Neutral Citation Number: [2013] IEHC 570

THE HIGH COURT

[2012 No. 432 MCA]

BETWEEN

CONCEPTA GOSS, SEAN CUNNIFFE, STEPHEN LANE,

LUKE FLANAGAN, FINIAN MC GRATH AND

DANIEL TRAYERS

APPLICANTS

AND

JOSEPH O'TOOLE, HELEN O'TOOLE AND O.T. INVESTMENTS LIMITED

RESPONDENTS

JUDGMENT of Mr. Justice Hedigan delivered on the 17th day of December 2013

Application

1. This is an application for injunctive relief under s.160 of the Planning and Development Act 2000. The applicants in their pleadings seek:-

> (i) An order restraining the respondents from carrying out (or continuing to carry out) any development (other than exempted development) on lands situate at Town Parks, Tuam County Galway and the Townland of Demesne, Tuam, County Galway;
>
> (ii) An order restraining the respondents from carrying out any development on the lands owned by Galway County Council at Town Parks, Tuam;
>
> (iii) An order restraining the respondents from using/continuing to use the lands and/or any structure at Town Parks as a commercial split level car park;
>
> (iv) An order restraining the respondents from having vehicular use and access to the service road that links Bishop Street, Tuam with the inner relief road at Tuam Town;
>
> (v) An order directing the respondents to remove an unauthorised split level car park and all unauthorized ancillary structures;
>
> (vi) An order compelling the respondents to remove the unauthorized service road that links Bishop Street, Tuam, with the inner relief road and all unauthorised structures erected thereon;
>
> (vii) An order directing the respondents to restore the lands within 30 days of the date of this order to their condition before the unauthorised development;
>
> (vii) An order directing the respondents to pay to the applicants all costs.

The applicants however, at this moment, confine themselves to seeking an order restraining the use of the split level car park.

Parties

2. The applicants describe themselves as concerned residents of Tuam, County Galway. The third named respondent is a company incorporated on the 25th July, 1974, bearing Registration Number 48516 and having its registered office at Bishop Street, Tuam, County Galway. The first and second named respondents operate the Supervalu supermarket in Tuam and are the sole directors of the third named respondent. The second named respondent is the company Secretary.

Background

3.1 These proceedings pertain to the construction of an unauthorised car park of 7905 m2 (hereinafter the "split level car park") with 240 spaces located in the centre of Tuam beside the respondent's SuperValu supermarket. The car park is adjacent to the supermarket and is accessed from the north end by a spur road from the inner relief road. It may also be accessed from the south via the service road which was also built without planning permission. The car park generates a great deal of traffic with vehicles constantly moving and turning within it.

3.2 On 10th August, 2007, the respondents applied to Galway County Council for planning permission for a mixed use development of an area of 29,540m2 to be located on 3.6 hectares at Town Parks, Tuam. This application was accompanied by an Environmental Impact Statement (hereinafter "EIS") and an Environmental Impact Assessment (hereinafter "EIA"). Permission was granted which was appealed to An Bord Pleanála by Tuam Tennis Club. An Bord Pleanála granted permission subject to 27 conditions on 1st April, 2010.

3.3 The development was to be constructed in Tuam town centre and was to include a pedestrianised landscaped plaza, hotel, nursing home and several commercial and residential units. It was also to include a two level underground car park.

3.4 On 9th December, 2011, the respondents began works on the lands, being the construction of a large commercial split-level car park and the erection of trolley bays, signage and lighting. The residents of Tuam understood that the respondents were embarking on the first phase of the mixed use development the subject of their application for planning permission. However, on 11th January,

2012, the first named respondent announced via "The Tuam Herald" that he had put the mixed use development on hold. Ultimately he did not proceed with it and instead proceeded to build the current development for which no planning permission was granted.

3.5 During the course of pre-planning discussions with Galway County Council in respect of the respondents' proposed project, the respondents were informed by the council that their application for planning permission should take account of an inner relief road which the council intended to construct and which it was hoped would relieve traffic congestion in Tuam. The respondents' development was to be accessed by a section of that inner relief road. The Council did not have sufficient funds to build this road and it came to an agreement with the respondents whereby the respondents would, at no charge, provide it with the land on which to build the road and also fund most of its construction. This formed a condition of the planning permission granted to the respondents. The Council, in exchange, agreed to transfer to the respondents the land on which the public car park in Tuam stood as well as a portion of the public right of way which ran on the Palace Road and which locals used to access the swimming pool and local school.

3.6 On 23rd May, 2011, the members of Galway County Council voted to transfer certain existing car park lands to the respondent under s. 183 of the Local Government Act 2001, and voted to extinguish the public right of way on the Palace Road pursuant to s. 73 of the Roads Act 1993 (as amended). An issue regarding the validity of this resolution would later lead to these matters being voted on again on 26th November 2012.

3.7 In July 2012, the Council served a notice of intention to extinguish the public right of way pursuant to s. 73 of the Roads Act 1993.

3.8 In the meantime, construction of the split-level car park took place with removal of the right of way on the Palace Road. As a consequence, locals had to cross what was now a car park to get to a public park known as the Palace Grounds. In March, 2012, when the car park had been completed Tuam town residents, including the first to third named applicants raised concerns that the car park was a dangerous means of accessing the nearby school and the other amenities of the Palace Grounds.

3.9 In response to these concerns in July 2012, the respondents constructed a service road through the car park linking Bishop Street with the section of the inner relief road which provides access to the new split level car park. No planning permission was sought for this road at the time of construction.

3.10 Locals were still concerned about the safety of the route through the car park and service road prompting Galway County Council to commission a Road Safety Audit in October 2012, which recommended a number of changes to enhance safety. The respondents are not in a position to affect these changes until they obtain planning permission.

3.11 Following complaints to it by the applicants in respect of the unauthorised nature of the development, Galway County Council issued a warning letter to the respondents on 22nd August, 2012, and enforcement notices were served on the respondents on 16th October, 2012. The unauthorised development set out relates to:-

1. The unauthorised creation of a split level car park and associated ancillary works;

2. The unauthorised creation of a service road (linking Bishop Street and the Inner Relief Road).

These notices still remain in force although the Council has not acted on foot of them. Following the expiry of the 30-day period allowed for adherence to the notices on 26th November, 2012, the applicants issued proceedings.

3.12 An application for retention permission for the unauthorised development and permission for further development in respect of the required safety features was submitted to the council by Patrick Newell, architect, on behalf of the respondents, on 22nd November, 2012. Owing to the submissions made and safety concerns surrounding the development that application was withdrawn and another was lodged on 23rd January 2013.This was then withdrawn owing to the threat of legal proceedings and a fresh application bearing reference No. 13/644 was lodged on 19th June 2013.

3.13 Notice of intention to grant permission issued from the Council on 3rd October, 2013. The applicants intend to appeal the granting of the planning permission to the respondents and to seek restoration as far as is practicable of the Palace Road to its condition before the unauthorised development took place.

Applicants' Submissions

4.1 Danger posed by the development to pedestrians; the construction of the car park involved the removal of 162m of the Palace Road, and the public right of way thereon. The applicants contend that the car park is a risk to pedestrian users especially children who walk the route. They assert that for many years the residents of the nearby Palace Fields and St.Joseph's Park estates used the Palace Road as a safe means of accessing the town centre. Many people, including children, also used the road to access the Palace Grounds, the swimming pool and tennis courts. They can no longer do this and it is contended that the route is now hazardous for residents and children alike. Mr. Lane, one of the applicants and principal of St.Patrick's Boys Primary School, gave evidence to the court that in March 2012, after the respondents had finished building the car park and removed the remaining section of the Palace Road that joined the inner relief road and Bishop Street it became clear to him and to other principals in the town that the car park was hazardous for children who use the route. Whereas the children formerly accessed amenities such as the swimming pool through the right of way along the Old Palace Road, they no longer had this option and had to traverse the route that replaced the demolished section of the Palace Road with its associated traffic hazards.

Mr. Lane explained that the respondents, in an attempt to deal with this issue, constructed an unauthorised service road through the car park area which links Bishop Street with the inner relief road. He noted in evidence that in doing so the respondents constructed narrow footpaths of approximately 1m in width. Mr Lane stated that the recommended width is 1.8 m and that the existing paths are so narrow as to be virtually unusable.

Railings were also erected along the footpath and Mr. Lane is of the view that these railings appear to steer children onto the road rather than towards the footpaths.

Mr. Cunniffe one of the applicants, who is also a member of Galway County Council and a resident of Tuam, indicated in evidence that he agreed with Mr Lane's opinion regarding the danger posed by the road. Another applicant, Ms Goss, gave evidence that the construction of the car park and the removal of the right of way caused chaos among users, particularly school children who were swarming around the area.

Ms. Goss did agree with counsel for the respondent that school children also cross the cathedral car park from St.Jarlath's College.

However she indicated that this is safer than the service road since most of the cars in that car park are parked there for the day which means there is less movement and therefore it does not pose the same danger as the respondent's car park. This is because the respondent's car park is a supermarket car park with constant moving of traffic throughout the day. She also indicated that the safety audit commissioned by the county council has not alleviated her concerns about safety since not all the children stick to the route identified in the audit.

Requirement for an EIA
It is argued by the applicants that the development has impacted on the architectural and archaeological heritage of the centre of Tuam Town. There is now a large space of unauthorised car parking which changes the town centre beyond recognition. Many old trees (including a 200-year old lime tree) have been removed and the old demesne wall and historic walled gardens surrounding the Bishop's Palace have been demolished. The new relief road runs very close to the river Nanny. The river walk that is supposed to be there is now too narrow and residents can no longer avail of this river walk. This coupled with the removal of the Palace Road constitutes a significant loss of amenity to Tuam and its residents.

The applicants' expert witness, architect Mr Paul Mannion, in his affidavit referred to the deleterious effect of these changes on the town stating that:-

> "The construction of the unauthorised car park with lighting, signage, plastic trolley bays and other structures and the removal of the tennis courts/basketball courts have altered the whole appearance of the area significantly and have materially changed the use of the lands. The loss of surrounding trees, the Palace road, the old Demesne wall of Bishop's Palace, the tennis courts and the open space has significantly changed the character and appearance of the area and has had [sic] impacted significantly on the environmental space."

Surface car parking was an issue of environmental impact identified in the EIS that accompanied the application for the proposed mixed use development which was not proceeded with by the respondents. The construction of the car park it is argued is therefore in direct conflict with the observations of the EIS produced by the first named respondent himself.

The development is located beside the river Nanny. The applicant's planning consultant, Mr. Eamon Collins engineer, expresses concern that the river is vulnerable to the impacts of oil and fuel surface spill emissions from the car park given its proximity to the car park and that no oil interceptor has been installed.

Moreover, the location where development has occurred is within a zone of archaeological potential and within the curtilage of various protected structures. The applicants contend that the respondents have breached planning law in undertaking development in such an area. They argue that the development covers an area of 2.444 Ha and therefore exceeds the threshold that requires a proposed development to be assessed for urban development as set out in Schedule 5 Part 2 (10)(b)(iv) of the Planning and Development Regulations 2001 which covers urban development of an area greater than 2 hectares in the case of a business district.

All of this means that had the respondents applied for planning permission before construction, the planning authority would have been required to determine if an EIA or an EIS was required. Neither assessment was carried out and the respondents instead went ahead with the unauthorised development. They now seek retention planning permission for a reduced area of the development site from 2.444 Ha to 1.358 Ha. This reduction was achieved by simply excluding two further unauthorised car parks also serving the supermarket from the current retention application. These two areas had been included in two previous applications. They continue to exist and are used as car parks.

It is argued that retention planning permission is not available as a remedy to the respondents and the council is precluded from considering any application for same under s. 23(12) of the Planning and Development Act 2010, as amended by s. 23(12) of the Planning and Development (Amendment) Act 2010 which provides:-

> "(12) A planning authority shall refuse to consider an application to retain unauthorised development of land where the authority decides that if an application for permission had been made in respect of the development concerned before it was commenced the application would have required that one or more than one of the following was carried out—
>
> (a) an environmental impact assessment,
>
> (b) a determination as to whether an environmental impact assessment is required, or
>
> (c) an appropriate assessment."

Despite this the council deemed the application for retention planning permission valid and issued a notice of decision to grant.

The applicants wrote to the Council requesting that it provide reasons as to why the application for retention permission was being considered. The response received by letter of 18th January, 2013, stated that the Council's planning department did not consider the unauthorised development an "urban development" and that the car park had less than the threshold 400 car parking spaces (although it exceeded the 2 Ha threshold) and therefore the development did not fall into either relevant category in Schedule 5 Part 2 10(b) of the Planning and Development Regulations 2001. The applicants do not agree with the Council's rationale given that the development is located in a town centre which is zoned commercial

The applicants also rely on the decision of the European Court of Justice in Commission v. Ireland (Case 215/06) where it found Ireland to be in breach of Articles 1 and 2 of Directive 85/337 EEC as amended due to the unrestricted availability of retention planning permission for unauthorised developments for which an EIA/NIA was required but not carried out. It found at para. 57:-

> "While Community Law cannot preclude the applicable national rules fromallowing, in certain cases, the regularisation of operations or measures which are unlawful in light of Community Law, such a possibility should be subject to the conditions that it does not offer the person concerned the opportunity to circumvent rules or to dispense with applying them, and that it should remain an exception."

4.3 No disadvantage to the respondents in granting the reliefs sought

The applicants reject any assertion by the respondents that the granting to them of the relief they seek, namely removal of the unauthorised car park and restoration of the right of way, could cause the respondents to suffer hardship.

The applicants contend that since March, 2012, the respondents have had the benefit of a car park for which no planning permission has been granted. They further contend that they had ample car parking for their customers before the unauthorised development and will continue to have ample parking when the unauthorised car park is removed- thus any claim of hardship is unfounded.

Moreover, it is asserted that the respondents are more than likely obtaining significant commercial benefit from their unauthorised activities. Although currently there is no charge for use of the car park it appears that the respondents do intend to operate the car park as a commercial enterprise quite separate from Supervalu. This is evident from the fact that the respondents have engaged APCOA, a parking management company, to manage the commercial aspect of the split level car park. APCOA signs have appeared in the car park together with wheel clamping warning notices. Ticket dispensing machines have also been erected. It is therefore argued that these are not merely temporary trivial works and the respondents from the outset intended to make money from the unauthorised car park as a separate commercial entity to the supermarket.

It is contended that the respondents will continue to gain from the breaches of planning law if the reliefs sought by the applicants are not granted, therefore the court should grant the reliefs sought.

4.4 Respondents have breached planning laws

The development carried out is not one which is exempted under s.4 (1) of the Planning and Development Act 2000, and therefore is unauthorised. The respondents made a commercial decision not to avail of the planning permission granted for the mixed use plaza development. The applicants argue that there was no reason for the respondents not to seek fresh planning permission for the split level car park, ancillary structures and the building of the service road but they chose not to do so.

The section of the inner relief road constructed deviates significantly from the plans submitted to An Bord Pleanála. The permission for the mixed use development was granted on condition that the respondents, among other things, created a tree-lined walkway by the river Nanny. They have done so. However, the road is closer to the river than envisaged. This spoils it as a riverside walk. Moreover, neither the plans for the proposed section of the inner relief road under the part 8 procedure or the plans submitted as part of the application for planning permission envisaged that the road be opened by constructing an access road onto the respondents' site at the point where the service road meets the section of the inner relief road. The respondent claims that the access was created by Galway County Council. The applicants argue that even if this is the case it does not change the fact that it is unauthorised development.

The applicants refute the first named respondent's contention that he did not intend to flout planning law. They point to his past planning transgressions as evidence that this is not the case. Moreover, they assert that if he had wished to observe planning laws, he would have engaged an expert to prepare a planning application for the unauthorised car park before it was constructed as opposed to retrospectively.

The respondents rely on *Morris v. Garvey* [1983] 1 I.R. 319, to argue that the court should grant the relief they seek. That case related to unauthorised development of a dwelling which the court ordered be demolished under s. 27(2) of the Local Government(Planning and development)Act 1976, which is the precursor of s. 160 of the Planning and Development Act 2000. At p. 324, Henchy J. stated in respect of s. 27(2):-

> ". . . the High Court becomes the guardian and supervisor of the carrying out of the permitted development according to its limitations. In carrying out that function, the court must balance the duty and benefit of the developer under the permission as granted, against the environmental and ecological rights and amenities of the public, present and future. . . It would require exceptional circumstances (such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship, or suchlike extenuating or excusing factors before the court should refrain from making whatever order (including an order of attachment for contempt in default of compliance) as is necessary to ensure that the development is carried out in conformity with the permission."

The applicants contend that this also applies where someone has no planning permission at all such as in the instant case.

The applicants do not agree with the respondents' assertion that the development is an amenity for the town. The notice to grant permission of 3rd October, 2013, requires works to be carried out to meet traffic safety issues addressed in the traffic audit and also requires the removal of the existing covered walkways and trolley bay coverings in the interest of the setting of a protected structure. This is strongly indicative that the unauthorised development has actually had negative traffic and conservation impacts.

Mr. Cunniffe in evidence indicated that the road does not take any traffic away from the centre of Tuam. He believes that traffic has not been reduced but is merely deviating to other parts of the town.

Indeed, Mr. Cunniffe also gave evidence that he does not believe that the right of way has been properly extinguished. He accepts that the County Council voted to extinguish the right of way on 26th November, 2012, but contends that any extinguishment was only to come into effect when an alternative right of way was put in place. This is evident from the minutes of the meeting on 26th which stated at p. 10 that:-

> "The extinguishment shall come into effect when an alternative right of way for pedestrians and vehicles …is put in place and a legally binding agreement giving effect to it is entered into between the owner of the lands and Galway County Council."

He himself abstained on the vote for the extinguishment of the right of way and voted against the transfer of the lands to the respondents later on at the meeting.

Given the above, the applicants contend that the court should grant them the reliefs sought and they point to *Wicklow County Council v. Forest Fencing Limited Trading as Abwood Homes and George Smullen* [2007] IEHC 242, wherein Charleton J. held that the court has a duty to uphold the principle of proper planning and development under clear statutory rules and that is its starting point in any proceedings.

4.5 Delay on the part of the applicants

The applicants deny that they have delayed in this matter. Ms. Goss gave evidence that the applicants only discovered that the development was unauthorised in July 2012. They argue that they gave the respondents a chance to comply with the requirements of the enforcement notice issued on 16th October 2012, and when they failed to act within the requisite 30 days they then initiated

proceedings on 26th November, 2012.

4.6 Section 162 of the Planning and Development Act

Section 162(3) of the Planning and Development Act 2000 provides:-

> "No enforcement action under this part (including an application under section 160) shall be stayed or withdrawn by reason of an application for retention of permission under section 34(12) or the grant of that permission."

Section 162(3) therefore, the applicants argue, removes the discretion of the court in placing a stay on the enforcement notices.

They concede that a court could, however, place a stay on the granting of the injunction sought by the applicants for a period of time on the grounds that an application for retention permission has been made or on hardship grounds. However, the applicants argue that the court's discretion in this regard is constrained, in that it would require the respondents to show exceptional circumstances in order to exercise its discretion in the respondents' favour. They rely upon the same dictum of Henchy J. cited above in *Morris v. Garvey* [1983] 1 I.R. 319, at paragraph 4.4.

Moreover, the applicants point out, Morris involved the breach of planning permission on the part of the respondent. The unauthorised development the subject matter of these proceedings however has no planning permission whatsoever. The respondents thus are in breach of the requirement to seek permission for the unauthorised development as well as the construction of the unauthorised development. This breach is therefore of a more serious nature. Also, there are no exceptional circumstances such as those enumerated in Morris that can permit this Court to exercise its discretion to refuse an injunction. The respondents it is argued commissioned the construction of the car park by engaging Coffey Construction Ltd. to carry out the works. It is therefore difficult for them to argue genuine mistake in the construction of the unauthorised development.

The applicants further rely on *The Right Honourable The Lord* Mayor, Alderman and *Burgesses of Dublin v. O'Dwyer Brothers (Mount Street) Limited* [1997] IEHC 77, to argue that the court should not grant a stay. In that case, Kelly J. refused to grant a stay on the injunctive relief sought by the applicants since the respondents had been notified well in advance of the applicants' complaints. Similarly, the applicants argue, from March 2012, up to the present, the respondent has made use of the unauthorised car park although he had been requested as early as December 2012, to cease use of same. It is argued that the court should take this into account when deciding whether to grant the reliefs sought.

The applicants note that the right of way on the Palace Road was removed before the county council managerial order for removal of same was granted. They believe that the conduct of the respondents in this regard should not be ignored by the court when considering the appropriate orders to be made. Likewise, it is contended, the respondents' previous record of carrying out unauthorised developments and regularising them by later retention permissions also justifies the court in refusing to stay any order granting the reliefs sought.

If An Bord Pleanála grants retention then any injunction granted by this Court can be discharged as the applicant will be compliant with planning laws. If An Bord Pleanála do not grant retention permission the injunction can remain in place obviating the necessity for the applicants to reapply to the court for relief further down the line.

The applicants therefore submit that the court should grant the reliefs sought so that the respondents be ordered to cease use of the unauthorised split level car park and restore same to its previous condition unless and until authorised to make lawful use of same under the Planning Code.

Respondents' Submissions
5.1 Benefits conferred by the development

The first named respondent is 80 years of age. His wife is 79, of ill-health and resides in a nursing home. The respondent has been involved in business in Tuam for over 45 years and employs 165 people. He is anxious that the centre of Tuam continues to prosper. To this end, in addition to transferring 0.4 hectares of land to the council in return for an adjoining 0.2213 of a hectare, he also agreed to give €1.1 million to the Council to enable it to build the inner relief road and of that sum €977, 000 has been paid to date.

The first named respondent believes that the development has improved the overall appearance of the area. He believes that public access between Bishop Street and Palace Fields, the presentation school and the swimming pool has not been interfered with and that the inner relief road has alleviated traffic and has enhanced overall access to the town centre.

The first named respondent argues that many residents of Tuam felt that he was doing a service to the town by developing the area and he points to the minutes of the council meeting of 26th November, 2012, where Councillor Mannion stated:-

> "Tuam was lucky to have someone willing to invest in the centre of town."

He also points to a traffic and transport statement prepared by Mr. Alan Lipscombe of Traffic and Transport Consultants Ltd. which found that the section of the inner relief road already constructed has already had a positive impact on traffic distribution through Tuam Town centre and that the completed scheme will have an even greater area of influence. He compared traffic volume in 2005, before the road was constructed, with 2013, and noted that there has been a significant reduction in traffic volumes on Bishop Street with different parts of it seeing a reduction of between 17 % and 24%. He finds that the inner relief road clearly has had a beneficial impact for all traffic in Tuam town centre.

He argues that it was not he but Galway County Council who carried out not only the construction of the road but construction of the pedestrian crossing over same and also built footpaths and a section of the road leading from the relief road into the respondent's car park area.

Safety
The first named respondent argues that at all times his motivation in building the relief road, in extinguishing the public right of way and in the provision of a car park was to improve the amenities in Tuam and to alleviate traffic. He indicates that he never wanted to, nor did he ever think, that the works carried out could pose a danger to pedestrians.

He contends that he has done all he can to date to address any safety concerns the applicants may have and notes that the applicants have not averred to the fact that further works have been carried out by him in this regard following a meeting which took

place on 17th May, 2012, between the respondents' planning consultant Mr. McCarthy, school principals in the area and some of the applicants.

Following this meeting, the respondents built a service road through the car park. They are of the view that the old right of way was not as safe as the service road since now there are speed restrictions in place whereas previously there were none. Moreover, safety features including marked pedestrian crossings, tunnels, safety railings, signs and lighting have been installed across the car park to ensure safety of pedestrians. Students are easily guided by teachers as they traverse the footpath across the respondent's premises. The respondents point to the oral evidence of Mr. Lane, who when asked whether he thought the route through the respondent's car park was the safest route to the swimming pool, agreed that it is at the moment. The respondents reject that there is any risk of an accident occurring in the car park and argues that the applicants are well aware that no accidents have occurred since works were completed in March 2012.

Mr. Patrick Newell, engineer, who was engaged by the respondents in July 2012, to prepare revised plans for the car park and to prepare the planning permission application adduced evidence that the works carried out to date by the respondent have greatly improved matters from a safety point of view. He also gave evidence that safety fears surrounding the crossing of children through the car park are unfounded and that the footpath railings do function to keep the children on the footpath and off the road.

He is of the opinion that the premises as constructed is safe and indeed far safer than that which pertained prior to the demolishing of the old public right of way, which, he says, was a roadway deficient in lighting, with only one footpath and none of the safety features that now exist. While accepting that wider footpaths would be more prudent he rejected Mr. Lane's contention that the footpaths are currently virtually unusable and notes that the footpaths constructed by the respondents are the same width as the footpaths constructed by the council at the entrance to the car park (being 1.2m). He informed the court that the current planning application by the respondents incorporates a proposal to widen the paths to 2m as recommended by the RPS safety audit.

Children from various schools traverse the cathedral car park which is used as a pick up point by buses travelling to Galway on a daily basis. This is despite the fact that this car park, unlike the respondents', has no railings or footpaths on it but the applicants have not raised concerns in this regard. Ms. Goss in evidence stated that she did not believe that the cathedral car park was dangerous although she accepted that she was not qualified to give a professional opinion. The respondents are surprised then that she should feel that she is qualified to give an opinion on the safety of the development the subject matter of these proceedings.

As referred to above, an independent safety audit was commissioned by Galway County Council in relation to the safety issues. The Council engaged a firm, RPS consultants, to carry out a stage 3 road safety audit in respect of the access road between the inner relief road and Bishop Street. The additional relatively minor works identified as being necessary by this audit are incorporated in the respondents' planning application. The respondents cannot yet carry out these works but when planning permission is granted they argue, the works will be done without delay. They find it curious that the decision to grant permission which encompasses the improvements recommended in the safety audit will be appealed to An Bord Pleanála by the applicants since its sole aim is to enhance the safety of the development.

Delay
The applicants it is contended did not alert the planning authorities to the fact that they were unhappy with the road when it was being built. Use of the road continued for nine months before the applicants issued proceedings on 26th November, 2012, and therefore it is asserted that the applicants are guilty of delay. The respondents are of the view that the applicants only acted because the first named respondent placed an advertisement in the local paper indicating his intention to apply for planning permission and reject the applicants' assertion that they were merely waiting for the enforcement notices to be dealt with by the council since they had been in contact with the enforcement section since July 2012.

They are of the view that the court, when deciding whether or not to grant relief, should take into account this delay. They rely on the court's judgment in *Smyth v. Dan Morrissey Ireland Ltd.* [2012] IEHC 14, where he refused to grant the relief sought as the applicant had failed to act promptly.

The absence of planning permission
The first named respondent argues that it was never his intention to ignore the requirements of planning law and any breaches he made were not done deliberately. Once he became aware of the complaints being made against him regarding the development, he engaged experts to advise him and rectify matters.

The respondents lodged an application for retention permission in November 2012, and when the first named respondent became aware of the safety issues raised by the safety audit, he withdrew this application on 18th January, 2012 and submitted a revised application on 23rd January. He also commissioned an Architectural Impact Assessment which was submitted with the retention application. He believes this planning application addresses all of the issues relating to nearby protected structures

He argues that the respondents did not give him adequate time to rectify matters before issuing proceedings. He notes that by letter dated 16th November, 2012, the applicants' solicitors sought an undertaking from him within seven days of the date of the letter to carry out works within 30 days, failing which, injunction proceedings would be sought. The respondent only received that letter on 20th November, 2012. On 26th November, 2012, the applicants' notice of motion issued and Ms. Goss swore her affidavit, but made no mention of the vote by the members of Galway County Council to extinguish the right of way under s. 73 of the Roads Act 1993, which was to take place on that day- despite stating under cross-examination that she had been aware that the meeting was taking place then. Mr. Cunniffe knew that the Council had voted to extinguish the right of way on 26th November, 2012, and agreed to transfer it to the respondents. Nevertheless, on 27th November, he swore his affidavit and did not make reference to the vote taken the day before. The respondents believe the court should take into account this behaviour of the applicants and rely on Leen v. Aer Rianta cpt [2003] 4 I.R. 394, wherein at p. 409 Mc Kechnie J. referring to a principal enunciated by Henchy J. in Morris v Garvey stated that:

> "In deciding whether to grant an injunction in this case and, if so, on what terms, there are certain matters to which particular attention shall be given. These include:-
>
> a) the conduct, position and personal circumstances of the applicant….."

The first named respondent disputes the allegation that he has destroyed the Palace Road and its environs. Contrary to what is alleged at para. 9 of Ms Goss' affidavit, he says he did not carry out all of the works referred to, and argues that, in fact, most of the works were carried out by Galway County Council's contractor - in particular the construction of the replacement access onto the inner relief road. He argues thus that the enforcement notice is incorrect in stating that the respondents are guilty of "[u]nauthorised

creation of a service road (linking Bishop Street and the inner relief road), unauthorised creation of a means of access onto the inner relief road".

Moreover, the respondents do not believe that they are guilty of destroying the surrounding areas as alleged by the applicants. Mr. David Slattery, conservation architect, who drew up a report for the respondents, visited the site with Mr. Gus Mc Carthy on 23rd May, 2013. In his observations on the works undertaken, he states that the former Palace has undergone radical alteration from the 1960s and has lost many of its significant features. He notes that there is no area including the area of the car park that could be considered as being in a defined area of curtilage. He is of the opinion that it would be difficult to consider that isolated sections of the former demesne and garden wall lie within the curtilage of the Bishop's Palace. He states:-

> ". . . it is reasonable to state that the extent of alteration and change which occurred to the original Bishop's Palace prior to the works undertaken by Mr O'Toole in 2012 was radical and for the most part irreversible."

He goes on to say:-

> "It is quite clear that the historic curtilage of the Bishop's Palace no longer survives and that there is no longer a defined curtilage to the former palace."

The respondents indicate that they were unaware of the existence of a tree preservation order, and that the lime tree was damaged by a Council contractor was in dangerous state and therefore had to be removed. They argue that it was the Council which removed a portion of what the applicants claim to be the "old demesne wall" as part of the construction of the inner relief road. Although the respondents played no part in the removal of the wall, they have engaged their experts in relation to same and intend to rectify the issue. They propose constructing a series of rubble stone walls and to plant semi-mature trees to provide visual boundaries. These remedial works for which a decision to grant permission issued on 3rd October, 2013, are intended to alleviate the adverse visual impacts which are said to exist and improve the overall appearance of the area.

The court's discretion
The court has wide discretion under s. 160 of the Planning and Development Act 2000. The respondents submit that if the court were to grant the relief sought by the applicants, it would have a devastating effect on the respondents' business and on the town of Tuam. They believe that the development carried out is a betterment and improvement of the town and adds to the amenity of the town centre. They argue that if the road is returned to its former state then no traffic will be able to move from Bishop's Street to the inner road since there would be no through access from the respondent's property.

It is submitted that in the overall context of the entire development carried out by the respondents, any breach of the Planning Code that has occurred is not so serious or grave as to require granting the orders sought by the applicants.

The respondents rely on the judgment of Hogan J. in The County Council of the County of Wicklow v Katie (otherwise Catherine) Fortune 2012 IEHC 406, where he stated at para. 28:-

> "In recent times this Court has stressed that the discretion is limited in those cases where the infraction is gross and the developer has not acted in good faith."

At para. 33 he said:-

> "Other factors which might influence the exercise of discretion was . . . whether demolition might involve . . .hardship to the developer himself . . . "

The respondents submit that at all times they acted bona fide and in an open and transparent manner, in circumstances where the local authority was also carrying out development at the very same locus and was aware of the works being carried out by the respondents' contractors. The respondents spent enormous amounts of money, both in terms of the works undertaken, the retention of consultants and advisers and the voluntary transfer of lands to the council. The respondents point to the fact that they have given a written undertaking to the applicants not to carry out any works pending the outcome of their application for retention permission. Any removal of the development it is submitted would cause hardship to the respondents and they therefore request the court to exercise its discretion not to grant the applicants the relief they seek.

DECISION
6.1 These proceedings are in relation to a large development in Tuam town centre. The order sought however in this application is limited to the split-level car park, as identified. The applicants seek an order restraining its unauthorised use as a car park.

6.2 There is a preliminary objection made by the respondents on the grounds of the applicants' alleged delay. I accept that the applicants only discovered the development was unauthorised in July 2012. I think it was reasonable for them to await the outcome of the enforcement notices served on 16th October, 2012. Thus, when they moved on 26th November, 2012, they moved, in my view, within a reasonable time. There was then and remains today a substantial measure of confusion as to the planning status of the entire area. It is no surprise the applicants felt constrained to wait until at least some measure of clarity emerged with the failure of the respondents to comply with the enforcement notice. This preliminary objection is rejected.

6.3 The applicants argue that the court should make an order pursuant to s. 160 of the Planning and Development Act 2000. This section provides as follows:

> "160.—(1) 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 the permission pertaining to that development or any condition to which the permission is subject.

> (2) In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature."

6.4 It is conceded that the split-level car park is an unauthorised development.

6.5 The principles that should guide the court in dealing with this type of application were set out by Henchy J. in *Morris v. Garvey* [1983] 1 I.R. 319, at p. 324, where he stated:

> "When sub-section 2 of section 27 is invoked, the High Court becomes the guardian and supervisor of the carrying out of the permitted development according to its limitations. In carrying out that function, the court must balance the duty and benefit of the developer under the Permission, as granted, against the environmental and ecological rights and amenities of the public, present and future, particularly those closely or immediately affected by the contravention of the Permission. It would require exceptional circumstances (such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship, or such like extenuating or excusing factors) before the court should refrain from making whatever order (including an order of attachment for contempt in default of compliance) as is 'necessary to ensure that the development is carried out in conformity with the Permission'."

In this extract, Henchy J. was dealing with the power and duty of the court under s. 27 of the Local Government (Planning and Development) Act 1976, which may be taken as the predecessor in all relevant matters to section 160. This principled approach to a failure to comply with planning permission is also directly relevant to development unauthorized by planning permission.

This passage was approved by Clarke J. in *Cork County Council v. Slattery Precast Concrete Ltd. & Ors.* [2008] IEHC 290, where he stated at para. 12.1:

> "12.1 It is agreed that the court retains a discretion as to what should be the appropriate course of action to adopt in circumstances where it is established that there has been an unauthorised development. The discretion is to be sparingly exercised. See Henchy J. in *Morris v. Garvey* [1982] ILRM 177. In practice there have been some cases where the court has delayed, rather than refrained from, making an order so as to afford a party an opportunity to regularise the situation relating to an unauthorised development by giving a reasonable opportunity to the party concerned to make a retention application. Section 162(3) of the 2000 Act makes clear that a retention application does not operate as a stay. The precise circumstances in which a court should, therefore, exercise its discretion in such cases does require some consideration. Obviously it is no part of the function of a court to grant planning permissions or, indeed, to pre-empt the decision of the relevant planning authorities (including the Board) as to what matters ought be the subject of planning permission. On the other hand there may well be cases where it might appear that making an order requiring, for example, the demolition of a building or a portion of a building in circumstances where there was every reason to believe that there was good chance that retention permission would be obtained (for example where there was a minor technical failure to comply with a planning permission) might be disproportionate. At the same time the starting point has to involve a recognition that unauthorised development is unlawful and that a court should be slow to tacitly accept the unauthorised nature of a development by giving any undue leeway to the party who has been guilty of the unauthorised development in the first place."

Clarke J. continued at para. 12.2:

> "12.2 An important starting point has, therefore, to be to consider the nature of the unauthorised development and the history of the actions of the person who now seeks the exercise of the courts discretion."

In *Commission v. Ireland* Case-215/06, the European Court of Justice found Ireland to be in breach of Articles 1 and 2 of the Directive 85/337 EEC (as amended) due to the unrestricted availability of retention planning permission for unauthorised developments for which an EIA/NIA was required but not carried out. The court, at para. 57 of its judgment, stated as follows:

> "While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the condition that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception."

Further, at para. 61, of its judgment, the court stated:

> "61. It follows from the foregoing that, by giving to retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning permission preceding the carrying out of works and development, when, pursuant to Articles 2(1) and 4(1) and (2) of Directive 85/337 as amended, projects for which an environmental impact assessment is required must be identified and then – before the grant of development consent and, therefore, necessarily before they are carried out – must be subject to an application for development consent and to such an assessment, Ireland has failed to comply with the requirements of that directive."

The applicants argue that the development has impacted on the architectural and archaeological heritage of the centre of Tuam town. It is argued that an environmental impact assessment is required for the development that has actually occurred. It would appear at this stage of the proceedings that this is the case.

6.6 Thus, the following principles are clear from the decisions of the Irish courts and the European Court of Justice. The same principles that apply to the court's exercise of its discretion to refrain from making whatever orders are necessary to ensure compliance with planning permission (or the law, where there is none) should apply where retention is sought. There must be exceptional circumstances present such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship or something of equivalent force before the planning authorities should grant retention. The point of departure for the authorities in considering a retention application is that the development is unlawful and should not be permitted, save for the presence of the above exceptional circumstances. Retention permission should be an exceptional decision. Where such exceptional reasons are identified as present and sufficient, the authorities must ensure that any retention permission which is granted does not offer the applicant the opportunity to circumvent any aspect of the planning laws.

6.7 As things now stand, locals and children cross the unauthorised car park en route north from Bishop Street. Because of narrow sidewalks on the new service road, together with other safety concerns, the safest route, it is agreed, is through the new car park.

However, unlike the nearby all-day car park in the grounds of St. Jarlath's, this supermarket car park is busy all day with cars coming and going in the normal course of operation of such a car park. Mr. Lane, who is a Principal of St. Patrick's Boys School, gave evidence which I found convincing and disturbing, that children were drawn to crossing the car park in place of their old route. This he considered to be dangerous and I accept his judgment on that. All of this alteration, it must be noted, has come about without planning permission. It is impossible to accept the first named respondent's contention that all the unauthorised work was unintentionally in breach of the planning laws. He cannot but have been aware that the works he embarked upon in December 2011 were unauthorised. He himself acknowledged in the 'Tuam Herald' in January 2012, that the project for which he had received planning permission in 2010 was not going ahead. I do not believe he was in any doubt but that he could not proceed in a piecemeal fashion. Mr. O'Toole has considerable experience of the planning laws. He appears, in fact, to have established a particular modus operandi. He has an extraordinary planning history. He has a pattern of constructing unauthorised developments and subsequently seeking retention. This history is set out by the applicant, Ms. Connie Goss, in her affidavit of 22nd March, 2012, at paras. 9 and 22 in considerable detail. It is a litany of unauthorised development followed by retention permission repeatedly given. In his replying affidavit of 19th June, 2013, to this affidavit of Ms. Goss, Mr. O'Toole, whilst responding to other matters, passes over all these allegations without any reference. Mr. Gus McCarthy, in his affidavit sworn on 20th June, 2013, simply states that any unauthorised developments were rectified by way of retention permission. On this uncontradicted evidence before the court, he has carried out eight unauthorised developments since 1996. He has been the subject of six enforcement or warning notices but has repeatedly been granted retention permission. The most recent retention permission was granted on 3rd October, 2013, in respect of much of the work involved in this application. This history demonstrates little regard for the planning process on the part of the respondent. It also reflects little credit on those charged with responsibility for the integrity of the planning process in Tuam. The planning situation in the historic heart of Tuam, as revealed in the evidence before the court in this application, may be described as chaotic.

6.8 In the light of the judgments in the European Court of Justice (as it then was), the Supreme Court of Ireland and the High Court of Ireland, as cited above, it is not possible for this court to extend any discretion to the respondent in relation to this application. The unauthorised use of the split-level car park must be restrained. I am conscious of the present season and wish to minimise inconvenience for the people of Tuam who are the innocent victims of the unauthorised works that have taken place in the centre of their town. The end of the school term is close and so the dangers of which Mr. Lane gave convincing evidence are likely to abate considerably over the next few weeks. Solely in the interests of the public of Tuam, I will make the order sought restraining all use of the unauthorised split-level car park involved in this application, but I will put a stay on this order until the end of the first week in January.

6.9 I will hear counsel as to the exact form of the court order which should have a map annexed thereto identifying exactly the area involved.