionable conduct which could not be said to give rise to an estoppel. Even if any such wider principle of unconscionability were to arise, I do not think that any conduct of the respondents in relation to their overall mobility management strategy could be regarded as unconscionable conduct. The respondents sought to keep their options open regarding future car parking and a future park and ride facility, and they were entitled to do so in my opinion.
67. As mentioned above, the focus in the High Court was on s. 160(6)(a)(ii), rather than (i), and so it is necessary to consider also the finding of the trial judge in the context of the former provision. Sub-paragraph (ii) provides that an application for relief shall not be made in respect of a development for which permission has been granted after the expiration of a period of 7 years, beginning on the expiration of the appropriate period.

68. The applicant's case in the High Court was framed in terms of a development where permission had been granted, and in terms of alleged breaches of conditions 3 and 7. It was therefore necessary, in applying sub-paragraph (ii), that any application seeking relief for same be brought within 7 years, beginning on the expiration of the appropriate period. The appropriate period relates to the life of the planning permission, which in this case expired on the 16th December, 2007, and allowing an additional 45 days to cover the Christmas periods by virtue of s. 251 of the 2000 Act. The 7 year time limit for bringing an application is then extended by 63 days, again by virtue of s. 251 of the 2000 Act, so that any application was required to have been commenced by April, 2015. This application was not commenced until the 20th July, 2016, and I am satisfied that the trial judge was correct in finding that it was therefore out of time by virtue of s. 160(6)(a)(ii) of the 2000 Act, in the event that this provision was applicable.
69. The applicant sought to counter the difficulties arising under s. 160(6)(a) by relying instead on s. 160(6)(b). The latter provision allows an application for relief to be made at any time in respect of any condition "concerning the ongoing use of the land". The trial judge held that condition 7 was a condition relating to the provision of a "temporary" car park "during the period of construction", but the grant of permission did not include any condition regarding the ongoing use of the car park during that construction period. By this, she appears to have meant a condition as to the day-to-day terms of operation of the car park, such as hours of operation and so forth.
70. I am satisfied that the trial judge was correct in reaching the above findings. Condition 7 required a particular thing to be done at a particular time, *i.e.* detailed proposals about certain matters (including particulars of the temporary car park) to be submitted and agreed "prior to the commencement of development". In my opinion, condition 7 could not be viewed as a condition "concerning the ongoing use of the land".
71. As regards condition 3, the position is the same in my opinion. Condition 3 also required a particular thing to be done at a particular time, *i.e.* a strategy to be submitted for written agreement "prior to the commencement of development". It is, therefore, not to be classified as a condition "concerning the ongoing use of the land".
72. The applicant sought to argue on appeal that condition 1 was also a condition "concerning the ongoing use of the land", although it appears that such argument was not made in the High Court. Condition 1 requires that the development should be carried out in accordance with the plans and particulars lodged with the application, except as may be otherwise required in order to comply with the conditions set out thereafter. The applicant submitted that as the plans and particulars indicated the temporary nature of the car park, the condition, therefore, was a condition "concerning the ongoing use of the land".
73. In one very broad sense, condition 1 might be thought to be such a condition, insofar as it could be seen as indirectly requiring the temporary car parking area to be used as such only during the period of construction, but not thereafter. However, I do not think that it was the intention of the Oireachtas to capture the standard type of condition which condition 1 represents within the ambit of the term "condition ... concerning the ongoing use of the

land” under s. 160(6)(b) of the 2000 Act, as such a construction of that provision would deprive s. 160(6)(a) of much force and effect. In my opinion, the respondents are correct in their submission that such a condition must relate to the day-to-day terms upon which the ongoing use of the land is to be permitted, such as conditions regarding hours of operation, noise levels, and so forth. Condition 1 is not that type of condition, and is, therefore, not a condition “concerning the ongoing use of the land”.

Conclusion

74. In my view, the trial judge was correct in finding that this application was not commenced within the statutory time period. In circumstances where that issue is dispositive of the appeal, I do not think it is necessary or appropriate for the Court to decide the questions arising on the substantive issue regarding the alleged unauthorised development, as set out at para. 52 above, and I would prefer to leave those potentially difficult questions for another case where they require to be determined. It is also unnecessary in the circumstances for the Court to consider the issue of the Court’s discretion to grant relief under s. 160.
75. Accordingly, I would dismiss the appeal, and affirm the decision of the learned trial judge. With regard to costs, as the appellant has been entirely unsuccessful in this appeal, my provisional view is that the respondents are entitled to their costs of the appeal. The same result would follow if the Court were to apply the traditional approach whereby “costs follow the event”, and I see no circumstances present that would justify making any alternative orders for costs. If either party wish to contend for an alternative order, they have liberty to apply to the office of the Court of Appeal within 14 days of delivery of this judgment for a brief supplemental hearing on the issue of costs. If such hearing is requested, and results in an order in the above proposed terms, the requesting party may be liable for the additional costs of such a further hearing. In default of receipt of such application, an order in the above proposed terms will be made.
76. As this judgment is being delivered electronically, I note that each of Whelan J. and Pilkington J. have indicated their agreement with it, and with the orders I propose.