

THE HIGH COURT
CIRCUIT COURT APPEAL

[RECORD NO. 2018 368 CA]

CORK CIRCUIT, COUNTY OF CORK

[RECORD NO 2017 01140]

BETWEEN

BARRY HAYES, MAIREAD KEOHANE, ASSUMPTA O’KANE AND FERGAL LENNON

APPLICANTS/APPELLANTS

AND

NICHOLAS O’DONOGHUE

RESPONDENT

JUDGMENT of Mr. Justice QUINN delivered on the 21st day of January, 2020

1. The first and second named applicants reside at Cladach, the Demesne, Monkstown, Co. Cork.
2. The third and fourth named applicants reside at Glencairn, the Demesne, Monkstown, Co. Cork.
3. The respondent is the owner of a site, circa 0.44 acres, located between Cladach and Glencairn which he purchased in 2008. Cladach is to the south west of the site and Glencairn is to its north east. The site is boarded at the north west by remaining lands in the Demesne estate, and at the south east by a cul-de-sac known as Alta Terrace.
4. The site was originally owned by Anglo Eire Property Company, (“Anglo Eire”), the developer of the Demesne. Although the site now has an entrance directly on to Alta Terrace – about which there is controversy in this case – houses in the Demesne do not have entrances on Alta Terrace, and are accessed by an estate road to the north of the site.
5. The respondent’s family home is Thorncliffe, on Alta Terrace, and is located directly across Alta Terrace from the site.
6. The gradient of the site is from the north west towards the south east. Therefore, Alta Terrace, Thorncliffe and other houses on Alta Terrace are all at a lower level of the hillside facing south east towards the sea.

June 2017

7. Between 26 and 29 June 2017, Mr Aengus Canty, a contractor retained by the respondent undertook certain works on the site.
8. On 27 June 2017, the applicants’ solicitors, Messrs Hickey Dorney wrote to the respondent and complained that the respondent was engaging in “*unauthorised works*”. The essence of the complaint made in that letter was that “*natural forestry and a well have been removed from the site and that diggers are currently on the site carrying out excavation works altering the site levels up to 6 metres ... that drainage works were being carried out diverting the natural stream on the site which we are advised will affect drainage on our clients’ properties and could result in flooding of same.*”

9. The applicant's solicitors warned the respondent that the works were being brought to the attention of the "Planning Authority Enforcement Section" and that unless they received an undertaking to cease the works they would apply to the Circuit Court for an injunction preventing the works continuing.
10. The respondent telephoned Hickey Dorney and stated that he was not doing works on the site and that he was "*simply clearing the site*".
11. There was some controversy as to what else was said in this conversation. The applicants' solicitor, Carol Hickey, swore an affidavit to the effect that the respondent informed her that he had three offers from people interested in buying the site. That averment has not been contradicted.
12. The first named applicant, Mr. Hayes, also spoke to workmen on the site, and in particular Mr. Canty. Mr. Hayes says that Mr. Canty informed him that he had been instructed by the respondent to continue his work.
13. On 28 June 2017, these proceedings were commenced and the applicants made an *ex parte* application to the judge in the Circuit Court at Cork on that day. The Court granted leave to issue and serve a notice of motion seeking orders under s. 160 of the Planning and Development Act, 2000, as amended, ("the Act"), returnable for Friday 30 June 2017.
14. When the matter came before the Circuit Court on Friday 30 June, it was adjourned to enable the parties exchange further affidavits, including engineering evidence, and the respondent gave an undertaking to desist from any further works on the site pending the determination of the proceedings.
15. After further adjournments and exchanges of affidavits, the matter was ultimately heard before the Circuit Court on 10 October 2018 when the court dismissed the claim. The applicants appealed to this Court.
16. The matter was heard on the basis of affidavits sworn by two of the applicants, the Respondent, their respective engineers and others. The Respondent and the engineers for each side were cross-examined.

Planning and other history of the site

17. During the hearing there was extensive debate as to the exact relevance of the planning history of the site. The respondent submitted that the only matter with which this Court should be concerned is a determination of whether the works performed by him in June 2017 constituted "works" within the meaning of that term in s.2 of the Act which in the absence of a planning permission or exemption could be the subject of any orders under s. 160.
18. I have concluded that the planning history of the site is relevant at the very least to understand the character and features of the site and to put a proper context on the complaints now made in these proceedings.

19. The Demesne is an estate which now comprises of 25 houses constructed on individual sites within the estate pursuant to planning permission originally applied for by Anglo Eire in 1989. That planning permission is referred to in this judgment as "S/589/1710".
20. A number of the conditions attached to the Cork County Council Notification of the Decision ("NOD") to grant S/589/1710 are relevant to an understanding of the site and its planning status. They include the following: -
 - (i) A condition (3) that open space/woodland areas and access roads within the estate be retained in private ownership, and requiring the establishment of a management company to maintain these areas.
 - (ii) That the recommendations contained in a tree surgeons' report submitted to the planning authority be carried out in full and that certain fencing be erected around identified trees so that they could be retained and protected (Condition 5).
 - (iii) That woodland areas in the estate be retained as public amenity areas (Condition 15).
21. The NOD dated 21/5/1990 required that the development be carried out in accordance with certain plans and particulars which were lodged with the planning authority on 8 June, 1989 "as amended on 13/7/89 and 22/3/90". The drawings originally submitted on 8 June, 1989, are referred to as Drawing Numbers 1589/201, 202, 203 and 204. On Drawing 1589/201, the area comprising the site the subject matter of these proceedings is designated "*open space*". There was some debate as to whether this description extended to the entire of the site but in the absence of separate delineation, it is clear from the drawing presented to the court that this designation applies to the entire of the site the subject of these proceedings.
22. A later version of the drawings submitted in response to a request for further information by Cork County Council does not show the words "*open space*" on this part of the drawing. However, there is no record of any deviation from or waiver of Condition No. 3 requiring the retention of open space or woodland within the estate, or that the first set of drawings could be disregarded or treated as withdrawn.

The 2002 Refusal

23. In 2002 an application was made by the then owner of the site for outline permission for construction of a dwelling house. The application was refused and the following reasons were given by the planning authority, Cork County Council: -
 - 1) "The development would contravene materially a development objective indicated in the development plan for the use of the area as low density individual sites in woodland setting, by eroding the woodland setting for the individual housing sites already permitted under S/89/1710.
 - 2) The proposed development would be contrary to the proper planning and development of the area because it would contravene materially existing planning

permission register number S/89/1710 which regulates the development of the overall lands of which the site forms part, and which provides for the continued use of the site of this application as wooded public open space.

- 3) The site is a wet, wooded one containing extensive rushy areas and a number of small streams, and is not suitable for development. The planning authority is not satisfied that these conditions could be rectified so as to make the site capable of development, without increasing the risk of flooding on this site and adjoining properties in wet weather. The proposed development is already in an area which is at a risk of flooding, and the proposed development would increase this risk.
 - 4) The planning authority is not satisfied that the site can command the public sewer, or (having regard to the unsuitability of the site for on – site disposal) that the sewerage arising from the development can otherwise be satisfactorily disposed of”.
24. A full reference to the content of the report of the then senior planner Mr. Mansergh, on 13 June 2002, is instructive: -

“Site visited 12 June 2002. Site is a wet wood, heavily overgrown, with numerous small streams in addition to the main one on the SW boundary, and much of its area growing luxuriant rushes. The trees on site are sparse and in various states of health. The wood may have become wetter as a result of development to the west, as conditions now seem wet relative to the species present – mostly sycamore and horse chestnut – while wet adapted species like alder are absent.

Ground conditions are totally unsuitable for development of any sort at present, and for development to take place, large scale clearance, and drainage works and filling would be necessary. Drainage would raise the question of where the surplus water would go. The application refers to soak ways on site, in relation to the runoff generation by his own development. Phelim O’Neill notes that some of the site acts as a flood plain at present in wet weather. A resident of the existing Victorian house on the opposite (lower) side of the road has written in, complaining that the development and tree felling which has already taken place in Monkstown Demesne has increased runoff and caused flooding, that the council has laid drainage pipes under the road without his permission to alleviate the flooding, and that has resulted in flooding in his garden as well. Two new looking 14 – inch plastic pipes are in place, carrying the stream under the road.

It seems clear that permitting this development would increase runoff and diminish water storage on site and that the application does not include proposals for dealing with the consequences. (emphasis added)

The Area Engineer, the Housing Estates Engineer and the objector (who is also an engineer) all question whether the proposed house would in fact command the sewer as the northern end of the road, as proposed in the application. The site would not be suitable for a septic tank.

This application forms part of a site (the Monkstown Castle Demesne Lands) on which permission for 25 houses was granted under S/89/1710. It (sic) shown in that application as wooded public open space. Condition 15 of that permission requires that the woodland area be retained as public open space, and condition 3 provides that open space/woodland areas shall be retained in private ownership and that a management company should be set up to maintain these areas. There is no evidence of management activity on the site to which this application applies.

This application therefore breaches the overall permission for these lands. The quality of the woodland is fairly poor at present, and incapable of use as open space, but this is partly due to a failure to manage the woodland in accordance with the permission granted. Retention of the area in its wild state is nevertheless important. The Monkstown Demesne development is clearly intended to work on the basis of houses set in woodland, and it is zoned as such in the 1996 plan. Narrowing the woodland belt between Alta Terrace and the main access road into the demesne development would seriously erode the sense of that development being set in woodland.

Having regard also to the major practical problems in developing this site, refusal of permission is recommended”.

25. The objector referred to in the report of the planner was the respondent's late father, then owner of Thornccliffe.
26. The Respondent claimed that when purchasing the property in 2008, he had no knowledge of the detail of the planning history either in terms of the conditions attached to the S/89/1710 or the reasons for the refusal in 2002. Whether the respondent had actual knowledge of the detailed conditions of the permission S/89/1710 or of the reasons for the 2002 refusal is not determinative of the case. However, as emerges from events referred to below, it is difficult for the court to accept that before 2017 he was not actually aware of those matters or ought to have been aware of them, through a combination of planning and other inquiries made in the conveyancing process at the time of purchase of the site, and having regard to certain pre-planning consultations which he undertook with Cork County Council on a series of dates in or around 2009.

2009 Clearance Works

27. The respondent gave evidence that after purchasing the site he set about cleaning it up and making it safe. He says that during 2009 in the course of cleaning the site he removed seven truckloads of rubbish, opened drains, removed dead trees, planted additional hedgerows and trees, and cleaned the existing stream of fallen trees and vegetation. He says also that he fenced off the site from its entrance at the Demesne and gated the entrance from the Alta Terrace side.
28. He also says that the stone wall which marked the boundary of the site against Alta Terrace had fallen over a period of many years and was rebuilt by him at that time.

29. In 2009 when this work was undertaken a number of residents of the Demesne made complaints to Cork County Council in respect of the clearing of the site. This led to the issue of a warning letter by Cork County Council in March 2009. Ultimately, following submissions made by the respondent to the Council, the Council determined that no action should be taken in respect of the clearing of the site at that time.
30. The Council also acknowledged at that time that the subject site is in private ownership, and although initially the applicants in these proceedings suggested that the site ought to remain, consistent with the original planning permission, a "public open space" it has been accepted that the site was validly transferred to the respondent in 2008 and that it is no longer publicly accessible.
31. It appears that a number of "pre planning" meetings also took place during 2009 between the respondent and Cork County Council.
32. On 3 October 2009, the respondent wrote to Cork County Council submitting "*some ideas*" which he had in order to further investigate with the County Council "*as to the possibility of securing planning permission for a dwelling on the site across the road from Thorncliffe – my family home*".
33. At this stage the respondent indicated that he and previously his late father had been concerned over a long period of time as to the flooding effects of the site on Thorncliffe. He said that for many years prior to his acquisition of the site, the site had not been properly maintained and had been used by many locals as an infill site and had been subjected to regular dumping. He said that the cumulative effect of these issues was to cause flooding at Thorncliffe and re-routing of a stream on the site. He indicated that the principal purpose of the clearing works which he had undertaken in 2009 was to resolve the flooding issue at Thorncliffe.
34. With the letter of 3 October 2009, the respondent submitted drawings and illustrations and a proposed site layout and certain house designs. No application for planning permission was made at this time.

2013

35. The respondent gave evidence that for a limited period during 2013 he had facilitated the Cork County Council by enabling the site to be used as a form of "*staging post*" in connection with works which the County Council were undertaking on the lower Monkstown Road, closer to the seashore. He said that as part of this work some hardcore surfacing had been laid inside the gate to the site at Alta Terrace to facilitate the movement of trucks and diggers. This is relevant to one of the complaints in these proceedings.

June 2017

36. In the grounding affidavit for the purpose of the *ex parte* application, the first applicant referred to the following activities: -

1. He said that the respondent had caused excavators to go on to his site with diggers and workmen and that he had engaged in considerable unauthorised work on the site without any planning permission.
 2. That the level of the respondent's site had been changed by "*up to approximately six metres*".
 3. That the respondent had caused a considerable amount of trees to be removed.
 4. That the respondent had interfered with a stream running through the site.
 5. That the general removal of the site works and drainage works were a cause of concern for flooding in the Demesne and that this violated the planning restrictions deriving from the original planning permission S/89/1710.
37. This initial description of the works was very general, made as it was in the context of an *ex parte* application for injunctive relief. The description of the works was later expanded by the applicants' engineer, Mr. O'Kennedy.
38. In the replying affidavits the scale and extent of the works is contested and it has been submitted by the respondent that none of the works constituted development such as would require a planning permission. It is also submitted by the respondent as follows that: -
1. The felling of any trees amounted to no more than the removal of two dead trees and that there was no further felling of trees or significant removal of vegetation.
 2. That any alteration in site levels was limited to a decrease in the level rather than an increase and did not exceed one metre. He also said that his instructions to the contractor carrying out any works was always that the site levels at the end of the activity should be restored to the same level as at the outset of the work. He therefore submits that such activity does not constitute unauthorised works or change of use and in any event would not justify the making of an order pursuant to s. 160.
 3. The respondent contends that the Alta Terrace entrance is the same as it was in 2013 except that the metal gate had been moved into the site temporarily from its original position and that it was his intention that the gate be restored to its original position closer to the road.
 4. A number of complaints arise in relation to the treatment of streams and drains, to which I shall refer later.
39. In relation to the allegation that the conditions of S/89/1710 stipulate the site to be a "*public open space*" the respondent asserts that nothing in the works undertaken by him would constitute a breach of that condition. He also submits that these proceedings can only concern works undertaken between 26 and 29 June 2017. There was extensive

disagreement between the deponents, particularly the engineers, as to how much of the works complained of by the applicants were undertaken in the period 26 to 29 June 2017 or were the result of earlier activities at the site.

40. The respondent in his replying affidavit stated that in June 2017 he engaged the contractor Aengus Canty to "*clean up the site*" and carry out the following: -
1. Stream – cleaning of silt from stream and banks at either side.
 2. Dead tree stumps – removal of three dead tree stumps and to bury them on site.
 3. Drains – clean drains which had been opened in 2009 of vegetation ensuring falls to stream were correct and close back drains using correct materials which included a 600mm land drainage pipe, 2 – inch graded stone and cover with topsoil and grade surface to match existing. No soil was removed from the site.
 4. Concrete posts – replace wooden posts at each corner of the site with concrete posts. The respondent says that this work was not completed due to the undertaking given to the court on 30 June 2017.
 5. Grading raking of soil and seeding site. The respondent says that he instructed the contractor that on completion of the works referred to above the site should be returned to its original levels and reseeded with grass. Again, he says that this was not completed as a result of the undertaken given on 30 June 2017.
 6. Tree planting – the respondent said that he had approximately 200 potted trees and shrubs on the site that were waiting to be transplanted to the site. This apparently has not been completed due to the undertaken given on 30 June 2017.
41. The respondent's evidence was that further to these instructions, the contractor entered the site on 26 June 2017 and cleaned the silt from the stream, removed the dead tree stumps and cleaned and "*closed back the drains*". He says that the contractor ceased all activities on the site on the 29 June, 2017, and that no further activities have taken place there since the undertaking was given to the court on 30 June, 2017.
42. I shall return later to the detail of the evidence in relation to each of the headings of complaint.

Section 160 of the Planning and Development Act 2000

43. Section 160 of the 200 Act provides as follows: -

"(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 [any] 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”.*

Unauthorised works

44. Section 2(1) of the 2000 Act defines “unauthorised works” as follows: -

“. . . any works on, in, over or under land commenced on or after 1 October 1964, being development other than—

- (a) *exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or*
- (b) *development which is the subject of a permission granted ...”*

Works

45. The term “works” is defined by s. 2(1) as follows: -

“Works includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal ...”. (emphasis added)

Discretion

46. The extent of the court’s discretion in a matter of this nature was considered in detail by the Supreme Court in *Meath County Council v. Murray* [2017] IESC 25. In that case there had been some debate as to the extent to which equitable principles influence the operation of the discretion to make an order pursuant to s. 160 of the Act.

47. The starting point is that the use of the word “may” in the Section forms the basis for the discretionary nature of the jurisdiction. McKechnie J. said as follows: -

“It is not difficult to understand why this is so, nor is it difficult to identify the features inherent in equitable injunctive relief which are notably absent on the statutory side. To name but a few: neither interest nor harm is a requirement; the sequential approach governing interlocutory injunctions on the equity side, namely, whether there is a fair question to be tried, whether damages will be an adequate remedy, and where the convenience lies, does not feature; no undertaking as to damages is required; the ultimate relief is always an injunction in permanent form; there is a limitation period expressly provided; and, of course, the section serves a public law function. The court therefore cannot approach an application in the same

manner as it would were equitable principles in a private law context at issue. Consequently, at the level of principle, whilst the court has power to make both interim and interlocutory orders, that power is not intended to absorb within the section general equitable principles.”

Later, McKechnie J. continued as follows: -

“...the jurisdiction to grant injunctive relief, or to withhold it either conditionally or unconditionally, is to be found within the section, whose construction is to be informed by the 2000 Act as a whole. Whilst undoubtedly a discretion exists, the parameters within which that must be exercised must likewise be statutorily based. Accordingly, equitable principles cannot be used to expand the discretionary aspect of the section unless such are found within it. This view is primarily intended to identify the jurisdictional basis of the courts’ power to issue a section 160 order. It is not stated for the purpose of disapplying any of the established jurisprudence which is statutorily based, nor is it intended to trim back the exercise of the courts’ discretion, provided that the basis for same is properly understood”.

48. McKechnie J. also cited the following relevant passage from the judgment of Henchy J. in *Morris v. Garvey* [1983] IR 319: -

“This Court has judicial notice, from what it knows to have happened in other cases, that (for motives which may be put down to expediency, avarice, thoughtlessness or disregard of the rights or amenities of neighbours or of the public generally) developers who have contravened the conditions of a development permission have knowingly proceeded with unauthorised development at such a speed and to such an extent as would (they hoped) enable them to submit successfully that the court’s discretion should not be exercised against them under sub-s. 2 of s. 27 because the undoing of the work already done would cause them undue expense or trouble. For my part, I would wish to make it clear that such conduct is not a good reason for not making an order requiring work carried out in such circumstances to be pulled down”.

49. Finally, McKechnie J. identified a number of considerations which he considered would inform the court in the exercise of its discretion as follows: -

- “(i) The nature of the breach: ranging from minor, technical, and inconsequential up to material, significant and gross;*
- “(ii) The conduct of the infringer: his attitude to planning control and his engagement or lack thereof with that process:*
 - Acting in good faith, whilst important, will not necessarily excuse him from a s. 160 order,*
 - Acting mala fides may presumptively subject him to such an order;*

- (iii) *The reason for the infringement: this may range from general mistake, through to indifference, and up to culpable disregard;*
- (iv) *The attitude of planning authority: whilst important, this factor will not necessarily be decisive;*
- (v) *The public interest in upholding the integrity of the planning and development system;*
- (vi) *The public interest, such as:*
 - *Employment for those beyond the individual transgressors, or*
 - *The importance of the underlying structure/activity, for example, infrastructural facilities or services.*
- (vii) *The conduct and, if appropriate, personal circumstances of the applicant;*
- (viii) *The issue of delay, even within the statutory period, and of acquiescence;*
- (ix) *The personal circumstances of the respondent; and*
- (x) *The consequences of any such order, including the hardship and financial impact on the respondent and third parties”.*

50. McKechnie J. concluded by stating that the weight to be attributed to each of these factors would be determined by the circumstances of a given case and that the list is not intended to be exhaustive.

51. I shall return later to the factors which inform the court in this case in the exercise of its discretion under Section 160 of the 2000 Act. Before doing so, and because the evidence was characterised by a lack of clarity on both sides regarding much of the detail and a number of the issues were intermingled, it is necessary to separate the factual issues into the following six: -

- 1) The north west drain.
- 2) The south west drain.
- 3) The stream through centre of site.
- 4) The gate to Alta Terrace.
- 5) Tree felling.
- 6) Site levels.

North west drain

52. Prior to 26 June, 2017, on the north west boundary of the site there was an open stream or drain flowing from the north point of the site in a south westerly direction.
53. The respondent says that this drain only became open in 2009 when he initially cleared the site.
54. Photographs were exhibited which show that the works to this drain comprised excavation of the drain of sufficient scale to enable the installation of an engineered "French" drain, surrounded by what was described as geo textile membrane, and then supported by crushed stones surrounding the drain. At the time of the photographs the piping had been laid but the drain was not covered. The exhibited photographs show a person, who the court understands to be the first named applicant, standing in the excavated area such that his head and shoulders were below the bank of earth created by the excavation with only his raised hand reaching higher than the earth bank.
55. Mr. O'Kennedy says that this photograph illustrates excavation at one location of at least 2.5 metres from the original ground level to the top of the stone covering the newly laid pipe. What had previously been an open water course was now an engineered French drain, to be covered over with crushed stones and later with topsoil.
56. The respondent's engineer, Mr. Waterman, himself described the work as the laying of a pipe and the drain being backfilled using geotextile membrane surrounded by 2 inches of crushed stone, which would then be covered in topsoil. He says that no soil was removed from the site during the course of this exercise.
57. It has not been denied by the respondent that this stream was an open drain before these works and that earth was extracted for the purpose of laying a pipe or a French drain to be protected with the geotextile membrane and then the 2 inch crushed stone. Nor could it be denied that the photograph of a man standing in the excavated drain illustrated excavation of at least 2.5 metres.
58. Mr. Waterman acknowledged in his evidence under cross – examination that the photograph of Mr. Hayes taken on 26 June 2017 shows the excavation of a trench which could only have been affected by the use of the mechanical digger as shown in the photographs. He acknowledged also that this must constitute "works" within the meaning of the Act. Mr. Waterman sought to suggest in his evidence that the term "excavation" used in the Act could only refer to permanent excavation and that as it was the respondent's stated intention to cover the newly laid piped drain by restoring the topsoil, that this entire exercise would not require authorisation under the Act.
59. The respondent acknowledged that the effect of inserting the engineered French drain would be to channel water across the north west boundary so that it would continue into the drain running on the south west boundary and onwards towards Alta Terrace. This had the effect that whereas previously water would seep or soak through to the centre of the site, it would now be channelled across to the boundary of the site and flow onwards towards Alta Terrace without seeping through the centre of the site.

60. Both the respondent and his engineer acknowledged under cross-examination that the effect of these works is to reduce or even eliminate the general leakage of water from the north west boundary into the centre of the site. Clearly this would have the most radical effect of reducing the water saturation of the site as a whole.
61. Even if one of the effects of this was to reduce flooding from the site to Thorncliffe, there seems to be no doubt that the first effect of this excavation and laying of a new engineered French drain was to prevent water from seeping from the original open drain through to the centre of the site, thereby radically altering the character of the site as a wet woodland. Even if, as the respondent contends, the use of the phrase "wet woodland" in S/89/1710 were not to have binding effect on an owner of the site today, it is inescapable that these excavation works effect an alteration of the lands, within the definition of "works" in s.2 of the 2000 Act.
62. To a casual observer, it might be said that this is an objectively sensible improvement of the lands which will reduce the flooding effect not only on Thorncliffe but also on the route of Alta Terrace itself. Whilst that may be correct, the excavation work and the laying of new piping and protection surrounds are clearly works within the meaning of s. 2 of the Act for which the respondent had not obtained any prior planning permission or authorisation.

South west drain

63. The open drain running along the south west boundary of the site, which adjoins the property occupied by the first and second named applicants appears to be a continuation of the "north west" drain. There was put into evidence photographs showing that a volume of stones had been laid where this drain meets Alta Terrace. The applicants say that these have the potential effect of blocking the flow of water from this drain into the pipes which run under Alta Terrace. And therefore, that a likely result is flooding of Alta Terrace itself.
64. As regards the allegation that loose stones have been laid which conceal the entrance to the piping which runs under Alta Terrace and that this has the potential to cause flooding at that location, I cannot find that this constitutes "*works*" within the meaning of s.2 and therefore can make no order under s.160 of the Act. If this aspect were to actually cause a nuisance or otherwise give rise to a separate cause of action, this finding by me does not preclude an aggrieved party from a remedy, but it would not be appropriate for this court to speculate on potential effects of the loose stones in the absence of evidence of such effects.
65. It appears that water has been flowing from the first and second applicants' site into the open drain on the respondent's site along this boundary, and the photographs exhibited illustrate piping to control that flow running into the stream on this boundary. The evidence was that piping to manage the control of this flow was installed by the respondent himself to protect from any flooding which might otherwise arise from this flow.

66. The applicant claims that there has been a redirection of this drain.
67. There is a lack of clarity in the evidence on both sides as to whether there was any diversion of this stream. In the affidavit of Mr. O’Kennedy, sworn on 22 December 2017 he states as follows: -

“I do not accept that there was no diversion of a stream. I further do not accept that this was addressed adequately by any submissions submitted by or on behalf of the respondent [to the Council] I say that the exhibits to the respondent’s affidavits are [sic] the submissions made by or on behalf of the respondent do not show any detailed information on where the stream on site was, or where the stream on site is now. It does not provide any detailed information as to where the streams were worked on. I say that the photographs exhibited to your deponents earlier affidavit show that significant areas and streams were worked on and in some cases piped and closed over. These details are not shown on the submission from the respondent to the local authority”.

68. The allegation of diversion of this drain has been made in the most general of terms and the applicant has not exhibited photographs or maps to evidence diversion caused by unauthorised works undertaken in June 2017. Even the applicants’ engineer acknowledges the vagueness of this complaint. Accordingly, there is no form of order which I can make regarding diversion of this drain.

Stream through centre of site

69. It is alleged by the applicants that photographs predating June 2017 show a meandering stream running diagonally across the centre of the site and that this has been completely covered up or diverted away from the centre. Some of the earlier Ordnance Survey maps produced to the court appeared to show the existence of a stream running diagonally across the centre of the site, and the applicants have put before the court a photograph from April 2011 which shows the meandering stream running through the centre of the site. Later or more recent photographs show the centre without this stream. However, the evidence does not include any form of proof that the works undertaken by the respondent in June 2017 were the occasion for the covering over of this stream. The court is then faced with speculating as to whether the covering of this stream formed part of the work in 2017 or occurred earlier.
70. Certain photographs exhibited display the state of the site in 2015. They appear to show the central area of the site laid out as a maintained lawn without the appearance of any stream meandering through the centre.
71. In his evidence, the respondent swore that he had closed up the central stream in or about 2011/2012. He acknowledged that the effect of this would be to assist in any future application which might be made for permission for the construction of a house on the site. This admission is relevant to an issue to which I shall return, but in the absence of any evidence that diversion or closure of this stream occurred as part of the works in June 2017, this court cannot now make an order under s.160 of the Act.

Entrance gateway

72. The applicants exhibit photographs which show a gated access to the public roadway at Alta Terrace. They say that S/89/1710 shows a stone wall running the full length of the boundary along Alta Terrace and that the opening of an entrance and construction of a gateway clearly is in breach of that permission and has not been the subject of any permission or authorisation.
73. The respondent admits that a gateway has been erected and an opening made from Alta Terrace into the site. The photographs also show that an area inside the boundary now comprises a hard core. The respondent says that this arose when he permitted the site to be used as a staging area in 2013 by the Council. He says that stone and materials were drawn from the site to be used in the rebuilding of the retaining wall at Lower Monkstown, below Thorncliffe. He says that the site had to be prepared for trucks going onto the site so hardcore was laid inside the perimeter of the fence, thereby facilitating trucks and diggers entering and leaving the site.
74. The evidence of Mr. O’Kennedy which has not been disputed on this point, is that prior to June 2017, the gate had been “flush with the fencing and at the edge of the road” and that it is now set back some three metres, which has the effect of widening the entrance to Alta Terrace.
75. The photographic evidence illustrates conclusively that in addition to the establishment of a new hardcore base within the perimeter, some of which is attributable to the events of 2013, the gate now stands relocated several meters inside the perimeter, supported by hard core – albeit that the hard core was necessitated by the 2013 works in collaboration with Cork County Council – thereby creating or at least facilitating a larger entrance to the site.
76. Two observations can be made in relation to this aspect of the matter: -
- 1) No planning permission of any kind exists for the opening of an entrance of this scale onto Alta Terrace.
 - 2) There is evidence that in the course of facilitating certain works in 2013 by the Council this entrance was used and therefore there is doubt as to whether the current state of the entrance was due to the activities of June 2017. However, it was acknowledged by the respondent that in the course of the June 2017 works, the gate was moved inwards into the site. The effect of this is to widen the entrance in a manner which was not authorised. I shall direct that the gate itself be restored to the perimeter and that the boundary wall be reconstructed up to meet the gate at each side.

Removal of trees

77. The applicants claim that the respondent undertook a “wholesale removal of trees”. The height of the applicants’ evidence is to exhibit a number of photographs which show the site on various dates preceding 2017 as a wooded site. These include a photograph taken as of 2009 which shows the site to be heavily wooded, and then what is referred to as a

“recent” aerial photograph showing the site still to be heavily wooded. Also exhibited are a number of photographs alleged to have been taken in June 2017 showing the site to be much more sparsely populated as regards trees.

78. Apart from the very general statements by the first applicant and his engineer, there is a dearth of evidence of particular trees having been felled by the respondent during the works of June 2017.
79. It is alleged by the applicants also that the S/89/1710 identified thirteen particular trees, and that on an inspection of the site now it is evident that those trees have been removed.
80. The respondents’ evidence is that he removed certain dead trees from the site and arranged for other tree stumps to be buried. It is also submitted that the mere felling of trees would fall within the exemption provisions of Section 4 of the Act. This element of the application is resolved by the absence of direct evidence of the removal of trees in June 2017. Accordingly, there is no form of order which can be made by this Court in relation to trees.

Site levels

81. In the applicant’s grounding affidavit sworn 28 June 2017 he alleged that the level of the respondent’s site had been changed by up to approximately six metres. In the affidavit of Mr. O’Kennedy sworn on 19 July 2017 it was alleged that various materials had been “imported into the site”, including both stone and soil and that this material had been placed around the site. It is also alleged that “the soil has been graded off to provide a level central area to the site”. Photographs were exhibited showing a generally level central aspect to the site after the works complained of.
82. The affidavits exchanged on this subject and the cross-examination included references to differing surveys purporting to identify alterations in site levels at various parts of the site. The affidavits, and the evidence under cross-examination, reflects fundamental disagreement between the parties as to the accuracy of each other’s respective surveys including disputes as to such matters as what base levels were taken for comparison with earlier ground levels. More importantly, it is also clear that the respective engineers concentrated their surveys on different parts of the site. For example, it is alleged by the applicant that the respondent’s engineer concentrated his measurements in the lower areas of the site where, on any account, less site levelling occurred than in the more northerly parts of the site.
83. Even under cross-examination of the respective engineers, which was largely argumentative in nature as opposed to probative, this lack of clarity prevailed. However, an inspection was undertaken by a firm called Precise Control on behalf of the applicants in April 2018 and which is referred to in Exhibits A and B to the affidavit of Mr. O’Kennedy sworn on 21 May 2018. The clearest of all of these illustrations is the survey exhibited by Mr. O’Kennedy which is dated 1 May 2018 and which identifies contours in April 2018 and differences in level at these points in the site from 2009. For the most part, these

differences appear to concentrate on the north and north easterly parts of the site and show a range of differences from between 200mm and 1000mm.

84. Having considered the evidence of the engineers and the surveys produced to the court, I have concluded that the only survey which is sufficiently clear is the survey at Exhibit B to the affidavit of Mr. O'Kennedy sworn 21 May 2018. This shows in red a series of deviations from 2009 levels, principally at the north and north eastern points of the site. I am satisfied that these alterations of levels constitute alterations to the property which were not the subject of any permission and accordingly should be reversed.

The discretionary matters

85. In this case, I have had regard to the following aspects of the evidence;

1. The general conduct of the respondent and his stated intentions,
2. The engagement of the respondent with the planning authority
3. The scale of the works, which range from minor to very substantial, and,
4. The conduct of the applicants.

86. The respondent insisted originally that everything which he had done at the site both in 2009 and 2017 has been firstly for the purposes of cleaning up the site following dumping of rubbish by other parties and secondly to prevent the flooding of his family home, Thorncliffe.

87. The applicant says that the respondent intends to develop the site and ultimately to erect a dwelling house or at least to bring the site to a condition that it will be suitable for such a development, either by him or by a purchaser from him. In this regard, the applicants say that the works are demonstrably directed to addressing the reasons which were given by the planning authority for the refusal for the outline of planning permission for the construction of a house in 2002.

88. The respondent says that if ever another application is made for permission to erect a dwelling house, the applicants and others will all have their right to make observations and to object. In response to this the applicants say the respondent's actions were aimed at gradually rendering the site suitable for development and construction of a house, principally by improving the drainage of the site, levelling the site and general clearance of trees, thereby depriving it of the wet woodland character it enjoyed when S/89/1710 was originally granted for the Demesne as a whole and, more directly, to overcome the reasons given for the 2002 refusal.

89. The applicants' solicitor has given evidence to the effect that when she served the warning letter, the respondent stated in a conversation to her that he had had three offers for the site. This evidence has not been contradicted.

90. The respondent also sought initially to claim that he had not been aware of the planning history of the site. This appeared to be a suggestion that he was not aware of either the

conditions of S/89/1710 or of the reasons for the 2002 refusal. He went so far at one point as to suggest that he had only very recently, possibly even in the context of these proceedings, become aware of those matters. He also said that when he was engaged in communications with the planning authority in 2009 they never drew to his attention the existence of the conditions attached to S/89/1710.

91. Under cross-examination the respondent acknowledged that he knew generally that this site had a certain planning history. He said that the planning files searched on his behalf did not reveal the detail now known to him, but agreed that he had retained solicitors to act in the purchase of the site and that both the solicitor and he would have known how to undertake planning searches.
92. It is noteworthy that the respondent's late father was one of the objectors to the application which had been refused in 2002. The respondent confirmed that from time to time he had discussed the site with late father but not at a sufficient level of detail regarding its planning history.
93. The respondent also agreed under cross – examination that he accepted that the site was within the lands referred to in S/89/1710 although it is accepted by all parties that the respondent acquired good title to the site when he purchased it in 2008.
94. The respondent also acknowledged that in the course of his consultations with Cork County Council in 2009 he said to the planning authority that if he could put a house on the site he would do so. It would be a suitable house compatible with the general character of the locale.
95. The respondent agreed that condition of the site prior to any works which he had undertaken was such that it would be an "*uphill battle*" to secure permission to build a house having regard to the reasons given for the 2002 refusal. He acknowledged also that the altered state of the site in terms of drainage, clearance and levelling generally would improve the prospects in that regard.
96. The respondents' engineer, Mr. Waterman, sought to insist that no part of any of the works the subject of the activity in 2017 were such as would require any form of permission. He said that apart from preparing the site for a house there could be other reasons for the works being done by the respondent, most notably, the protection of Thorncliffe from flooding. However, Mr. Waterman agreed that the works which were done in 2017 would render the site more suitable for development.
97. I have concluded from the affidavit evidence and from the cross-examination of the witnesses that the principal object and effect of the works undertaken by the respondent in June 2017 was to render the site more suitable for the construction of a house and in particular to ameliorate the characteristics of the site which gave rise to the 2002 refusal, as part of a plan to improve the prospect of a successful planning permission application, either by himself or purchaser of the site.

Conduct of the applicants

98. The respondent submitted that the first applicant has from time to time undertaken certain works at its own site, including raising of levels and the diversion of a stream, the effect of which was to cause a flow of water into the respondents' site. In so far as there is evidence of this activity it is matched by evidence is that the respondent took his own measures to ameliorate the effect of this outflow by installing pipes which would control the effect of that flow. Therefore, the respondent took his own protection measures on the boundary with Cladach, albeit that I have not found sufficient evidence to make an order under s.160 in relation to that aspect. Reference was also made to certain tree felling and level alterations at Glencairn by the third and fourth named respondents.
99. Each of these aspects has been the subject of separate correspondence and from time to time complaints to Cork County Council and at one stage certain proceedings were threatened or issued. It is not for this Court on the hearing of these proceedings to determine conclusively the merits of those complaints. On balance I have come to the conclusion that in light of the disregard by the respondent of the requirement to obtain planning permission for certain of the works which he has undertaken on the site, the alleged infringements referred to by the respondent do not form the basis of an answer to this application under s. 160.

Communications with Cork County Council

100. When the respondent undertook certain works in 2009 complaints were made by a number of residents to Cork County Council. The respondent engaged with Cork County Council both in correspondence and in meetings and ultimately Cork County Council determined that there was no requirement for any enforcement proceedings and closed its file.
101. Complaints were made also to Cork County Council in relation to the activities of the respondent on the site in June 2017 and Cork County Council issued a warning letter to the respondent. The evidence is that the respondent addressed the matters raised in the letter from Cork County Council and that they ultimately took no enforcement proceedings. The respondent engaged with the planning authority and produced to them certain reports by his engineer at the time, Gabor Molnar. No evidence has been given by Mr. Molnar in these proceedings. It appears from that correspondence that further information was requested by the authority and provided by Gabor Molnar. The submission of the respondent is that the authority was satisfied and therefore concluded that it should take no enforcement proceedings. In fact a closer view of the correspondence reveals only that the queries raised by the authority were responded to. There is no evidence that the authority expressed itself to be definitively satisfied with these responses. No enforcement proceedings were taken by Cork County Council at the time but this does not amount to conclusive evidence that there were no grounds for such enforcement proceedings. It was a mischaracterisation of that correspondence to rely on it as evidence that the authority had determined that no breach of planning laws or regulations had occurred.

Scale of works

102. The respondent submitted that if there were any unauthorised development it was minor and *de minimis*. The most blatant of the activities of the respondent in June 2017 was the excavation of the drain on the north west boundary by the use of a Komatsu excavator and the installation of an engineered French drain the effect of which was to confine the flow of water along the boundary of the site, diverting it to another channel to Alta Terrace, thereby preventing the general leakage of water from that channel into the centre of the site. To describe such an excavation and alteration as *de minimis* is not credible. Further, by adapting this position the respondent compromised the credibility of submissions made regarding certain of the less clear aspects of the case. It is only because of the doubt regarding the evidence concerning the trees, the south west drain and the central stream that the respondent escapes having orders made in relation to those aspects.

Conclusion

103. I find that the following works constituted unauthorised development and shall make orders that the respondent restore the relevant portions of the site to their condition prior to 26 June 2017, namely: -

1. The excavation of the drain on the north west boundary and the laying of the engineered French drain and associated stonework and related materials (paragraphs 52 – 62),
2. The moving of the gate opening to Alta Terrace (paragraphs 72 – 76),
3. The alteration of ground levels as illustrated in red on the survey at Exhibit B to the affidavit of Mr. O’Kennedy sworn on 21 May 2018. (paragraphs 81 – 83)

104. I shall hear counsel as to the precise form of the order to be made in relation to each of the matters referred to above.