# Vitalograph (Ireland) Ltd. v. Ennis U.D.C. [1997] IEHC 69 (23rd April, 1997)

THE HIGH COURT
1997 No. 3355P

BETWEEN

VITALOGRAPH (IRELAND) LIMITED, PANALOK LIMITED, ASSL-AEG SERVO SYSTEMS LIMITED, THERMOFOIL PRINTING LIMITED, ORGANIC LENS MANUFACTURING, ESSIDEV SA, FERGUS ENGINEERING LIMITED, SMURFIT PACLENE LIMITED, TECHNICAST PLASTIC MOULDING (IRELAND) LIMITED, BROTHERS OF CHARITY, BIJOR LUBRICATING (IRELAND) LIMITED AND CALMON CLARE LIMITED
PLAINTIFFS
AND
ENNIS URBAN DISTRICT COUNCIL AND THE COUNTY COUNCIL OF THE COUNTY OF CLARE
DEFENDANTS
AND
IN THE MATTER OF THE LOCAL GOVERNMENT (PLANNING AND DEVELOPMENT) ACTS, 1963-1993
IN THE MATTER OF AN APPLICATION UNDER SECTION 27 OF THE LOCAL GOVERNMENT (PLANNING AND DEVELOPMENT) ACT, 1976 AS AMENDED BY SECTION 19 OF THE LOCAL GOVERNMENT (PLANNING AND DEVELOPMENT) ACT, 1992

BETWEEN
VITALOGRAPH (IRELAND) LIMITED, PANALOK LIMITED, ASSL-AEG SERVO SYSTEMS LIMITED, THERMOFOIL PRINTING LIMITED, ORGANIC LENS MANUFACTURING, ESSIDEV SA, FERGUS ENGINEERING LIMITED, SMURFIT PACLENE LIMITED, TECHNICAST PLASTIC MOULDING (IRELAND) LIMITED, BROTHERS OF CHARITY, BIJOR LUBRICATING (IRELAND) LIMITED AND CALMON CLARE LIMITED
APPLICANTS
AND
ENNIS URBAN DISTRICT COUNCIL AND THE COUNTY COUNCIL OF THE COUNTY OF CLARE
RESPONDENTS

**JUDGMENT of Mr Justice Kelly delivered the 23rd day of April, 1997 .**

1. The Plaintiffs all carry on business at Ennis Industrial Estate, Gort Road, Ennis, Co. Clare. At the entrance to the Industrial Estate there is situated a strip of land which was formerly used as a car park. It is owned by Clare County Council.
2. On the 5th January, 1997 a number of caravans forced their way on to this car park site and in order to do so the barriers which had been placed to prevent unauthorised access were forced. Since that time the land in question has been occupied by members of the travelling community who effectively use it as a halting site.
3. The uncontroverted evidence demonstrates that in addition to the caravans which originally came on in January of this year, further caravans have been brought on to the site. There have also been brought on to the site large amounts of scrap metal and waste material together with scrap cars and batteries. Horses and dogs have also been brought on to the site and there has been a steady accumulation of litter. The site is being used as a halting site by members of the travelling community. There is a total lack of any sanitary facilities on the site and so the general environment has deteriorated rapidly. The uncontroverted affidavit evidence demonstrates that it is not uncommon

to find children urinating in and around the area and to find the remains of faecal contamination, both on the site, on the estate road and on the lands occupied by some of the Applicants.
4. The detrimental effects of this activity on the industrial estate and the Plaintiffs need not be recited in full. It is sufficient to draw attention to some of them which are deposed to and which have not been denied. For example, in the case of the first-named Plaintiff, the business which it carries on requires that it be supplied on a daily basis with components for its manufacturing facility. The drivers of vehicles have indicated that they have serious concerns about the safety of the children who are now constantly using the access road and so the safety of the travelling children is in jeopardy. More particularly, bins used in that Plaintiff's business have been interfered with, mostly by young children, who run a considerable risk to themselves because of the activity that they have engaged in concerning these metal bins. Complaints have been received from the staff of the first-named Plaintiff, principally because of the amount of faecal material found on the pathways to the factory. That Plaintiff has carried out extensive work to ensure that the lawns and grounds of the factory building were designed in an attractive manner. But these grounds have been destroyed, both at the front, at the sides and at the rear, by the persons who are in occupation of the site in suit and particularly their horses.
5. In an affidavit sworn on behalf of the Brothers of Charity, it is averred, and again not denied, that they run sheltered workshops on the industrial site which cater for people with learning disabilities. Indeed, some of the persons who are employed within the workshops are themselves members of the travelling community. These workshops are operated on an non-profit-making basis. The presence of the persons, animals and the material, which I have already described in this judgment, in the view of the Area Manager for the Brothers of Charity, constitute a major risk to worker safety. In addition, he says that the overall condition of the estate has deteriorated considerably since the arrival of the travellers. The site of the sheltered workshop has had people defecating on the paths and the lawns which are required to be maintained on a daily basis for hygiene reasons. As recently as the 2nd March of this year a new group arrived, setting up in the car park beside one of the factories. As the number of caravans on the site increases, so does the amount of scrap and litter and the unhygienic conditions.
6. In short, the Plaintiffs complain that the activities which are now going on, on lands owned by the Clare County Council, constitute an actionable nuisance in respect of which they are entitled to an Interlocutory Injunction. They say that the level and extent of the activity which has been carried on there is such as to give rise to irreparable loss being sustained by them since many of them will be unable to continue their operations unless this activity is brought to an end.
7. Ennis Urban District Council is joined as a Defendant in the nuisance proceedings because the activity complained of is taking place within the area of that authority's responsibility. It is said that they effectively permitted the wrongful activity in question and so ought to be enjoined.
8. Whilst it is true that the replying affidavit in this case was sworn by Thomas Dowling, who is both the Assistant County Manager for the Clare County Council and who has been delegated managerial responsibility for the functions and powers of the Ennis Urban District Council, there is no evidence that the lands in question were owned by the Urban District Council and the letter of the 18th April, 1997 confirms that Clare County Council is the owner of the property. In these circumstances it does not appear to me appropriate for an injunction to be granted against Ennis Urban District Council. However, this may be of little significance since if an injunction is granted against the owner of the lands, it ought to bring to an end the activities in respect of which complaint is made.
9. The Defendants in the affidavit of Mr. Dowling say that the travellers have entered on to the industrial estate in question without the consent, express or implied, of the Defendants and the Defendants have not in any way authorised or permitted them to remain on the industrial estate or to cause any nuisance. The Defendants contend that if the Plaintiffs have any cause of action, then it lies against the travellers rather than against the Defendants.
10. The Defendants furthermore set forth in some detail the attempts which have been made over the years to provide appropriate accommodation for members of the travelling community. Insofar as those efforts have been concerned, there have been a number of proceedings in this Court dealt with by Mr. Justice Flood and Mr. Justice Barron. In October 1995 the Clare County Council was restrained from using lands at Drumcliffe, Ennis as a halting site. Following that, Clare County Council put in train steps for the acquisition of suitable lands elsewhere

with a view to providing halting sites. They were successful in this regard and obtained a site at Erinaghmore, Fountain, Ennis, Co. Clare with a view to providing a temporary halting site on it. Once it became known that that acquisition had taken place, immediate objections were raised by a number of local residents. There are allegations of intimidation and threats being made towards the servants or agents of the County Council and its contractors concerning this site. The County Council also identified a site at Erinagh Beg as a possible permanent halting site. Such was the level of protest concerning tests to be carried out on that site that the Council itself had to apply to the High Court and it obtained injunctions restraining trespass on the lands.

11. Subsequently judicial review proceedings were commenced against Clare County Council concerning its decision to develop a temporary halting site at the lands at Erinaghmore. On the 18th December, 1996 Mr. Justice Barron ordered Clare County Council to be restrained from developing that site as a temporary halting site because the development was a material contravention of the County Development Plan for County Clare. Consequently the County Council cannot at present take any further steps in relation to the provision of a halting site at Erinagh Beg.

12. Within the past 14 years, the Defendants have expended a sum in excess of £2 million in the provision of services for travelling families. They say that as matters now stand, they are not in a position to provide a further halting site or halting sites or temporary halting sites in the short term. This is because it will now be necessary to amend the Clare County Development Plan so as to facilitate the provision of suitable halting sites. They say that considerable expenditure of money has taken place in the provision of accommodation for and catering for the needs of travellers in the Ennis area but their efforts have been frustrated owing to the activities of certain of the travelling families themselves and the resistance by the local community to the provision of such accommodation.

13. I have considerable sympathy with the position in which Clare County Council finds itself. But in my view it cannot seek to solve its difficulties by permitting an unlawful use to be made of land which it owns so as to give rise to an intolerable situation of nuisance with exists in the present case. Although this nuisance has been extant since January of this year, Clare County Council has taken no steps in relation to it save for the writing of a letter to the occupiers on the 3rd April, 1997 which post-dated the proceedings. The writing of this letter appears to be the only step taken by Clare County Council with a view to bringing to an end the trespass upon its property and the creation of the nuisance thereon.

14. In these circumstances what is the legal position of Clare County Council as the owner of the lands upon which the nuisance is being created? This topic was considered by the Court of Appeal in England in the case of *Page Motors Limited v. Epsom and Ewell Borough Council* 80 L.G.R. 337.

15. In that case the Plaintiffs in late 1973 leased part of an estate owned by the Borough Council. They erected buildings on the site to conduct their business of the repair and sale of motor cars. At that time there were a few gypsy caravans parked illegally on an adjoining part of the estate, which also belonged to the Council. The number of caravans on the Council's lands increased rapidly reaching a maximum of 74 in 1977. The gypsies burned rubbish, obstructed access to the Plaintiffs' premises, failed to control dogs and committed other acts of nuisance. Although the Borough Council obtained an order for possession against the gypsies on 9th April, 1974, it did not enforce it. At that stage the County Council persuaded the Borough Council not to do so since to do so would simply transfer the problem elsewhere within the county or the borough. In February 1975 the Borough Council resolved to enforce the possession order but under pressure from the Department of the Environment and the County Council, the decision was not implemented. In July 1976 another possession order was obtained but not enforced. In 1978 the Council established temporary caravan sites for the gypsies elsewhere and by September 1978 all the gypsies had left the site. Meanwhile in August 1977 the Plaintiffs issued a writ against the Council alleging that the gypsies' activities constituted a nuisance which the Council had permitted to continue and claiming, inter alia, damages. Balcombe J., the trial judge, held that the gypsies had caused a nuisance to the Plaintiffs and that by failing to abate it within a reasonable period, which in the circumstances was a period ending on 1 January, 1975, the Council had adopted the nuisance and were liable in damages as from that date.

16. The Council's appeal from this decision was dismissed. In his judgment Ackner L.J., as he then was, quoted from the speech of Lord Wright in *Sedleigh-Denfield v . O'Callaghan* (1940) A.C. 880 where he said:-

*"The liability for a nuisance is not, at least in modern law, a strict or absolute liability. If the defendant by himself or those for whom he is responsible has created what constitutes a nuisance and it causes damage, the difficulty now being considered does not arise. But he may have taken over the nuisance, ready made as it were, when he acquired the property, or the nuisance may be due to a latent defect or to the act of a trespasser, or a stranger. Then he is not liable unless he continued or adopted the nuisance or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have became aware of it. This rule seems to be in accordance with good sense and convenience. The responsibility which attaches to the occupier because he has possession and control of the property cannot logically be limited to the mere creation of the nuisance. It should extend to his conduct if, with knowledge, he leaves the nuisance on his land".*

17. The trial judge and the Court of Appeal rejected a submission that a defendant cannot be held to have "adopted" a nuisance unless there is proved a positive desire on his part to use for his own benefit that which is causing a nuisance to the plaintiff.
18. In my view, Clare County Council in the present case has not taken appropriate steps within a reasonable period of time so as to bring to an end the nuisance complained of. Whilst it has never given its permission for either the trespass or the tortious activities which are going on on its lands, neither has it done anything to bring them to an end in an effective way. In my view, the County Council has with knowledge left the nuisance occurring on its lands.
19. Having regard to the principles already outlined, it appears to me that the Plaintiffs have made out a serious issue to be tried, have demonstrated the irreparable nature of the damage being sustained by them and, furthermore, have shown that the balance of convenience lies in favour of the grant of an injunction.
20. I do not accept that the Plaintiffs should be refused an injunction because they have a remedy against the occupiers of the lands. They are, in my view, entitled to choose the remedy they consider the more suitable for their requirements. Whilst they might obtain an injunction to restrain nuisance against the occupiers, they could not obtain an order for possession of the site as they have no entitlement to it. That, in the circumstances, may be the only practical and effective way to terminate the nuisance. On the facts here, the policing and enforcement of an injunction prohibiting nuisance alone would probably be difficult. Before departing from this topic, I should point out that by Order of the Court dated the 7th April, 1997 (Morris J.), the persons in occupation were given notice of these proceedings. One such person did attend before the Court and I heard him. He explained his position to me and it is one with which I have some sympathy but he readily acknowledged that the land is the property of the County Council and that he has no title to it.
21. In these circumstances I will grant an injunction to restrain the nuisance.
22. There is also before the Court an application for relief pursuant to Section 27 of the Local Government (Planning and Development) Act, 1976, as amended. The effect of an injunction being granted under the provisions of this section would be the same as the injunction which I am prepared to grant in respect of the nuisance. There appears to me to be little point in having two injunctions which bring about the same result and consequently it does not appear to me to be necessary to consider this aspect of the matter.
23. In the result there will be an injunction (the form of which I will discuss with Counsel) which will bring to an end the nuisance being created on the lands in suit.