



**THE COURT OF APPEAL**

**CIVIL**

**Court of Appeal Record No. 2020/145**

**High Court Record No. 2018/246/MCA**

**Ní Raifeartaigh J.**

**Neutral Citation Number [2022] IECA 6**

**Pilkington J.**

**Humphreys J.**

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

**BETWEEN**

**GERARD DOORLY**

**APPLICANT/APPELLANT**

**AND**

**CIARA CORRIGAN AND PADRAIG CORRIGAN**

**RESPONDENTS**

**JUDGMENT of Humphreys J. delivered on Friday the 21st day of January, 2022**

**Background and Procedural History**

1. The core issue in this appeal is whether the felling of trees at Claremount Demesne, Co. Offaly, constituted unauthorised development. The trial judge thought not, and refused to grant an injunction pursuant to s. 160 of the Planning and Development Act 2000 against that alleged unauthorised development. The appellant now argues that that approach was incorrect.

2. Section 160 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 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.”

The section was recently described as follows: “[s]ection 160 is intended to provide a summary procedure whereby breaches of the planning legislation can be brought before the court expeditiously. The procedure is colloquially described as an application for a “planning injunction”. The procedure is available to “any person”, and benefits from special costs rules under Part 2 of the Environment (Miscellaneous Provisions) Act 2011” (*Krikke v. Barranafaddock Sustainability Electricity Limited* [2019] IEHC 825, [2019] 12 JIC 0601 (Unreported, High Court, Simons J., 6<sup>th</sup> December, 2019)). That description is helpful, and wasn’t disturbed by this court when allowing the appeal in that case (*Krikke v. Barranafaddock*

*Sustainability Electricity Limited* [2021] IECA 217, [2021] 7 JIC 3001 (Unreported, Court of Appeal, Donnelly J. (Costello and Collins JJ. concurring), 30<sup>th</sup> July, 2021)).

### **Procedural history in the High Court**

3. The tree-felling apparently commenced in early March, 2018 (grounding affidavit of appellant, para. 59).

4. On 17<sup>th</sup> April, 2018, an application for a felling licence was made to the Department of Agriculture, Food and the Marine. This fact was notified to the trial judge who appears to have placed at least some reliance on it. While the application was for clear-felling, the licence ultimately granted was only for thinning, as we shall see.

5. Plenary proceedings were issued on 24<sup>th</sup> April, 2018 relating to alleged trespass. An undertaking by the defendants to stop tree-felling was noted by Costello J. by order of 16<sup>th</sup> May, 2018. Cross-examination of the second defendant was refused by Stewart J. by order of 6<sup>th</sup> July, 2018. Two motions in those proceedings were dealt with by the trial judge simultaneously with the matter currently on appeal, but no issues arise for present purposes in relation to the plenary action.

6. A motion seeking relief under s. 160 of the Planning and Development Act 2000 was issued on 22<sup>nd</sup> June, 2018 (dated 14<sup>th</sup> May, 2018 and issued on foot of an order of Costello J. of 21<sup>st</sup> June, 2018) grounded on an affidavit of the appellant.

7. The appellant delivered submissions on 17<sup>th</sup> July, 2018 and the respondents delivered submissions on 27<sup>th</sup> July, 2018 which are dated as of after the start of the hearing.

### **Hearing in the High Court**

8. The High Court action was heard over two days on 26<sup>th</sup> and 27<sup>th</sup> July, 2018. No oral evidence was heard and all factual findings in the trial judge's judgment, insofar as factual findings are set out, are based on her assessment of the affidavits. Obviously, this court, while having regard to that assessment, is in as good a position as the trial judge to read the affidavits.

### **The evidence**

**9.** As set out in the book of appeal, the critical evidence (leaving aside papers filed in the plenary proceedings) was as follows:

- (i). affidavit of appellant of 11<sup>th</sup> May, 2018 (grounding the original application), which *inter alia* exhibited the first of two reports from Mr Costin, the appellant's adviser;
- (ii). replying affidavit of the second respondent of 1<sup>st</sup> June, 2018;
- (iii). affidavits of the appellant of 8<sup>th</sup> and 21<sup>st</sup> June, 2018 in reply;
- (iv). a short affidavit of Anthony Mounsey, the respondents' adviser, who carried out the tree-felling on behalf of the respondents, of 4<sup>th</sup> July, 2018;
- (v). a short affidavit of Brendan Garry, developer and father of the first respondent, of 4<sup>th</sup> July, 2018.

**10.** Claremount House is listed as a protected structure in County Offaly in the following terms: "Claremount House is a wonderful example of a late eighteenth-/early nineteenth-century country house. Located south of Banagher town in a mature wooded parkland, the house, outbuildings, entrance gates and gates lodge form an important group of related structures." A historic map of the property marked "OSI" (Ordnance Survey Ireland) is set out at exhibit GD11 to the appellant's affidavit of 21<sup>st</sup> June, 2018 as part of the record of the Heritage Gardens maintained on the National Inventory of Architectural Heritage (NIAH).

**11.** The court has been provided with an illuminating map of the property at exhibit BB4 to the affidavit of the appellant of 11<sup>th</sup> May, 2018. Claremount Demesne, a Heritage Garden by NIAH, is shaped very roughly like an isosceles triangle. One side of the triangle is mainly folio OY9592 which is a heavily wooded area with ancient native Irish trees, and the other side is folio OY22812F which had tree-lined hedgerows along two sides of the boundary.

Claremount House (folio OY9739) is near the apex of the triangle, with an access road cutting through the wooded area.

**12.** In circumstances which don't arise for the court's consideration here, the two folios making up Claremount Demesne, apart from the House and access, came into the legal ownership (in trust) of the respondents. Hurricane Ophelia arrived in Ireland in October, 2017, blowing down a single identified tree in this heavily wooded Demesne as well possibly damaging a limited number of unidentified trees.

**13.** A short one-page "Report on condition of Trees at Claremont [*sic*] Banagher" was prepared by Mr. Anthony Mounsey ("Forestry Services/ Plant Hire") of Roscrea, dated 26<sup>th</sup> January, 2018. That report claims that the hedgerow ash trees were "very susceptible to infection". There is no statement that they were actually infected.

**14.** Mr. Mounsey went on to say that in respect of the roadside mature trees in the heavily wooded area, "there is significant evidence of heterobasidion annosum – Root and Butt rot Fungus". Thus, it was suggested that there was a risk of "collapse or windthrow". In respect of the trees further into the wooded area, mature Beech, Sycamore and Ash trees, it was suggested that "[a] number of these trees" (unspecified) "are in a hazardous state. "Some" (number unspecified) "are already completely dead". The Beech trees were alleged to show signs of Neonectria canker and Heterobasidion annosum. The Ash trees were allegedly at high risk of infection which again suggests that they were not actually diseased.

**15.** The map attached (at exhibit E to the respondent's affidavit) is not entirely consistent with this. It notes that a single tree was blown down by a storm. Point "D" is "[s]tart of wooded area". The large cut-down area in the heavily wooded area is described on the map as area "E" described as "[a]rea that had to be removed in order to grant access to area beyond "D" for future felling.

**16.** Large scale tree-felling operations took place between March, 2018 and 2<sup>nd</sup> May, 2018 on the lands in question. No environmental impact assessment, planning permission, tree-felling licence under the Forestry Act 2014, notice under the Roads Act 1993 or other development consent was obtained in advance of commencement of works.

**17.** Some way into the tree-felling, Offaly County Council issued a notice under s. 70 of the Roads Act 1993 on 20<sup>th</sup> April, 2018 requiring the respondents to obtain a survey by a qualified arborist and remove identified dangerous trees within a period of 28 days. That notice referred only to folio 9592 and not to folio 22812F.

### **The judgment of the trial judge**

**18.** The trial judge delivered a detailed, scholarly and thorough reserved judgment on 14<sup>th</sup> February, 2019, refusing reliefs. As noted above, we are not concerned with her decision in relation to the plenary action.

**19.** Paragraphs 1 to 11 set out the procedural history of the matter (including the plenary action).

**20.** Paragraphs 12 to 23 deal with the background to the ownership of the lands in question (folios 9739, 9592 and 22812F Co. Offaly).

**21.** Paragraphs 24 to 54 deal with the motions in the plenary proceedings, which as noted above are not before this court.

**22.** Paragraphs 55 to 74 address the section 160 proceedings and outline the section itself and the relevant evidence.

**23.** Paragraphs 75 and 76 summarise the issues which were identified by the trial judge, specifically:

- (i). whether there was a requirement for environmental impact assessment (EIA) under s. 172(1) of the Planning and Development Act 2000 or schs. 5 and 7 of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001);

- (ii). whether the lands on which the felling took place or will take place are within the curtilage or attendant lands of a protected structure; and
- (iii). whether the felling is in breach of the objectives of the County Offaly Development Plan 2014-2020 and art. 9(1)(a) of the 2001 regulations.

**24.** Paragraphs 77 to 88 deal with the EIA issue and on the burden of proof.

**25.** The only authorities cited under this heading are Case C-279/11 *Commission v. Ireland* [2008] ECR 1-4911 (Court of Justice of the European Union, 19<sup>th</sup> December, 2012, ECLI:EU:C:2012:820) (cited at para. 80), *Daly v. Kilronan Wind Farm Limited* [2017] IEHC 308, [2017] 5 JIC 1103 (Unreported, High Court, Baker J., 11<sup>th</sup> May, 2017) (cited at paras. 81 to 84), and *Meath County Council v. Murray* [2017] IESC 25, [2018] 1 I.R. 189, para. 83 of which is cited at para. 84. The trial judge's conclusion on the issue of the onus of proof is at para. 84 where she states that "the onus of proof is on the defendants to show that tree-felling is exempted development. The onus of proof in discharging the formal requirements of s. 160 is on the plaintiff as the moving party." That is a valid distinction as a summary of the legal position, although the detail of the onus of proof does need some teasing out, which I will attempt to address later in this judgment. In addition there is a question for resolution in this appeal as to whether the trial judge's judgment in fact approached the application of that principle to the facts on the basis of the respondents having to prove that the development was not exempted, or whether later on in her judgment she impliedly put the onus on the appellant on all matters.

**26.** At para. 85 she notes the respondents' submission that the appellant did not have evidence from a planning consultant, although she did not make an express finding on the relevance of that.

**27.** At para. 89, the trial judge accepts the appellant's submission that the requirement for an EIA is not dependent on there being a prior application for development consent. I entirely agree with her finding in that regard.

**28.** Paragraphs 90 to 94 return to setting out further submissions on the EIA issue and setting out the relevant legislation.

**29.** At para. 95 the trial judge concludes that much of folio 22812F is not wooded, and that the combined effect of the felling would not result in the area of deforestation being greater than 10 hectares. Again I would entirely agree with that finding.

**30.** At para. 96, the trial judge concludes that there is no evidence that the felling is for the purpose of conversion to another land use (which implies a view on the onus of proof, namely that it is for the appellant to prove conversion to another use), and expresses the view that "[t]he import of the evidence put before the Court is that the woodlands the subject of the defendants' licence application are to be replanted." At para. 97, the trial judge notes the submission that an intention to fell trees for profit is a change of use. However, at para. 98 she concludes that "[i]n the absence of any concrete evidence ... that the defendants are proposing a change of use of the lands", Mr Garry's planning history was not a sufficient basis to ground the relief sought. Paragraph 99 concludes generally that the threshold in sch. 5 part 2 para. 1(d)(iii) of the 2001 regulations had not been reached such as to deprive the tree-felling of its exempted status. This implies that she was in effect placing the onus of proof on the appellant to prove the exception to the exemption.

**31.** Paragraphs 100 to 103 set out submissions on the question of whether the development required EIA by reason of significant effect on the environment under sch. 7 of the 2001 regulations.

**32.** At paras. 104 and 105 the trial judge accepted the respondents' arguments. She referred to the proximity of various European sites, and stated that the appellant "tenders no evidence



to support the assertion that the tree felling in issue here falls within schedule 7 or indeed as to how the [respondents'] tree felling has had or will have a significant effect on these areas", which implies that only significant effect on European sites counted for this purpose.

**33.** At paras. 106 to 109 she referred to the submissions on the issue of whether EIA was required by virtue of the provisions on agriculture of what she refers to as directive 92/43, annex II, para 1(a), (b) or (d). However, there is a typographical error here as the passage quoted in her judgment is not part of directive 92/43/EEC (the habitats directive), but rather Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (the EIA directive).

**34.** At para. 110 she held that the findings already made regarding sch. 5 and 7 of the 2001 regulations precluded acceptance of that argument, which is of course totally logical assuming that premise.

**35.** At para. 111 she noted that counsel for the appellant relied on what she called the "*dictum*" of Baker J. in *Daly v. Kilronan*, although it wasn't clarified as to why Baker J.'s holding was characterised as a *dictum*. The trial judge referred to her conclusion that the felling did not come within what she referred to as sch. 5 part 2(d)(iii) of the 2001 regulations (again a typographical error, presumably part 2, para. 1(d)(iii) was intended, *i.e.*, deforestation for conversion to another type of land use, of over 10 hectares). She also referred to her conclusion regarding the arguments under sch. 7 of the 2001 regulations, that is the criteria for determining significant effect on the environment. Her view was that, given those findings, *Daly v. Kilronan* was of "limited assistance". It may be helpful to note at this point that the issue raised by this paragraph is that since *Daly v. Kilronan* is an important authority on the burden of proof, and since the appellant's arguments were rejected largely on the basis that the appellant hadn't proved various matters (a burden of proof basis that impliedly didn't necessarily factor in the

holdings in *Daly v. Kilronan*), the question arises as to whether the correct approach was to reject the appellant's arguments on the basis of the appellant having in effect failed to discharge the burden of proof, and only then turn to *Daly v. Kilronan*, side-lining it as of limited assistance given that the appellant's arguments had already been dismissed.

**36.** Paragraphs 112 to 119 set out submissions under the European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011 (S.I. No. 456 of 2011) ("the 2011 regulations"), but it is not altogether clear why this was given separate treatment since this argument is in substance a repeat of the argument about annex II of the EIA directive, because the 2011 regulations implement that directive.

**37.** At para. 120, the trial judge dismissed the relevance of the 2011 regulations by finding firstly that the applicability of those regulations is predicated on there being an activity as defined in the regulations, a conclusion with which I agree, and then by asserting that "it has not been established that activity as defined in the Regulations is being carried out by the defendants". While no particular reasons are given for that conclusion, the formulation used implies a view of the onus of proof being on the appellant.

**38.** Paragraphs 121 to 136 record submissions regarding the impact on Claremount House as a protected structure and refer to relevant legislation and guidelines.

**39.** At para. 137 she states that she agrees with the respondents' submission that para. 13.4.19 of the Architectural Heritage Guidelines is not of relevance because it refers to gardens rather than woodlands. I agree with that finding.

**40.** Paragraphs 138 to 145 outline further submissions on the issue.

**41.** At para. 146 the trial judge states that the first question is whether the protected structure "encompasses the woodlands", and that if so, the question is whether the felling will materially affect the character of the structure or any element of it that contributes to its special architectural, historical or related interests.

**42.** Paragraphs 147 to 149 mainly outline the issues relating to whether the woodlands are part of the curtilage of Claremount House and at para. 150 the trial judge concludes that she did not glean any such view from the Record of Protected Structures. At para. 151 she stated that she was not convinced that the OSi map was a sufficient basis to conclude that the woodlands were part of the curtilage, and referred to the lack of expert evidence.

**43.** At para. 152 she states her conclusion that the appellant had not established that the lands were within the curtilage.

**44.** Paragraph 153 notes the appellant's submission that the lands are part of the "attendant grounds", and the respondents reply that accepts this to be so, but that it is "of no relevance" since they deny that the record of protected structure does not include the woodlands as a specified feature, and that the guidelines referred to in para. 13.3.2 of the Architectural Heritage Guidelines are not included in the record.

**45.** At para. 154 she states that "no compelling case has been made ... that the woodlands ... have been specified by Offaly County Council in its RPS as a protected feature."

**46.** At para. 155 she states that "other than describing the house as being located in a mature wooded parkland", the appraisal in the RPS is largely concerned with built structures, and that the appellant had not made out this point.

**47.** Paragraphs 156 to 163 consider, and reject, a claim that the felling breached an objective of the County Development Plan, and I entirely agree with that conclusion.

**48.** At para. 164 she considers the argument that there was a lack of a felling licence, but states that such issues "are not for this Court."

**49.** Paragraphs 165 to 167 set out further submissions on the felling licence point.

**50.** At para. 168 and 169 she concludes that the issue of the felling licence is not a sufficient basis for relief in the context of the s. 160 proceedings, and that the Forestry Act 2014 and Forestry Regulations 2017 contain a "standalone statutory framework". I agree with that

conclusion insofar as any breach of that legislation is not in itself a basis for a s. 160 injunction, although such a breach might nonetheless be relevant to aspects of the application, as discussed further below.

51. Paragraphs 170 and 171 set out her general conclusion that there is no merit in the arguments for s. 160 relief and that the relief is to be refused.

### **Post-judgment developments in the High Court**

52. A costs hearing was held on 22<sup>nd</sup> May, 2019 and judgment was reserved. The trial judge gave a separate costs judgment on 5<sup>th</sup> June, 2020 deciding to make no order as to costs.

53. In the meantime, on 9<sup>th</sup> December, 2019, the Department of Agriculture, Food and the Marine granted a felling licence permitting thinning with a view to replanting in relation to some of the lands, in particular an area of 4.8 ha. How exactly this area relates to the overall lands has not been entirely clarified. Obviously, even leaving aside planning questions, the licence provides no justification for the tree-felling carried out prior to that date which was effected without the benefit of any licence, and that's even before getting to the point that the licence only authorises limited thinning, not clear-felling of areas.

54. An archaeological report accompanying the decision noted the sensitivity and importance of the woodlands of Claremount House in its own right.

### **Order of the High Court**

55. The order of the High Court refusing reliefs was perfected on 24<sup>th</sup> June, 2020.

### **Procedural history in the Court of Appeal**

56. The notice of appeal was filed on 22<sup>nd</sup> July, 2020 and the respondents' notice on 11<sup>th</sup> September, 2020.

57. It was agreed that the felling licence that was obtained after the hearing in the High Court would be put before this court. As it happens, that licence had been appealed to the Forestry Appeals Committee, which held a hearing on 16<sup>th</sup> September, 2020. A written

decision dated 25<sup>th</sup> September, 2020 was signed, confirming the licence with a variation, although the person or persons to whom it is addressed have been blanked out on the copy furnished to the court, for some reason which has not been explained. The written decision states that “The proposal ... is limited in nature being for thinning, without clearfelling or any change in land use, and would be staggered over a number of years” (p. 2) The decision describes the Department’s position on the appeal that “the operation is being carried out under a woodland improvement style system where unsuitable trees are being removed and any gaps created are enriched by pit planting with Native Broadland species” (p. 2).

**58.** The decision goes on to repeat that “The proposal is of small scale and for a thinning, without the clearance of land which would be normal activities in a managed forest and would be carried out under licence and with conditions to adhere to a series of requirements and guidelines. The forest while mature is primarily composed of non-native species and is not a protected habitat and the proposal would help to regenerate the forest through supporting natural regeneration of the tree species” (p. 6). One can only compare this modest description of departmentally acceptable works with the clear-felling of whole areas and apparent bulldozing of lands into earth that was in fact carried out. Insofar as the decision considers that EIA is not necessary, that is a matter of law so curial deference doesn’t apply any more than it does in terms of the views of a trial court (discussed further below), but equally fundamentally the various matters argued in this appeal are not addressed in detail or at all in the Committee’s decision.

**59.** On 6<sup>th</sup> October, 2020, the Department sent an email stating that the felling licence had been confirmed, and later wrote to the first respondent on 21<sup>st</sup> May, 2021 enclosing a copy of the appeal decision and stating that the licence had not been confirmed as previously suggested but confirmed with a variation which required compliance with a woodland management plan prepared by F. Kealy and submitted with the application.

**60.** Returning to the progressing of the appeal in this court, the appellant's submissions were delivered dated 20<sup>th</sup> November, 2020 and respondents' replying submissions on 22<sup>nd</sup> January, 2021.

**61.** The books of appeal were also supplemented helpfully by a booklet of colour copies of relevant photographs, maps and materials. The appeal was duly heard on 26<sup>th</sup> February, 2021.

**62.** After judgment had been reserved, the appellant returned to the court to complain that tree-felling works on the site had been resumed, notwithstanding the undertaking in the High Court of which we had previously been informed. The matter was mentioned to Costello J. on 16<sup>th</sup> April, 2021, at the request of the appellant, and a further undertaking was then furnished by the respondents that no further felling would be carried out until the making of the order on the appeal in this court. The court was requested by the appellant to consider affidavits furnished by the parties on this issue and I deal with that matter below.

**63.** On 25<sup>th</sup> November, 2021, this court invited further written submissions on a memorandum prepared in the course of the court's researches on the issues, which identified possible further authorities and questions arising within the scope of the matters raised at the hearing. Both sides duly furnished written submissions on 20<sup>th</sup> December, 2021, which have been taken into account along with the previous written and oral submissions and all other material submitted.

### **Issues in the appeal**

**64.** While a larger number of points were canvassed in the High Court and in the notice of appeal, three basic issues emerged on the appeal apart from the question of remediation.

**65.** The orders sought in the notice of appeal are as follows:

- (i). an order setting aside the High Court order dated 23<sup>rd</sup> June, 2020;

- (ii). an order granting the reliefs sought at paragraphs 1, 2, 3, and 4 of the originating notice of motion dated 14<sup>th</sup> May, 2018 - those orders can be summarised as follows:
  - (a). para. 1 relates to an injunction against unauthorised development;
  - (b). para. 2 seeks an order directing restoration of the lands concerned, including, but not limited to the replacement of 139 Ash trees, 66 Beech trees, 55 Oak trees, 28 Sycamore trees and 23 Hawthorn trees with the same species of tree of semi-mature and/or mature age;
  - (c). para. 3 seeks a declaration that the works carried out between March, 2018 and 1<sup>st</sup> May, 2018 were unauthorised development;
  - (d). para. 4 seeks a declaration that the works carried out required evaluation by way of EIA prior to their carrying out; and
- (iii). costs of the appeal and/or an order pursuant to s. 7 of the Environmental (Miscellaneous Provisions) Act 2011 declaring that s. 3 of the Environmental (Miscellaneous Provisions) Act 2011, applies to the appeal.

**66.** Seven grounds of appeal are listed in the notice of appeal, which I can attempt to summarise as follows:

- (i). the trial judge erred in finding that the actions of the respondents did not constitute unauthorised development;
- (ii). the trial judge erred in law and in fact in finding that the activities of the respondents did not amount to an activity likely to have a significant effect on the environment;
- (iii). the trial judge erred in failing to hold that s. 57(1) of the 2000 Act applied because the development affected the character of a protected structure or its

curtilage or attendant grounds - this complaint also included a specific ground that the court erred in relation to the burden of proof;

- (iv). the trial judge erred in failing to hold art. 9(1) of the 2001 regulations applicable on the grounds that the felling of trees interfered with the character of a landscape the preservation of which was an object of the County Development Plan;
- (v). the trial judge erred in not considering breaches of the Forestry Act 2014;
- (vi). the trial judge placed undue weight on a felling licence application form as grounds for refusing the reliefs sought; and
- (vii). the trial judge erred in failing to have regard to the County Development Plan.

**67.** The respondents' notice is essentially an assertion that the trial judge was correct in all respects.

**68.** Summarising the issues in the present case has felt like a somewhat more fraught task than usual, but I propose to do so in the following way. First of all, I think it would be helpful to identify some issues that can be got out of the way or at least postponed to being a sub-aspect of the substantive issues, as follows:

- (i). It is claimed that permission is required here by reason of the objectives of the County Development Plan (art. 9(1)(a) of the 2001 regulations). However, the County Development Plan distinguishes between policies and objectives and while the appellant has pointed to various pieces of language in the County Development Plan, he hasn't actually identified any specific objective as being particularly relevant, as indeed the trial judge found. Such objectives as might be viewed as relevant, *e.g.* NHO-01 to NHO-03 do not seem to relate to this particular site as a landscape. So I think this argument has to be rejected.



- (ii). The trial judge's alleged disregard of breaches of the Wildlife Act 1976 and the Forestry Act 2014 was raised as a ground of appeal, but I see that as not being a stand-alone ground for a s. 160 injunction in its own right, but rather an element to be considered in among other elements when assessing the affidavits and when considering remediation, if we get to that point. Admittedly, it would have been a stand-alone point if an injunction was sought on that basis also. But in a case where that is actually contemplated, it's important that environmental law be accessible. While the relief sought here was purely under s. 160 of the Planning and Development Act 2000, environmental law should be approached in a holistic and purposive manner, particularly given its saturation with EU law, and if there were alleged breaches of multiple environmental codes in any one fact situation, the appropriate reliefs could be gathered together in a single notice of motion that would include, but not be limited to, relief under s. 160 of the Planning and Development Act 2000.
- (iii). A corresponding issue was raised by the respondents to the effect that the court was only one of a number of bodies that had considered the matter (the others being Offaly County Council, the Gardaí, the Department, the Forestry Appeals Committee and the High Court) and that the failure of any authority to take action in this matter to date leans against any order. Self-evidently, the statement that the High Court has already considered the matter doesn't add anything to the normal standard of appellate review. The Gardaí may not have thought fit to prosecute on the basis of unauthorised development, but in fairness the fact situation is not altogether garden-variety. As regards the Council's failure to pursue the question of unauthorised development, that can't resolve the issue and isn't of any huge weight. That omission may have been for any

number of reasons. Either the development is unauthorised or not, and whether the Council got involved could never be determinative, especially where there is no evidence capable of being rationally interrogated as to why they didn't get involved. The issue before the Department and the Forestry Appeals Committee was only that of a felling licence which permitted thinning, not clear-felling, and which was granted after (and hence has no relevance to) the felling considered by the High Court. It doesn't resolve the planning issue, and while the committee's decision does consider EIA, that is a point of law for this court to which curial deference doesn't apply, and in any event the main issues on this appeal weren't canvassed before the committee.

- (iv). Insofar as the appellant might have raised the issue of whether sch. 5, part 2, para 1(d)(iii) of the 2001 regulations had the effect of requiring EIA on the basis of the area deforested being greater than 10 hectares, that submission doesn't seem to stand up on the evidence, wasn't particularly pursued and seems impliedly withdrawn in para. 23 of the written legal submissions of the appellant.
- (v). The argument was also made originally that the woodlands were within the curtilage of the protected structure. That argument got little traction in the High Court and wasn't strongly pursued in this court anyway. The focus of the protected structure submission was on the separate argument, dealt with below, that the woodlands were part of the attendant lands.

**69.** With those issues addressed in that manner, the number of substantive issues in the present appeal (leaving aside what potential remediation might be appropriate depending on the findings on those issues) reduces to three headings:

- (i). the onus of proof and the factual findings by the High Court;

- (ii). whether environmental impact assessment was required; and
- (iii). whether permission was required because of effect on a protected structure.

### **Issue 1 - the onus of proof**

70. As noted above, this is explicitly raised in the notice of appeal, and underlays much of the way in which the trial judge approached the matter.

### **Parties' submissions on issue 1**

71. At a number of points in his submissions, the appellant contended that the trial judge placed far too high an onus on the appellant to prove the respondents' intentions or to establish that the development was unauthorised. There is a clear dispute between the parties as to where the onus of proof lies in terms of proving whether or not the respondents fall within an exception to the tree-felling exemption.

72. The appellant submits that the onus of proof lies upon the respondents to prove that their actions fall within the scope of exempted development, which was what the trial judge in fact stated (although there is an issue about whether this principle was correctly applied). The appellant says that this includes an onus on the respondents to prove that they do not fall within the relevant exceptions to the exemption.

73. Conversely, the respondents submit that the appellant bears the onus of proving unauthorised development, and accordingly that he must prove that the respondents do not fall within the relevant exceptions to the exemption, *i.e.*, must negative the claimed tree-felling exemption.

### **Analysis of issue 1**

74. It is worthwhile beginning this discussion with an analysis of the standard of appellate review, although that is an issue that applies generally to all aspects of the appeal, it is convenient to discuss it here.

### **Standard of appellate review**

75. As I noted for this court in *Minogue v. Clare County Council* [2021] IECA 98, [2021] 3 JIC 2902 (Unreported, Court of Appeal, 29<sup>th</sup> March, 2021), one can view the standard of appellate review as falling on a spectrum from (a) a highly deferential approach giving very significant weight to the views of the trial judge, to (b) a situation where the appellate court is somewhat deferential to the trial court's assessment, to (c) a category of re-evaluative situations where deference does not apply and the appellate court simply forms its own view.

76. Two particular strands of that jurisprudence are relevant here. Obviously, all questions of law are re-evaluated by the appellate court. The trial court is either right or wrong on legal questions, and there is no room for curial deference in that regard. In the present case, the trial judge's application of the burden of proof was to substantially colour the factual conclusions.

77. And secondly, as regards findings based on affidavit evidence without cross-examination, a somewhat deferential approach should be taken (*Ryanair Ltd. v. Billigfluege.de GmbH* [2015] IESC 11, [2015] 2 JIC 1901, 2015 WJSC-SC 25217 (Unreported, Supreme Court, Charleton J. (Hardiman, McKechnie, Clarke and MacMenamin JJ. concurring), 19<sup>th</sup> February, 2015) and *McDonagh v. Sunday Newspapers Ltd.* [2017] IESC 46, [2018] 2 I.R. 1); although an appellate body is not in any worse position than the trial court to evaluate affidavits and form its own view, albeit after having afforded due weight to the views of the trial court. Here, as noted above, the assessment of the affidavits was heavily intertwined with the more re-evaluative question of the burden of proof, rendering a deferential reading less appropriate than might otherwise be the case.

78. In the present case, the trial judge correctly identified that the onus of showing that development was exempted fell on the respondents. However, I think it is likely that some confusion may have been caused by the fact that not all caselaw on the onus of proof was opened to the court, and I attempt to summarise the up-to-date caselaw in the following section

of this judgment. Under those circumstances, it may not be totally surprising that in the application of the law to the facts, there may have been some confusion whereby in effect the onus came to be placed on the appellant in the judgment of the trial judge.

### **Caselaw on the onus of proof**

**79.** It may be helpful to start with the precursor of the current planning injunction. Section 27 of the Planning and Development Act 1976 was the previous statutory incarnation of that remedy, since replaced with s. 160 of the 2000 Act.

**80.** In *Lambert v. Lewis* [1982] 11 JIC 2401, 1983 WJSC-HC 611 (Unreported, High Court, 24<sup>th</sup> November, 1982), Gannon J. dealt with an application under s. 27 of the 1976 Act. The key issue was whether the user was exempted development (see para. 10). At para. 23 the learned judge said as follows: “[t]he onus of establishing exemption falls on the Respondents. In my view they have failed to show that the subject premises are not being put to an unauthorised use. The Applicant therefore is entitled to the relief claimed.”

**81.** In *Dublin Corporation v. Sullivan* [1984] 12 JIC 2102, 1985 WJSC-HC 181 (Unreported, High Court, Finlay P., 21<sup>st</sup> December, 1984), the court found that the onus of proof was on the applicant to show that an intensification of use had occurred, such as to give rise to a change of user for planning purposes (para. 28). That is simply another way of saying that the onus is on the applicant to show that there has been a development (or change of use).

**82.** Finlay P. in *Sullivan* expressly accepts the decision in *Lambert*, saying at para. 7 that “[t]he decision of my learned colleague with which I would agree was that in those circumstances at least the Respondents seeking to justify on the grounds of a statutory exemption carried the onus of establishing that he came within the Regulations concerned.”

**83.** In *Dillon v. Irish Cement Ltd.* [1986] 11 JIC 2602, 2004 WJSC-SC 2866 (Unreported, Supreme Court, 26<sup>th</sup> November, 1986), Finlay C.J. speaking for the Supreme Court (Griffin and McCarthy JJ. concurring) dealt with an application for an injunction against unauthorised

development (under s. 27 of the Planning and Development Act 1976, the predecessor provision to s. 160 of the Planning and Development Act 2000), by saying as follows at para. 4 of his judgment:

“I am not satisfied that this comes within Class 34 as an exemption. I am satisfied that **in construing the provisions of the exemption Regulations the appropriate approach for a Court is to look upon them as being regulations which put certain users or proposed development of land into a special and, in a sense, privileged category.** They permit the person who has that in mind to do so without being in the same position as everyone else who seeks to develop his lands, namely, subject to the opposition or views or interests of adjoining owners or persons concerned with the amenity and general development of the countryside. **To that extent, I am satisfied that these Regulations should by a Court be strictly construed in the sense that for a developer to put himself within them he must be clearly and unambiguously within them in regard to what he proposes to do,** and I am not satisfied that the process which I entirely accept as being correct and responsible, the process which is described by the Respondents and which they are seeking to do by removing this very large quantity of 10,500 tons of this shale and putting it through their process could properly or ordinarily be described as an attempt to examine the nature of the subsoil. I am quite satisfied that a much more appropriate description of it is that it would be an examination of the quality of the subsoil, for a very specific and confined purpose. In those circumstances, I am satisfied that it does not come within Class 34. It is clearly a development which if not exempted requires planning permission and that **there should be an injunction, and in the circumstances of the case it would be my view that the**

**injunction should be in the form claimed in the motion to continue unless planning permission is granted** when it should then cease” [emphasis added].

84. *Dublin Corporation v. McGowan* [1993] 1 I.R. 405 was a case where Keane J. was dealing with a s. 27 application in respect of the division of a dwelling into multiple sub-units. He held that the onus of proving unauthorised use lay on the applicant, a finding that is to be read in the context of the real issue there being whether the use had pre-dated 1964.

85. Section 160 of the Planning and Development Act 2000 replaced s. 27 of the 1976 Act and is the current basis for the statutory planning injunction against unauthorised development. That is the jurisdiction invoked here. The new provision did not come into operation immediately, as noted further below.

86. “Development” is defined in s. 3 of the 2000 Act primarily by sub-s. (1) in the following terms: “[i]n this Act, “development” means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.”

87. “Unauthorised development” is defined by s. 2(1) of the 2000 Act in the following terms: “unauthorised development” means, in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use”.

88. The more notable terms referred to in that definition are themselves defined as follows:

““unauthorised structure” means a structure other than—

(a) a structure which was in existence on 1 October 1964, or

(b) a structure, the construction, erection or making of which was the subject of a permission for development granted under Part IV of the Act of 1963 or deemed to be such under section 92 of that Act or under section 34, 37G or 37N of this Act, being a permission which has not been revoked, or which exists as a result of the

carrying out of exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act);

“unauthorised use” means, in relation to land, use commenced on or after 1 October 1964, being a use which is a material change in use of any structure or other land and being development other than—

(a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or

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

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

(a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or

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

**89.** Thus, at the risk of over-simplification, an unauthorised structure, use or works means a structure or development, unless:

- (i). it existed or commenced before 1<sup>st</sup> October, 1964;
- (ii). it has a permission; or
- (iii). it is exempted development.



**90.** Ó Caoimh J. in *Fingal County Council v. Crean* [2001] IEHC 148, [2001] 10 JIC 1905 (Unreported, High Court, 19<sup>th</sup> October, 2001) considered the onus of proof in the context of an application under s. 27 of the 1976 Act. In granting relief, he said as follows at para. 30: “I am further satisfied that the onus rests upon the respondents to satisfy this Court that the exemption contended for is one to which they are entitled. On the basis of the evidence before me I am satisfied that the work carried out by the second named respondent company was work to replace the pre-existing hoarding with a new structure and that this is borne out by the photographs. I am satisfied that insofar as any conflict is concerned that the onus would rest upon the respondent to satisfy this Court that the work carried out was an exempted development. I am of the view that the respondents have failed to satisfy this Court that the complained of development constitutes an exempted development under the terms of the Act or Regulations made thereunder. In all of the circumstances I am satisfied that the applicant is entitled to the relief set forth at paragraphs 1 and 2 of the Notice of Motion before this Court.”

**91.** By virtue of the Planning and Development Act 2000 (Commencement) (No. 3) Order 2001 (S.I. No. 599 of 2001), Part VIII of the 2000 Act, which includes s. 160, commenced on 11<sup>th</sup> March, 2002.

**92.** A detailed examination of the issue of the onus of proof is set out in McKechnie J.’s judgment in *South Dublin County Council v. Fallowvale Ltd.* [2005] IEHC 408, [2005] 4 JIC 2803 (Unreported, High Court, 28<sup>th</sup> April, 2005).

**93.** The essential holding of McKechnie J. was that a moving party had to satisfy the court, by probable evidence, of the proofs which were essential to a successful application under s. 160 of the Act of 2000, but when the development complained of was sought to be excused by either s. 4 of the Act of 2000 or under the exempted developments provisions in the Planning and Development Regulations 2001, the onus of establishing that point was upon she who asserted the exemption (*i.e.*, the respondent).

**94.** At para. 120 of his judgment, McKechnie J. referred to the decision in *Lambert v. Lewis*. At para. 121 he cited pp. 10-11 of that judgment: “[b]ecause there is no existing permission granted under the Planning Acts to use the subject premises other than as an amenity contiguous or adjacent to the curtilage of a private residence in an area zoned for primarily residential use and because the occupier Mr. Lewis [*i.e.*, the respondent to the s. 160 motion] has made applications for permission for retention of use the onus lies on him to establish the facts from which the court could reasonably infer that there has been no such material change of use. This he has failed to do.”

**95.** He referred to Gannon J. having gone on to say at p. 14 of his judgment “[i]n my view any change of use from use for such purposes is an unauthorised use unless coming within the provisions for exempted development in either the 1963 Act [*i.e.*, Planning and Development Act 1963] or the Regulations of Statutory Instrument 65 of 1977. The onus of establishing exemption falls on the Respondents”.

**96.** McKechnie J. went on to note that *Lambert v. Lewis* was expressly approved by Finlay P. in *Dublin Corporation v. Sullivan*.

**97.** He also cited the decision of Ó Caoimh J. in *Fingal County Council v. Crean* [2001] IEHC 148, [2001] 10 JIC 1905 (Unreported, High Court, 19<sup>th</sup> October, 2001) in which the judge concluded that the onus of proof rested upon the respondents to satisfy the court that the exemption relied upon, being that contained in s. 4(1)(g) of the Act of 1963 applied to the circumstances of that case.

**98.** McKechnie J. then cited *Dillon v. Irish Cement Ltd.* referred to earlier in this judgment, and said that this provided “[f]urther support for this position”, also referring to para. 2.654 of O’Sullivan and Shepherd, *Irish Planning Law and Practice*, (Issue 7, Butterworths, 1991).

**99.** At para. 123, McKechnie J. noted that the decision in *Westport UDC v. Golden* [2002] 1 I.L.R.M. 439 was in a contrary sense, but noted that the same judge also gave judgment in an

earlier case, *Lennon v. Kingdom Plant Hire Ltd.* (Unreported, High Court, Morris P., 13<sup>th</sup> December, 1991) where one of the issues was whether or not the works in question could be correctly categorised as land reclamation and thus exempt under the then exempting regulations. It would appear that the case proceeded on the basis that the onus of establishing the applicability of the exemption rested upon the respondents, although that was essentially a concession.

**100.** While acknowledging that divergence, McKechnie J. concluded crucially at para. 125 as follows:

“In my opinion the stage presently reached is that **there is clear preponderance of authority in favour of the proposition that when the development complained of is sought to be excused under cover of either s. 4 of the Act of 2000 or under the exempted developments provisions in the Regulations then the onus of establishing this point is upon he who asserts.** In this context I cannot see any difference between the section and the Regulations. I also cannot accept that *Lambert v. Lewis* can be explained away as being a decision on its own facts and neither can the decision of the Supreme Court in *Dillon v. Irish Cement*. In reaching this conclusion, however, I am not in any way suggesting that the onus of proof is not otherwise on the moving party. Such party must therefore satisfy the court by probable evidence of all the other proofs which may be essential to a successful application under s. 160 of the Act of 2000” [emphasis added].

**101.** I might respectfully say here that McKechnie J.’s reference to the “preponderance” of the caselaw is in my view very apt because it is not difficult to find particular sentences or paragraphs in the different cases in this area that could be viewed as contradictory. But one has to step back and view the jurisprudence as a whole.

**102.** In *Fingal County Council v. Dowling* [2007] IEHC 258, [2007] 7 JIC 2604 (Unreported, High Court, de Valera J., 26<sup>th</sup> July, 2007), de Valera J. seems to have approached the limitations defence on the basis that the applicant had to prove that it didn't apply (para. 29), thus resolving a contradiction on the affidavits in favour of the respondent (para. 30). As we shall see, Hogan J. later took a different, and in my view clearly preferable, view on this issue in *Wicklow County Council v. Fortune (No. 1)* [2012] IEHC 406, [2012] 10 JIC 0401 (Unreported, High Court, 4<sup>th</sup> October, 2012).

**103.** In *Pierson v. Keegan Quarries Ltd.* [2010] IEHC 404, [2010] 10 JIC 0702 (Unreported, High Court, 7<sup>th</sup> October, 2010), Irvine J. held, relying on *Sullivan*, that an applicant had to show that there was an unauthorised use, but it was not contested by the respondent that the onus lay on that party to prove the defence of the limitation period.

**104.** *Wicklow County Council v. Jessup* [2011] IEHC 81, [2011] 3 JIC 0802 (Unreported, High Court, 8<sup>th</sup> March, 2011) was a case where Edwards J., granted declaratory relief in an appeal against a dismissal of an application under s. 160 of the 2000 Act. While there is some wide language in relation to the onus of proof, that must be viewed in the light of two factors; firstly, the discussion is relatively summary and I don't think it can be said that the issue was fully contested and argued in the way that was done in *Fallowvale* and later in *Fortune*; and secondly, and more importantly, the actual context where this question came to a head was not who had to prove exemption or non-exemption, but proof that a previous use had been abandoned, which Edwards J. held fell on the applicant (paras. 97, 148, 151-152).

**105.** In particular, the court said at para. 97 as follows: "[t]he respondents have submitted, and the Court accepts it as being a correct statement of the law, that the onus of proof in s. 160 proceedings is borne by the applicant. Moreover, to the extent that the respondents contend that their development is exempt development, the respondents do not have to prove that their development is exempted development. Rather, authorities such as *Dublin Corporation v*

*Sullivan* [,] *Carroll and Colley v Brushfield Ltd* (unreported, High Court, Lynch J, 9th October, 1992); *Dublin Corporation v McGowan* [1993] IR 405; *Westport UDC v Golden & Ors* [2002] 1 I.L.R.M. 439; *Dublin City Council v Fallowvale* [...] and *Fingal County Council v Dowling* [2007] IEHC 258 indicate that it is for the applicant to prove that it is not exempted development.” However for the reasons set out above I think that this demonstrates the insight of McKechnie J.’s comments in *Fallowvale* about the “preponderance” of authority. Yes, *Golden* is in the contrary sense, but *Sullivan*, *McGowan* and *Dowling* all deal with a different issue, and *Fallowvale* supports the view (and expressly says) that the onus of proof of exemption is on a respondent. *Lambert*, *Crean* and the Supreme Court decision in *Dillon* also reinforce that, but are not referred to in this passage. On this basis I don’t think that *Jessup* detracts from the conclusion that the preponderance of authority (as well as the clear statement of the Supreme Court in *Dillon*) supports the onus of proof being on the respondent to show that development is exempted. Should the issue of the onus of proof in respect of abandonment of a use fall for consideration in a future case, Hogan J.’s discussion in *Fortune*, to which we now turn, of facts within the peculiar knowledge of a party, may require some reconsideration of that question.

**106.** In *Wicklow County Council v. Fortune (No. 1)* [2012] IEHC 406, [2012] 10 JIC 0401 (Unreported, High Court, 4<sup>th</sup> October, 2012), Hogan J. in effect acknowledged the distinction referred to by McKechnie J. in *Fallowvale*, in particular that between the “general” onus of proof on an applicant on the one hand and proof of exempted development being on a respondent on the other. In this regard he cited *Westport U.D.C. v. Golden* [2002] 1 I.L.R.M. 439 *per* Morris P., *Fingal County Council v. Dowling* [2007] IEHC 258, [2007] 7 JIC 2604 (Unreported, High Court, de Valera J., 26<sup>th</sup> July, 2007), *Wicklow County Council v. Jessup* [2011] IEHC 81, [2011] 3 JIC 0802 (Unreported, High Court, 8<sup>th</sup> March, 2011) *per* Edwards J.

and *Dublin Corporation v. Sullivan* (Unreported, High Court, Finlay P., 21<sup>st</sup> December, 1984) in respect of the former element.

**107.** As noted above, in *Dowling*, de Valera J. seems to have approached the limitations defence on the basis that the applicant had to prove that it didn't apply (para. 29). That in my view is not reconcilable with Hogan J.'s judgment citing that case, although he doesn't particularly draw attention to the contradiction. But Hogan J.'s analysis is clearly preferable, both in terms of the spectrum of authority considered (de Valera J. only cites *Sullivan* on this point), and more importantly in terms of the inherent logic of the argument. As Hogan J. points out, the limitation period is a matter of defence, not jurisdiction.

**108.** Having extensively quoted McKechnie J.'s judgment in *Fallowvale*, Hogan J. went on at para. 17 to note that in *Pierson v. Keegan Quarries Ltd.* [2010] IEHC 404, [2010] 10 JIC 0702 (Unreported, High Court, 7<sup>th</sup> October, 2010), Irvine J. noted the parties had agreed that "the onus of proof lies upon the party who seeks to rely on a statutory time limit to defeat a claim to prove that assertion."

**109.** The issue in *Fortune (No. 1)* was whether the development was more than 7 years before the enforcement action. Hogan J. held at para. 19 that this was "simply a matter of defence, not jurisdiction. This means that the application will be regarded as statute-barred only if the respondent elects to raise this defence. In my view, in the light of *Fallowvale* the onus in this regard rests with her who asserts that this is so, namely, Ms. Fortune. This, however, she has signally failed to do."

**110.** He went on at para. 20 to suggest that "it could be said that a more general principle of the law of evidence bearing on peculiar knowledge really underlies and explains decisions such as *Lambert v. Lewis*, *Dillon v. Irish Cement* and *Fallowvale*. This is perhaps especially true of matters such as the date of commencement of a particular development as distinct, for example, from the question of whether the development was unauthorised. The latter question lends itself

to objective determination by reference to a public register to which the public have access. It is, therefore, not considered unfair or unreasonable that the onus of proof in this regard should - at least in general - rest with the applicant.”

**111.** When Hogan J. is referring to proof of the development being unauthorised, this must be construed as a reference to proof that there does not exist a planning permission. When he is speaking of this being determinable from a public register, by necessary implication he can’t have been speaking about a case where exemption is asserted, because that is not only not determinable from any public register, but could potentially involve quite an intricate set of factual propositions, many of which would, to take the perspective of Hogan J.’s analysis, fall squarely within the peculiar knowledge of a respondent. Thus, this passage certainly can’t mean that an applicant has to undertake an onus in relation to demonstrating that exemption doesn’t apply, as such an interpretation is not supported by the authority cited by Hogan J. and would indeed contradict not only the rest of his judgment as well as *Fallowvale* and *Lambert v. Lewis*, but also the Supreme Court decision in *Dillon*.

**112.** As regards the requirement that the applicant prove the jurisdictional prerequisites for an injunction, *Fortune* establishes that this does not include negating the limitations defence. Section 160 allows an order where “an unauthorised development has been, is being or is likely to be carried out or continued”. This involves proof that the act or omission complained of has been, is being or is likely to be carried out or continued by the respondent which may include persons unknown.

**113.** A very direct authority on the burden of proof in the context of proving an exception to an exemption is contained in the recent judgment of Baker J. in *Daly v. Kilronan Windfarm Ltd.* [2017] IEHC 308 (Unreported, High Court, 11<sup>th</sup> May, 2017). Her finding of law and fact in that case was as follows at para. 56: “[t]he onus is on the respondents to establish that the grid works are exempted development: see Hogan J. in *Wicklow County Council v. Fortune*

(*No. 1*) [2012] IEHC 406, [2012] 10 JIC 0401 [(Unreported, High Court, 4<sup>th</sup> October, 2012)] and McKechnie J. in *South Dublin City Council & Anor. v. Fallowvale Limited* [...]. The respondents have not shown me that as a matter of law, the grid connection works can be deemed to be exempt.”

**114.** That was a case in which there was quite a chain of steps that had to be examined to reach the conclusion of lack of proof of exempted development. That may be clearer if I take the liberty of quoting paras. 57 to 62 of her judgment:

“57. The respondents argue that the judgment of Peart J. in *Ó Grianna & Ors. v. An Bord Pleanála* [2014] IEHC 632] is not on point. Planning permission exists in the present case for the turbine development, and is now exempt from challenge. The decision in *Ó Grianna & Ors. v. An Bord Pleanála* does not mean that Peart J. was of the view that planning permission was required for the grid connection merely on account of the fact that it was part of a larger project. However his judgment, it seems to me, carries a necessary implication that because the grid connection is part of the larger project, and if one identified part of that project requires an EIA, the grid connection works cannot be considered to be exempt development, as they are part of a larger development which requires an EIA.

58. As the grid works are part of a development that does require an EIA, the local authority must carry out an environmental assessment in the context of the project as a whole of which the grid connection forms part.

59. In interpreting the provisions of the PDA which permit an exemption in certain circumstances, a court should not come to a conclusion which has the effect that a project can be impermissibly split, albeit that taken alone part of the project could readily be seen as coming within the exemption. The general principle must be that the project must be considered as a whole, and therefore any argument that an



exemption can exist is one that cannot be determined without reference to that first principle.

60. Arising from the judgment of Peart J. in *Ó Grianna & Ors. v. An Bord Pleanála*, and the European case law, and because the interpretation of the exemptions in the PDA must be given one that is supported by the European context, I do not consider that my decision rests on whether the respondents are correct, that the net import of the Appropriate Assessment Screening Report and the EIA Screening and Environmental Report submitted which show no likely environment impact.

61. The planning authority has not carried out an EIA and the Screening and Environmental Reports prepared by Fehily Timoney Associates on behalf of the first respondent, while they might have supported the consideration by Leitrim County Council which led to its determination under s. 5, and are to be regarded as evidence of a likely environmental impact, they are not a finding of such. The carrying out of an EIA is the function of the planning authority and one which has not yet been engaged.

62. I am not satisfied that the grid works can be characterised as exempt, and the matter of whether an EIA is required is a matter for the Board. This is the approach taken by Peart J. when the matter returned before him, and he delivered a second judgment, *Ó Grianna & Ors. v. An Bord Pleanála* [2015] IEHC 248, by which he rejected the argument that the breach could not be cured by remittal to the Board, and did remit, in order that the Board could proceed in whatever way it considered proper having regard to his conclusion.”

**115.** It will be evident from the foregoing that there is no support in the caselaw for the novel proposition advanced by the respondents here, that if development is exempted in a particular

broad category (for example, tree-felling), save in certain prescribed circumstances (for example, where EIA is required), it is sufficient for the respondent to prove the broad category without negating the prescribed circumstances. That would severely undermine the principle that proof of exemption lies on the party asserting exemption. It would also fly in the face of the Supreme Court's judgment in *Dillon* that exemption confers a privileged position on the respondent and should be construed strictly, and that proof of that exemption lies on such a respondent. Furthermore, negating the prescribed circumstances where the broad category of exemption does not apply could in certain circumstances (especially where it depends on the factual state of affairs) lie within the peculiar knowledge of the respondent and hence for him or her to prove. Finally, the suggested novel rule makes no sense at a jurisprudential level. Law is a seamless whole, and the development is either exempted or is not. It is simply illogical to say a respondent has done enough by half-proving the exemption.

**116.** Precisely this situation is dealt with by Baker J. in *Daly v. Kilronan Wind Farm*. There, there was a *prima facie* exemption for the works in question: "Class 26 of Part 1 of the second schedule to the Planning and Development Regulations 2001, as amended by the Regulations of 2011, ('the Regulations') ... provides as follows: 'the carrying out by any undertaker authorised to provide an electricity service of development consisting of the laying underground of mains, pipes, cables or other apparatus for the purpose of the undertaking'" (para. 14 of her judgment).

**117.** However Baker J. then turned to s. 4(4) of the 2000 Act: "Section 4(4) of the PDA (as substituted by the Act of 2011) provides: 'Notwithstanding paragraphs (a), (i), (ia), and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required'" (para. 17). "No dispute arises with regard to the characterisation of the grid works as development, and whether the works of development are exempt depends

then on the question of whether the works required an EIA/AA” (para. 18). She went on to point out that, “[t]he circumstances in which an EIA or AA is required for a particular development are contained in s. 172 of the PDA, and Article 93 of schedule 5, part 2. para. 3(1) of the Regulations and provision is made for an EIA when a wind farm contains more than five turbines, or in the case of sub-threshold development where the planning authority or the Board determines that the proposed development is likely to have a significant effect on the environment. An underground grid is not an ‘installation for the harnessing of wind power’, but the treatment of the grid works as exempt must be made in the context of recent jurisprudence.” (para. 19) and as stated above, crucially concludes “[t]he onus is on the respondents to establish that the grid works are exempted development: see Hogan J. in *Wicklow County Council v. Fortune (No. 1)* [2012] IEHC 406 and McKechnie J. in *South Dublin City Council & Anor. v. Fallowvale Limited* [...]. The respondents have not shown me that as a matter of law, the grid connection works can be deemed to be exempt” (para. 56).

**118.** Thus the actual *ratio* of that decision concerned the failure of the respondent in s. 160 proceedings to negative an “exception” to what was *prima facie* exempt development.

Precisely the same legal question arises here. This is a holding - not, as one might infer from the wording of the judgment of the trial judge in the present matter, a *dictum*.

**119.** Perhaps at this juncture it’s worth adverting to the respondent’s argument that it’s impractical to ask a respondent to negative every exception to an exemption. The answer is that only relevant exceptions having to be negated. There was no doubt in the present case about which exceptions needed to be considered, *i.e.* which exceptions were relevant. The loose analogy is with criminal law: the prosecution must prove their case, but also have to negative a relevant defence if it arises; but for it to be relevant, the defendant has to point to a sufficient basis for such a defence to arise at all. In circumstances such as here, the onus was on the respondents to prove exempted development. That involved satisfying the tree-felling criterion

but also negating any potentially relevant exceptions. By raising the non-application of that exemption by reference to an exception, to the standard of arguability, an applicant would do sufficient to require the respondents to prove the non-application of that exception to the exemption.

**120.** Turning now to *Meath County Council v. Murray* [2017] IESC 25, [2018] 1 I.R. 189, it is in the context of the considered and developed view of the onus of proof as set out by McKechnie J. in *Fallowvale* that the passing reference by the same judge to the onus of proof regarding “formal requirements” in para. 83 of *Murray* must be viewed. That phrasing should be considered referable to the s. 160 requirements of whether development is occurring or whether a permission has been granted, and shouldn’t be considered as casting doubt, by a side-wind, on McKechnie J.’s own immensely detailed and scholarly earlier judgment in *Fallowvale* or the Supreme Court’s earlier decision in *Dillon*.

**121.** In *Diamrem Limited v. Cliffs of Moher Centre Limited* [2018] IEHC 654, [2018] 11 JIC 2001 (Unreported, High Court, 20<sup>th</sup> November, 2018), Faherty J. helpfully set out counsel’s (correct in my view) submission that in *Murray*, the onus of proof that development was exempted was not an issue in that case (para. 151). At para. 156 she said: “with regard to where the onus lies, I accept the applicant’s submission that insofar as exempted development is concerned, I am satisfied that the onus is on the respondents to establish that the development is exempted development.” The Court of Appeal decision in the case, *Diamrem Limited v. Cliffs of Moher Centre Limited* [2021] IECA 291, [2021] 11 JIC 0501 (Unreported, Court of Appeal, Woulfe J. (Whelan and Pilkington JJ. concurring), 5<sup>th</sup> November, 2021) at para. 47, notes without adverse comment Faherty J.’s statement that the onus to establish exempted development lies on the respondent.

**122.** In *Waterford City & County Council v. Centz Retail Holdings Ltd.* [2020] IEHC 634, [2020] 12 JIC 1601 (Unreported, High Court, 16<sup>th</sup> December, 2020), Simons J. said *obiter* at

para. 28: “it seems anomalous that an applicant should have to prove a negative, i.e. that there is no extant planning permission which authorises the development complained of. Approaching the matter from first principles, it is at least arguable that once an applicant in proceedings under section 160 of the PDA 2000 has established that development is being carried out, the onus then shifts to a respondent to establish that such development comes within the terms of any planning permission relied upon. Certainly, this is the position in respect of “exempted development” (*South Dublin County Council v. Fallowvale Ltd* [...]).” While the issue of the onus was decided in that case on the basis of a concession, I do tend to agree with Simons J. that an applicant should not have to prove a negative, but since this would modify existing caselaw, a final decision on that is best left to a case where it makes a critical difference. It may not make much difference in practice if the matter can be checked from a public register. If it can’t be so checked, then we may be in the space of the matter being within the peculiar knowledge of the respondent.

**123.** In *Ferry v. Caulderbanks* [2021] IEHC 97, [2021] 2 JIC 0507 (Unreported, High Court, 5<sup>th</sup> February, 2021), O’Regan J. commented at para. 58 (without the authorities having been opened on this issue other than *Murray*) that the onus of proof of an unauthorised structure was on the applicant, that being in the context where the issue was whether the structure had been erected pre or post the 1963 Act. That is consistent with earlier authority that the applicant has to prove that there has actually been a development or works since the 1963 Act. It might be noted here that on appeal, Power J. treated the question of proving deviation from the terms specified in a planning permission as requiring proof by the applicant of the permission (see *Ferry v. Caulderbanks* [2021] IECA 345, [2021] 12 JIC 2105 (Unreported, Court of Appeal, Power J. (Faherty and Collins JJ. concurring), 21<sup>st</sup> December, 2021), para. 67), albeit that this would not normally be that difficult to do. At para. 74 she commented in passing that the burden of proof was on the applicant save in respect of exempted development or limitation,

but that must be viewed as a brief and very broad summary for the purposes of that decision, rather than an attempt to tease out every aspect of the mass of caselaw on a detailed point-by-point basis. For example, the caselaw indicates that the specific question of limitation is an example of a broader point, consistent with general legal principles, that the respondent must prove points of defence (which include but are not limited to the question of limitation periods). Nor was it necessary for the purposes of the decision in *Ferry* to examine the principle, again consistent with the general law, that proof of matters within the peculiar knowledge of a party lies with that party (see *per* Hogan J. in *Fortune*).

**124.** In *Kerry County Council v. McElligott* [2021] IEHC 542, [2021] 7 JIC 3003 (Unreported, High Court, 30<sup>th</sup> July, 2021), Hyland J. said at para. 59 that the onus of proof to establish exemption lies on the respondent. It does not speak to the specific situation of proving an exception to an exemption, which arises in the present case. As it happens, that was a case where a conclusion in line with previous authorities was arrived at without the parties opening all those authorities.

**125.** In *Fingal County Council v. Nugent* [2021] IEHC 618, [2021] 10 JIC 0101 (Unreported, High Court, 1<sup>st</sup> October, 2021), Hyland J. said it was well-established that the onus of proving a defence by way of limitation lay on the respondent (para. 51).

### **Conclusions on the onus of proof**

**126.** It seems to me that viewed as a whole, certain clear principles emerge from the preponderance of the caselaw, despite that tangle of cases being possibly somewhat daunting at first sight. There are, it is true, different emphases in some of the cases, but some of these arise from the broad body of caselaw not being cited to the court in some or many of the cases. Taking the jurisprudence as a whole, one can attempt to summarise it as follows:

- (i). the onus of proving the initial formal requirements, specifically the jurisdiction of the Circuit Court if applying in that court; and that a development (in the

sense of works and the like or change of use) on, in, over or under land commencing on or after 1<sup>st</sup> October, 1964 without a grant of planning permission, has been, is being or is likely to be carried out or continued by the respondent, which may include persons unknown, lies on the applicant (*Sullivan, McGowan, Pierson, Murray*), and in the case of an allegation that the development carried out deviate from the terms of a permission, proof of the terms of that permission is for the applicant (*Ferry*), subject to qualification if this turns on facts within the respondent's peculiar knowledge (*Fortune*) and possibly insofar as proof of the existence of a permission may lie on the respondent (*Centz*), at least if an applicant has discharged an initial onus to aver that there is no such permission;

- (ii). the onus of proving any other point of defence, such as the 7-year limitation period, lies on the respondent (*Pierson, Fortune, Nugent*);
- (iii). the onus of proving that a development is exempted lies on the respondent (*Lambert, Dillon, Crean, Fallowvale, Daly, Diamrem, McElligott, Ferry*); this includes an onus on the respondent to prove that any particular provision, having the effect of displacing what would otherwise be an exemption, does not apply (*Daly*); and
- (iv). in any event, the onus of proving any other matter within the peculiar knowledge of a party lies on that party (*Fortune*).

### **Evaluation of the affidavit evidence**

**127.** An initial contextual point is that it is notable that, even according to Mr. Mounsey's map (*i.e.*, the evidence of the respondents), Storm Ophelia only blew down one identified tree. That is specified on the map (exhibit E to the affidavit of the second respondent of 1<sup>st</sup> June, 2018) as "Approx location of large tree blown down by storm" – the singular is notable.

Paragraph 17 of the affidavit of the second respondent of 1<sup>st</sup> June, 2018 which while speaking vaguely of “other trees” blown by the storm only in fact specifies one tree in an identifiable manner. Paragraph 25(a) of the affidavit refers to the location of this one fallen tree – no other storm-felled trees are specifically identified either in Mr Mounsey’s map or at all. In those circumstances, reliance on that event seems to be no more than a convenient ground of justification for the respondents in respect of arrangements, from January, 2018 onwards, to cut down a significant number of trees on the property. Perhaps predictably, the respondents’ supplementary submissions also referenced Storm Barra, but there has been no suggestion that any trees fell in any storms at any time apart from the one identified tree that fell victim to Storm Ophelia.

**128.** Felling without a licence contravenes s. 27 of the Forestry Act 2014. And felling during the breeding season is contrary to s. 40 of the Wildlife Act 1976. Without needing to make any formal finding as to breach of these provisions, it is notable that the question of whether they were complied with hasn’t been satisfactorily addressed on the merits by the respondents.

**129.** It is to be presumed that Mr. Mounsey in holding himself as providing forestry services and plant hire would have been aware of the requirements of the 1976 and 2014 Acts. No particularly convincing engagement with those provisions has been advanced.

**130.** An additional lacuna in the respondents’ evidence is that how and why the notice under the Roads Act 1993 was issued is not by any means clear. The notice is addressed to the respondents at the appellant’s address, Claremount House. The respondents haven’t explained how they received it or became aware of it.

**131.** The rationale advanced for the felling included the following:

- (i). There was much reference to Hurricane Ophelia some months beforehand, but as noted above, Mr. Mounsey’s map only identifies one tree as having been blown down in that storm.



- (ii). Initially it was suggested that the tree-felling was justified under the Roads Act 1993 notice, but clearly that is of very limited scope and only arose after the felling began. Its terms require a “survey” which must mean a precise quantification and analysis, not the kind of general statements that Mr Mounsey has produced.
- (iii). Then it was claimed that Mr. Charles Fahy of the Forest Service was aware of the felling. When he was contacted, he rejected this and said he understood that the Gardaí had put a stop to the felling operation, and that he was on leave for the month of March, 2018 anyway (see exhibit GD9 to the affidavit of the appellant of 21<sup>st</sup> June, 2018).
- (iv). There is a suggestion of intent to replant as set out in Mr. Fahy’s email and in the tree-felling licence application, but that intention is not stated on affidavit. There is in fact no properly admissible direct evidence that the respondents intend to replant the trees.
- (v). The felling licence actually obtained refers to thinning, which only means removing trees in accordance with good forestry practice of excess or diseased trees, or trees of poor quality in order to improve the growth, health and value of the remaining trees (sch. 4 to the felling licence, exhibit GD16 to the affidavit of the appellant of 21<sup>st</sup> June, 2018). This is in strong contrast to the process of clear-felling which involves the removal of all trees within a particular area and replanting - that was the type of activity to which the application form relates and the context in which the intention to replant was suggested (exhibit H to the affidavit of the second respondent). The felling licence ultimately granted certainly doesn’t include clear-felling or wide scale tree removal from a whole

area. Furthermore the felling licence - and the application form - clearly states that no felling should take place until the felling licence was obtained.

**132.** A noticeable feature of the case is that it's clear that the respondents are not the major moving parties in the felling, which was carried out by Mr. Brendan Garry, the first respondent's father-in-law. Despite this, the respondents interacted with the court on the basis of "holding themselves out in court to be a young couple who were purchasing the lands with no plans for same" (appellant's affidavit of 8<sup>th</sup> June, 2018 referred to at para. 71 of the judgment). The lands were bought in trust. That Mr. Garry was the beneficial owner was averred to by the appellant on 8<sup>th</sup> June, 2018 (see para. 71 of the judgment), and not denied. Mr. Garry is a major property developer, having 37 planning applications in the pipeline in Co. Offaly (affidavit of 8<sup>th</sup> June, 2018, para. 15, again not denied: see para. 71 of the judgment) and 11 company directorships (affidavit of 8<sup>th</sup> June, 2018, para. 14). It was Mr. Garry, not the respondents, who attended on site with Mr. Mounsey to inspect the trees following Hurricane Ophelia (see second respondent's affidavit of 1<sup>st</sup> June, 2018, para. 15, in which paragraph Mr. Garry is not even named, although later the affidavit introduces a "Mr. Garry" without explanation, but provides no full name for the same Mr. Garry), referred to at para. 66 of the judgment.

**133.** The second respondent confirms that the further inspection of trees by Mr. Mounsey in January 2008 had been at the request of Mr Garry (and not the respondents) (para. 18 of his affidavit of 1<sup>st</sup> June, 2018).

**134.** He goes on to say that it was Mr. Garry, not himself, who had a call about cattle on the land (para. 21) and that it was Mr. Garry, not the respondents, who sent emailed information about title in that regard (para. 21) and who received emailed communications about locks (para. 22). Mr. Corrigan specifically avers: "Mr. Garry advises me that he and Mr. Mousey

went to Birr Garda Station to notify the Gardaí that *they* were about to commence work” (emphasis added) in felling the trees.

**135.** The second respondent swears that he is “not aware at present precisely what prompted [the] notice [from the Council] and I am continuing to investigate that” (para. 29). It would be unlikely that a notice helpfully supporting some tree-felling arrived without advance warning during a contested tree-felling process without any intervention from the respondents or Mr. Garry. The most likely inference is that there are relevant material facts within Mr. Garry’s knowledge as to what stimulated the notice, that have not been furnished the court. Another surprising feature of the notice is that it is addressed to the appellant’s address. The question then arises as to how the respondents came to be aware of it. The second respondent answers this by interpreting that point as a claim of title by the appellant, which it isn’t (para. 43 of affidavit of 1<sup>st</sup> June, 2018). The appellant clarified the obvious by pointing out that the respondents’ lands “do not have a house or a post box. It is simply not possible for a postman to deliver post to a field.” How then did this notice get to the respondents? The natural inference is that Mr. Garry or Mr. Mounsey or both must have been in contact with the Council to have the notice issued and provided, but, if that’s the case, they haven’t provided information to the court as to their knowledge, if any, of how the situation came about.

**136.** Mr. Garry himself only comes into the case with a four paragraph affidavit of 4<sup>th</sup> July, 2018 in which he says he “actively assisted in the preparation of information for the affidavits of the Second-named Respondent” (para. 3), and that “[i]nsofar as the affidavit of the Second-named Respondent of 1 June 2018 recites events involving me, I confirm that this affidavit is true and accurate”. This formula leaves unanswered all of the otherwise unanswered questions arising from the respondents’ evidence.

**137.** While conflict between equally inherently credible averments, with no cross-examination, is normally resolved against the party carrying the onus of proof, a court is not

always obliged to regard all averments as being equally credible, or to disregard internal or evident problems with them (see by analogy the manner in which the Supreme Court considered it was entitled to prefer an affidavit over even oral evidence in *Koulibaly v. Minister for Justice, Equality and Law Reform* [2004] IESC 50, [2004] 7 JIC 2906 (Unreported, Supreme Court, Denham J. (Geoghegan and McCracken JJ, concurring), 29<sup>th</sup> July, 2004)). Among the matters to which regard might be had would be included the failure to explain patently relevant questions that are clearly within that party's responsibility. In my view, the weight to be placed on the respondents' evidence overall is diminished by a number of factors:

- (i). I infer that the respondents are willing to act on behalf of Mr. Garry, but failed to outline to the court the basis of that arrangement;
- (ii). as pointed out by the appellant (affidavit of 21<sup>st</sup> June, 2018, para. 13), the respondents failed to enlighten the court as to the full details of the trust;
- (iii). the respondents failed to acknowledge that "Mr. Brendan Garry is the person who has orchestrated the felling of trees ..." (para. 13 - not rebutted);
- (iv). there is no indication that either of the respondents has ever attended upon the lands in issue (para. 13 - not rebutted);
- (v). also as so pointed out, the respondents told the court that "the lands in question were purchased by a young couple and that the issue of costs was of concern to them" - this would not have been a candid way to present the facts where the land was bought in trust;
- (vi). in an affidavit sworn on 4<sup>th</sup> May, 2018, the second respondent claimed the felling was under a tree-felling licence (see affidavit of appellant of 8<sup>th</sup> June, 2018 (para. 10));
- (vii). the respondents swore that Mr. Charles Fahy of the Forest Service was aware of the felling (para. 29 of second respondent's affidavit of 1<sup>st</sup> June, 2018), which

is contradicted by Mr. Fahy's email of 11<sup>th</sup> June, 2018 to the appellant's solicitors - that was not rebutted; and

- (viii). the respondents deny bulldozing work (para. 36 of affidavit of 1<sup>st</sup> June, 2018), but photographs of the heavily wooded area clearly show mechanical levelling of the ground to red earth, much as the appellant's adviser Mr. Costin suggested.

**138.** While the second respondent did swear a replying affidavit, this seems to be hearsay, because of the fact that the property was bought in trust by the respondents (see exhibit C to the second respondent's affidavit). For who isn't specified, but as noted above the obvious inference is for the first respondent's father who is a property developer and who has sworn an affidavit in these proceedings. At least that's what the appellant averred to, which wasn't denied.

#### **Application of principles of onus of proof to the facts**

**139.** In the light of that analysis of the burden of proof, one can turn to the factual findings of the High Court. Two points need to be emphasised at the outset. Firstly, insofar as the burden of proof is concerned, that is a legal question which is subject to non-deferential review on appeal. And secondly, while the court will of course give considerable weight to the trial judge's assessment of the affidavits, it must be appreciated that this court is in as good a position as the trial judge to read the affidavits and resolve the conflicts involved. As matters appear to me, her assessment of the affidavits was saturated throughout with the approach that the appellant had to prove everything, a view which doesn't seem reconcilable with her earlier, correct, acceptance that proof of the development being exempted lay on the respondents.

**140.** In fairness to the trial judge, however, it must be emphasised that very few of the pertinent authorities seem to have been drawn to her attention.

**141.** It should also be noted, in fairness to the trial judge, that the evidence on both sides is unsatisfactory.

**142.** Mr. Costin’s report was criticised by the respondents and perhaps it could have been improved upon. Insofar as a party wishes to put forward an expert, there are certain criteria such as that expert’s qualifications, as well as the issue of expert’s duties including of objectivity. While I am not questioning his likely expertise, I prefer not to treat his report as an expert report in the legal sense for those reasons. But regard can still be had to it in terms of matters that he himself observed. Having said that, Mr. Mounsey is not an expert in this sense either, not because he is not qualified in the field of trees, but because he is not independent at all - his very own actions in cutting down these trees are very much in the cross-hairs of the case. While he avers to his “professional opinion” in his very uninformative and *pro forma* affidavit of 4<sup>th</sup> July, 2018 that should not be confused with independent expert evidence.

**143.** The evidence also includes a certain amount of hearsay. In fact neither side objected to the admissibility of the other side’s hearsay as such, but insofar as that was referred to on appeal it was urged on the court as a matter of weight. In the criminal context, the practice of transcript trawling and raising objections on appeal not raised at the trial was deprecated in *The People (Director of Public Prosecutions) v. Cronin (No. 2)* [2006] IESC 9, [2006] 4 I.R. 329. In the particular circumstances of *The People (Director of Public Prosecutions v. Lynch* [2016] IECA 78, [2016] 3 JIC 0304, 2016 WJSC-CA 7503 (Unreported, Court of Appeal, Edwards J. (Sheehan and Mahon JJ. concurring), 3<sup>rd</sup> March, 2016), a non-tactical, inadvertent, failure to object at the time to “profoundly prejudicial” hearsay evidence (*per* Edwards J. at para. 21) against the accused in the context of a *viva voce* trial, where an objection was nonetheless raised before the end of the hearing below, was analysed by this court thus: “[w]e are satisfied that in this case the defence cannot in justice be regarded as having acquiesced in a relaxation of the rule against hearsay. The fact that inadmissible hearsay was admitted before the jury renders, in the particular circumstances of the case, the appellant's convictions unsafe and

unsatisfactory” (para. 22). *Lynch* expressly recognises the doctrine of acquiescence in any relaxation of the rule against hearsay, and here it seems to me that both parties in the present appeal come into that category. Certainly it would be profoundly unfair at this point in the process to start cherry-picking paragraphs from the affidavits as being inadmissible hearsay in a way that should have been done before trial below, and that if done now would deprive the other side of the opportunity to rectify matters in a technically correct way, unless further evidence is to be admitted on appeal. In fact neither side asked this court to do that, so whatever acquiescence took place in the High Court has now been cemented down.

**144.** The acquiescence doctrine acknowledged in *Lynch* fits into a wider principle that it is not true that a court can only accept evidence that is sworn to. Information that is conveyed to the court without objection, admissions, judicial notice, certain public documents and so on, fall into the category of material that a court can receive and act on, on the same basis as if deposed to.

**145.** Turning then to the application of the above conclusions on the onus of proof to the way in which the factual issues were resolved below, the questions really resolve themselves. The position is as follows:

- (i). The onus of proving the jurisdiction of the Circuit Court obviously doesn’t apply. The appellant has clearly proved that a development (in the sense of works or a change of use) on, in, over or under land commencing on or after 1<sup>st</sup> October, 1964 has been, is being or is likely to be carried out or continued by the respondent. It is not in dispute that the tree-felling took place and that there was no grant of planning permission. That the appellant didn’t engage a planning consultant as referred to by the learned trial judge at para. 85 is really neither here nor there as far as this heading is concerned.
- (ii). The question of proof of abandonment of previous use isn’t relevant here.

- (iii). No point of defence, such as the 7-year limitation period, seems particularly relevant and certainly none has been established by the respondent.
- (iv). To hold that the respondent had discharged the onus of proving that the development is exempted, including proving that the provisions having the effect of displacing what would otherwise be an exemption, do not apply, could only apply if the respondent shows both the nature and purpose of the development is such that: (a) no EIA is required; and (b) the development does not require permission by reason of its effect on a protected structure. I deal with both of those matters below.
- (v). The onus of proving any other matter within the peculiar knowledge of a party, which lies on that party, is particularly relevant insofar as both the purpose and the details of the tree-felling are within the peculiar knowledge of the respondents, so they have the onus to prove the purpose and to rebut the appellant's evidence as to the scale and details of the development.

### **Issue 2 – the EIA directive and implementing legislation**

**146.** With that examination of the onus of proof set out, the next issue to fall for examination is whether the development was unauthorised because EIA was required.

### **Appellant's submissions on issue 2**

**147.** The appellant submitted as follows in respect of the argument that the deforestation would be likely to have significant effects on the environment:

“Schedule 5, part 2, 1(d)(iii) of the Planning and Development Act, 2001 [*sic, sc.* Regulations 2001], as amended (PDR 2001), coupled with Section 172 PDA 2000 affirms that deforestation for another type of land use, where the area to be deforested would be greater than 10 hectares of natural woodland requires an EIA. The Court rejected the contention that the area in question, namely Folio 9592 and Folio 22812



Offaly, constituted 10 hectares of natural woodlands. Whilst the Court accepted that the subject lands exceeded 10 hectares, it was noted that much of Folio 22812OY was not covered in woodland. However, the Court was asked to consider the matter in light of Schedule 5, Part 2, 15 of the PDR, 2001, which affirms that projects which do not exceed the specified limits, in this case 10 hectares, but which are likely to have a significant effect on the environment, having regard to Schedule 7 of the PDR 2001, would necessitate an EIA.

Schedule 7 of the PDR 2001 sets out the criteria for determining whether development should be subject to an EIA. The location of the proposed works (Part 2) is of relevance for several reasons, including the need to consider the environmental sensitivity of the geographical areas, the existing land use, the absorption capacity of the natural environment, paying particular attention to forest areas, and landscapes and sites of historical, cultural or archaeological significance. Part 3 of schedule 7 confirms that regard should be had to the impact of the works proposed.

The Report of Mr. John Joe Costin exhibited at “BB3” of the Appellant’s Affidavit dated the 11<sup>th</sup> May 2018, outlined the significant sensitivity of the area being felled noting the Claremont Demesne plantation mirrored that of the Phoenix Park both in terms of style, layout, species choice and its growth. In addition to ancient woodland trees on site Mr Costin noted the rare and unique parkland flora which included orchids and perennial wildflowers. The report expressly addressed the effect of the felling works on the environment and the character of Claremont House, noting the irreparable damage to the ancient woodlands which such works had already caused.”

**148.** On the second sub-issue of whether the deforestation amounted to a change of another type of land use, the appellant submitted:

“In rejecting the necessity for an EIA the High Court placed too great an emphasis on the contention that the lands were not being changed to another type of land use. The Respondent had not on affidavit expressed what their intentions for the land were; the Court took the content of the felling license *application form* exhibited, which included a replanting section as the Respondents intentions for the lands. It must be noted that this application form was the second document relied on by the Respondent to fell trees, the first being a Notice to remove dangerous trees which post-dated the felling works. The Felling License which ultimately issued did not authorise the works which took place, nor does it appear to direct replanting. The Respondents have only been permitted to thin trees meaning, removal of diseased trees or trees of poor quality to improve the growth of remaining trees. It is submitted that far too much emphasis was placed on the application form which resulted in a failure of the Court to fully consider the necessity of an EIA in the present case.

...

The decision of *Prenninger v Oberosterreichische Landesregierung Case C-329/17* concerned the necessity or otherwise of an EIA in respect of the construction of a path through a forest to facilitate overhead electrical power lines. The Court noted that it was apparent from the project at issue that the felling area concerned would continue to be subject to normal forest management, in so far as it remained possible to carry out regular cutting, logging and replanting of trees [para. 18]. Both the referring Court of Austria and the Federal Administrative Court of Austria considered that the clearance of a path in a forest was not a use of the forest floor for purposes other than forestry and therefore was not a conversion to another type of land use. The European Court of

Justice reject the referring Courts contention and confirmed the applicability of the EIA Directive and the necessity for an EIA in the matter.

....

At paragraph 98 the High Court contended that *in the absence of concrete evidence put before the Court by the Plaintiff that the Defendants proposed a change of use of the lands there was insufficient basis to ground the Section 160 relief*. This position was fundamentally flawed and imposed upon the Appellant far too high a burden of proof. The Appellant did not accept that the Respondents intentions for the land were simply to fell the demesne and replant same. Indeed the Respondents never formally set out their intentions for the lands, and only belatedly exhibited a felling license application form when their Notice under Section 70 of the Roads Acts, 1993, was challenged. The beneficial owner of the lands, Mr. Brendan Garry, has an extensive history of development projects and some 37 planning applications in the County of Offaly alone. It was the Appellants contention that the felling on the lands was part of and/or in furtherance of development.

Even if this position was incorrect, the actions of the Respondents in clear felling the entire Claremont Demesne and replanting it with sapling trees amounted to a new use of the land; being from uncultivated Heritage Garden/Parkland to a cultivated tree farm. It is submitted that *Prenninger v Oberosterreichische Landesregierung Case C-329/17* outlined above affirms such a position and reaffirms the obligation on the Court when considering EU Law to have regard to the overall spirit or object of the rule and not only its wording. As an example, it cannot be said that a decision to clear fell the entire plantation of trees in the Phoenix Park and replace same with sapling trees could escape

an environmental impact assessment simply because the felled trees may be replaced by sapling trees.”

### **Respondents’ submissions on issue 2**

**149.** The respondent submitted as follows on the factual context:

“The appellant’s submissions give the impression that permanent deforestation has occurred. This is incorrect. It was accepted by the learned trial judge that the evidence before the Court was that the woodlands are to be replanted. The appellant argues that this is not the true intention of the respondents. However, the appellant’s own evidence records the fact that lands are to be replanted, the appellant exhibits a letter from Mr Charles Fahey of the forestry services which states *“This plot will be replanted and together with natural regeneration, the timber cycle will start all over again”*. The appellant relies on a report from a Mr Costin records the respondent’s intentions as *“replanting the woodlands with 2 year old forest transplant”*.

For the avoidance of doubt, the woodlands in question are to be replanted to supplement natural regeneration. As such, these submissions will refer to ‘tree felling’ but the actions of the respondents should be read and understood as tree felling to be followed by replanting.”

**150.** The respondents also disputed the extent of the felling as contended for by the appellant.

**151.** On the issue of conversion to another type of land use, the respondents submitted:

“... in order for these provisions to apply the appellant must demonstrate: (i) the existence of a project listed in this part - in this case deforestation for the purpose of conversion to another type of land use, and (ii) that same would be likely to have a significant effect on the environment. Notwithstanding that both elements must be established, the learned trial judge correctly held that the appellant could establish neither.

The appellant argues at paragraph 26 of its submissions that the learned High Court judge placed too great an emphasis on the contention that the lands were not being changed to another type of use. This argument is misconceived as the regulations state that a conversion to another kind of use must be established, it is not one factor among others to be considered. This is reflected in the case law cited by the appellant in its own submissions, ... the case of *Prenninger v Oberösterreichische Landesregierung, Case C-329/17 ...*”

**152.** Specifically on the change of use argument, the respondents submitted:

“*Prenninger* does not override the requirement to demonstrate a new use or conversion to another type of use – as cited above, it reiterates that point. In that case a new use was found to arise from the fact that the land was cleared to support the transportation of electrical energy. That is a clear and demonstrable change in use. By contrast, no such use can be demonstrated in this case and the appellant instead invites the Court to engage in speculation.

The learned trial judge found that there was no evidence that the tree felling in this case constituted a change in use. Rather, the evidence before the Court, including evidence provided by the appellant itself, is that the woodlands are to be replanted.

The appellant argues that a change of use occurred due to the fact that Mr Brendan Garry, the father of the second named respondent, has a history of development projects. Alternatively, the appellant argues that a change of use has occurred in that there is a new use of the land as a cultivated tree farm. Both of these arguments are

unsupported by any actual evidence and the Court correctly rejected these as being entirely speculative.

By contrast, the respondent has provided a detailed explanation as to why the tree felling occurred and has supported this with evidence. Following the damage caused by storm Ophelia, the respondents instructed Mr Mounsey, an arborist, to attend the lands and prepare a report ...”

**153.** On the issue of whether the development had significant effects on the environment, the respondents submitted:

“At paragraph 31 of its submissions, the appellant states that the finding that no damage to the environment had been made out ignored the reports of Mr Costin. The learned trial judge expressly referred to the report of Mr Costin as part of the assessment of whether an EIA was required and was entitled to prefer the evidence adduced by the respondent. It is necessary to consider the report of Mr Costin as the appellant relies on it in support of a number of its arguments.”

**154.** The respondents submit that Mr Costin was insufficiently compliant with the legal definition of an independent expert, and continued:

“... the learned trial judge also held that the appellant could not demonstrate a significant effect on the environment and the appellants argument can also be dismissed on this basis.

Additionally, Schedule 7 (2) (c) refers to ‘mountain and forest areas’ whereas the Court found that much of the land in question is not wooded. The land in question is predominantly farmland. The appellant has provided no evidence: (i) that the lands in question are a designated area of special protection under Directive 79/409/EEC and

Directive 92/43EEC such that they would be captured by Schedule 7 (2) (e), (ii) damage to an EU protected site identified in the County Offaly development plan (iii) that the lands are protected landscapes as defined by Schedule 7 (2)(h)

To the extent that the appellant continues to argue that the factors in Schedule 7 have been triggered, it relies on the evidence of Mr Costin to support its claim. Having regard to the issues already raised in respect of Mr Costin's report, the trial judge was correct to find that the appellant had not demonstrated that the respondent's actions were likely to have a significant effect on the environment in the manner contemplated by the 2001 Regulations."

**155.** The 2011 regulations were referred to and their applicability was rejected.

### **Analysis of issue 2**

**156.** Felling of trees in such circumstances is normally exempted development (the concept being that it is subject to the Forestry Act 2014, albeit that may not have been complied with here), subject to specific situations where there is a requirement to obtain permission (s. 4(1)(i) of the 2000 Act). However, if an EIA is required, then such activity is not exempted development (s. 4(4) of the 2000 Act). There is perhaps a loose analogy with the destruction of bogs, where attempts were made to remove that process from the planning sphere and substitute a lesser form of regulation, a procedure that was recently condemned as contrary to EU law (*Friends of the Irish Environment Ltd. v. Minister for Communications* [2019] IEHC 646, [2019] 9 JIC 2002 (Unreported, High Court, Simons J., 20<sup>th</sup> September, 2019)).

**157.** Leaving aside the argument based on art. 9 of the 2001 regulations regarding objectives of the County Development Plan, which I have dealt with above, there were essentially three EIA-related arguments made as follows:

- (i). sch. 5, Pt. 2, par. 15 (inserted by article 19(h) of the Planning and Development (Amendment) (No. 2) Regulations 2011 (S.I. No. 454 of 2011), and read in the light of para. 1(d)(iii) of sch. 5, Pt. 2) of the 2001 regulations by virtue of likely significant effects on the environment regarding change to another land use;
- (ii). reg. 7 of the 2011 regulations regarding use for intensive agriculture; and
- (iii). s. 57 of the 2000 Act regarding impact on features associated with a protected structure.

**158.** I will address below the situations in which an EIA is required below, but to make sense of these situations one would first need to consider the relevant directive - 2011/92/EU as amended by directive 2014/52/EU.

**159.** Article 1(1) of the directive provides for a wide scope of application - “[t]his Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.”

**160.** Projects are defined in wide terms by art. 1(2) - “[f]or the purposes of this Directive, the following definitions shall apply: (a) "project" means: - the execution of construction works or of other installations or schemes, - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources ...”.

**161.** Article 2 imposes a requirement for development consent and for the process of EIA to be integrated into that consent process as regards projects defined in art. 4. Article 2(1) provides that “Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment. Those projects are defined in Article 4.” Article 2(2) in effect requires that where such consent is not necessary under existing law it must be provided for: “[t]he environmental impact assessment



may be integrated into the existing procedures for development consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.”

**162.** The projects identified in art. 4 of the directive fall into two groups - those for which EIA is automatic, and those for which EIA may be required depending on thresholds defined by reference to selection criteria set out in the directive.

**163.** Subject to an exception that doesn’t apply here, art. 4(1) deals with the automatic cases and provides that, “projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10”. The automatic category doesn’t apply in the present case.

**164.** The threshold cases are dealt with in art. 4(2) which provides that, “for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that determination through: (a) a case-by-case examination; or (b) thresholds or criteria set by the Member State. Member States may decide to apply both procedures referred to in points (a) and (b).”

**165.** The requirement to take into account the selection criteria is set out in art. 4(3) which states: “[w]here a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account. Member States may set thresholds or criteria to determine when projects need not undergo either the determination under paragraphs 4 and 5 or an environmental impact assessment, and/or thresholds or criteria to determine when projects shall in any case be made subject to an environmental impact assessment without undergoing a determination set out under paragraphs 4 and 5.”

**166.** Annex II para. 1 includes the following under the heading of “AGRICULTURE, SILVICULTURE AND AQUACULTURE”: “(a) Projects for the restructuring of rural land holdings; (b) Projects for the use of uncultivated land or semi-natural areas for intensive

agricultural purposes; ... (d) Initial afforestation and deforestation for the purposes of conversion to another type of land use.”

**167.** In screening which projects fall within EIA, regard must be had to the selection criteria in annex III. Of particular note here is para. 2: “[l]ocation of projects[:] The environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard in, with particular regard to: (a) the existing and approved land use; (b) the relative abundance, availability, quality and regenerative capacity of natural resources (including soil, land, water and biodiversity) in the area and its underground; (c) the absorption capacity of the natural environment, paying particular attention to the following areas: (i) wetlands, riparian areas, river mouths; (ii) coastal zones and the marine environment; (iii) mountain and forest areas; (iv) nature reserves and parks; (v) areas classified or protected under Member States' national legislation; special protection Natura 2000 areas designated by Member States pursuant to Directive 92/43/EEC and Directive 2009/147/EC; (vi) areas in which there has already been a failure to meet the environmental quality standards, laid down in Union legislation have already been exceeded and relevant to the project, or in which it is considered that there is such a failure; (vii) densely populated areas; (viii) landscapes and sites of historical, cultural or archaeological significance.”

#### **Conversion to another land use having significant effects on the environment**

**168.** The key issue is whether the respondents have shown that deforestation was not conversion to another land use which would have had significant effects on the environment.

**169.** The case of most immediate relevance here is Case C-329/17 *Prenninger v. Oberösterreichische Landesregierung* (Court of Justice of the European Union, 7<sup>th</sup> August, 2018, ECLI:EU:C:2018:640), which dealt with deforestation to create a path through a forest to support overhead power lines.

**170.** At para. 30 of its judgment the court emphasised that the meaning of terms in annex II of the directive was for it rather than national authorities: “[i]n that regard, the Court has already held that the concepts in that annex are EU law concepts which must be interpreted independently (see, to that effect, judgment of 25 July 2008, *Ecologistas en Acción-CODA*, C-142/07, EU:C:2008:445, paragraph 29).”

**171.** As regards deforestation at para. 1(d) of annex II, the court held at para. 32 that: “[i]t follows from the wording of point 1(d) of Annex II to the directive that it does not cover any deforestation, but only deforestation operations carried out for the purpose of conferring a new use on the land concerned.” The court went on to say at para. 35 that “[t]he Court has held that the EIA Directive’s fundamental objective, as follows from Article 2(1) thereof, is that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location should be made subject to a prior assessment with regard to their effects (judgment of 19 September 2000, *Linster*, C-287/98, EU:C:2000:468, paragraph 52).” At para. 36 “[m]oreover, the Court has pointed out on a number of occasions that the scope of the EIA Directive is wide and its purpose very broad (judgments of 24 October 1996, *Kraaijeveld and Others*, C-72/95, EU:C:1996:404, paragraph 31, and of 28 February 2008, *Abraham and Others*, C-2/07, EU:C:2008:133, paragraph 32).” At para. 37, “[i]t would run counter to the fundamental objective of the EIA Directive, and the wide scope which must be attributed to it, to exclude from the scope of Annex II thereto works consisting in the clearance of paths in forests, on the ground that such works are not expressly set out therein. Such an interpretation would effectively enable the Member States to circumvent the obligations imposed on them by the EIA Directive when they consent to a clearance of a path in a forest, regardless of its scale.”

**172.** The key point was that the land had “gained a new use”: “... the fact that the trees felled are immediately replaced by other forest vegetation, either naturally or artificially, has no

bearing on the fact that the land affected by the clearance of a path has gained a new use, namely that of supporting the transportation of electrical energy” (para. 40).

**173.** Section 172 of the 2000 Act states that an EIA is required in respect of a proposed development of a class specified in part 2 of schedule 5 of the 2001 regulations. Schedule 5, part 2, para. 1(d)(iii) of those regulations refers to “[d]eforestation for the purpose of conversion to another type of land use, where the area to be deforested would be greater than 10 hectares of natural woodlands or 70 hectares of conifer forest.”

**174.** It is not in dispute that the deforested area *stricto sensu* was below the 10 hectare threshold.

**175.** One then turns to schedule 5, part 2, paras. 14 and 15 of the 2001 regulations, which essentially allow the ten-hectare threshold to be disregarded if the works or development “would be likely to have significant effects on the environment, having regard to the criteria set out in Schedule 7” of the 2001 regulations.

**176.** A number of the criteria in sch. 7 are clearly relevant, particularly the following:

- (i). para. 2(c)(iii) refers to “the absorption capacity of the natural environment, paying particular attention to the following areas: (iii) mountain and forest areas”: in that regard the nature of the lands as a forest is relevant;
- (ii). para. 2(v) refers to “areas classified or protected under legislation, including Natura 2000 areas designated pursuant to the Habitats Directive and the Birds Directive”: this is not limited to EU law protection and includes areas with legislative protection generally, so is relevant here insofar as the record of protected structures is concerned; and
- (iii). para. 2(viii) refers to “landscapes and sites of historical, cultural or archaeological significance” and again the protected structure issue comes into the mix here.

**177.** For the court to find the development to be exempted, the respondents would have to show that this was not conversion to another kind of land use, or if it was, that the project would not be likely to have a significant effect on the environment.

**178.** As regards what the purpose of the tree removal was, not only is the onus on the respondents to show this if they want to claim exempted development, but it is also within their peculiar knowledge on any view.

**179.** Thus, I don't think it was correct for the trial judge to proceed on the basis that there was no evidence that the felling was for the purpose of another form of land use, that is on the basis that the onus was on the appellants (para. 96 of her judgment), or that "[t]he import of the evidence put before the Court is that the woodlands the subject of the defendants' licence are to be replanted." Unfortunately that finding isn't supported by any (or certainly not by any adequate) evidence, and it's notable that the trial judge didn't actually identify any such evidence. Even the term "import" is a sort of acknowledgement that the material on this point isn't very tangible. It wouldn't be asking too much for the respondents to undertake on oath precisely what they were going to do and they didn't do that. Counsel's instructions are not evidence. The belief of Mr. Fahy of the Forest Service that the lands would be replanted is not evidence in any sense. The fact that the respondents stated they would replant when seeking a clear-felling licence doesn't establish anything because that would have been a condition of the clear-felling licence, which they didn't get. All they got was a licence for thinning, so the premise of their previous statement in the application form no longer holds. Anyway, a representation in an application form is not adequate proof even if the premise continued to hold, and certainly not of a matter as crucial as this. None of the other matters pointed to by counsel for the respondents amount to adequate evidence on this point.

**180.** One can speculate as to why roadside trees would be removed, bearing in mind that roadside properties tend to be more valuable, but speculation isn't necessary. One can draw an

inference from the complete lack of evidence of any actual replanting in the years since the tree-felling. One can draw an inference from the coincidence that the alleged innocent quest to remove allegedly diseased trees in line with alleged best practice has resulted in the removal of every single tree in a wide area. One can draw an inference from the situation that the respondents bought the property in trust and don't seem to know a whole lot about it themselves, and a third party developer who has said very little to the court seems to be calling the shots. The only available conclusion is that the respondents haven't demonstrated the purpose of the tree-felling and, therefore, haven't demonstrated that this was exempt development.

**181.** Assuming *arguendo* I am wrong about that, I would have held there to be a change of use, for two independent reasons.

**182.** Firstly, the respondents' own arborist provided a map which expressly stated that the trees in the heavily wooded area had to be cleared "in order to grant access to [the] area beyond "D" for future felling". Creating an access route, even if temporary as alleged in submissions (though this allegation was not established in evidence), is conversion to another use for the purposes of *Prenninger*.

**183.** Secondly, using lands for timber harvesting is a very different use to using them as an uncultivated heritage garden. The concept of new use has an EU law meaning, to be construed broadly, not a national law meaning. The respondents in submissions (not adequately backed up by affidavit) deny any intention to sell timber, but the inference to be drawn from the complete removal of large numbers of trees is either that the timber will be sold or that some kind of development will be undertaken on the cleared lands or both. Either way there is sufficient evidence to support the inference that a change of use is intended.

**184.** As regards whether the project had significant effects on the environment, the respondents haven't discharged the onus of proof under that heading either. The status of the

gardens on the National Inventory is of considerable significance, where the woodland setting is specifically referred to, even without needing to rely on Mr. Costin's report under this heading. It is verging on self-evident that removal of a significant portion of trees surrounding a historic house set in a wooded heritage garden potentially has significant effects on the environment, certainly enough effects to pass any screening test and require full environmental impact assessment.

**185.** The trial judge placed a lot of emphasis on the lack of proof of affecting nearby Natura 2000 sites (para. 104), but even leaving aside the problem of the burden of proof discussed above, that was a mistaken premise because that is relevant to a different instrument - directive 93/43/EEC - not the one at issue here, directive 2011/92/EU. The trial judge also thought that the appellant hadn't tendered evidence, "to support the assertion that the tree felling in issue here falls within Schedule 7", but that brings us back to the misconception that the applicant has to show that the development is not exempted, rather than, as in *Daly v. Kilronan*, the respondent having to show that something that might be *prima facie* exempted is still exempted when one factors in the qualifications to that category. The trial judge thought that Baker J.'s judgment in *Daly v. Kilronan* is "of limited assistance" (para. 111). In fact on closer examination, the *ratio* of *Daly v. Kilronan* is directly in point here, and is not just helpful but determinative, although of course (as in every conceivable instance of applying any other jurisprudence), that principle is to be applied in a different factual context. In the light of that inevitable feature, I referred in *Habte v. The Minister for Justice and Equality* [2019] IEHC 47, [2019] 2 JIC 0405 (Unreported, High Court, 4<sup>th</sup> February, 2019) (see also *Habte v. Minister for Justice and Equality* [2020] IECA 22, [2020] 2 JIC 0502 (Unreported, Court of Appeal, Murray J. (McGovern and Power JJ. concurring), 5<sup>th</sup> February, 2020)) to the point made by Glanville Williams in *Learning the Law*, 11<sup>th</sup> ed. (London, Sweet & Maxwell, 1982) p. 77, that a judge can, if so minded, "seize on almost any factual difference between this previous case and the

case before him in order to arrive at a different decision”. But that is an empirical warning against an over-elastic approach to legal concepts, not a how-to guide to the circumnavigation of applicable precedents. In such circumstances, I conclude under this heading that the respondents haven’t discharged the onus of proving that the development is exempted.

**186.** In those circumstances the alternative argument that the respondents hadn’t shown that the removal was for the purpose of intensive agriculture in the form of tree-farming, for the purposes of regs. 2, 7 and 9 of the European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011 (S.I. No. 456 of 2011), doesn’t arise. If it had arisen, the respondents would have faced a similar problem of not proving why they removed the trees.

**Issue 3 – whether permission was required by reason of the effect of the works on a protected structure**

**187.** I can turn now to the second substantive basis for a s. 160 injunction, namely the effect on a protected structure.

**Appellant’s submissions on issue 3**

**188.** The appellant submitted, on the issue of the effect on a protected structure, that:

“It is respectfully submitted that on a literal reading of the RPS of Claremont House same expressly refers to the structure being located *in* a mature wooded parkland. This is a “specific feature” of the structure. A literal reading of the definition of a protected structure includes “any specific feature which is in the attendant grounds” of the structure.

The Appellant’s claim before the High Court was not merely that as the woodlands lay within the curtilage or attendant grounds of a protected structure then they too should be protected, but that as the woodlands which lay within the curtilage or attendant grounds, and which have been specified as a feature of the structure, any works to such



a feature which materially affect the character of the structure or an element of the structures architectural, historical or archaeological interest *required approval* from the planning authority.

It is the cumulative effect of the works which is of relevance to the assessment of Section 57 of the PDA 2000. The Respondents' intention was to clear-fell the entire Claremont Demesne, having already felled 1.4 hectares of broadleaf Irish trees it was proposed to fell the entire remainder of Folio 9592 being c. 4 hectares. Folio 9592 contains the Claremont Demesne plantation of trees, the driveway between Claremont House, the Claremont gateway, and the Claremont House gate lodge, all listed as specific features in the RPS of Claremont House, including the feature of the wooded parkland itself.

In the premise the actions of the Respondent could not but materially affect the character of a protected structure and thus the most prudent course to take was to ensure that such works would be carefully scrutinised by the planning authority, as confirmed at part 3.5.1 of the Architectural Heritage Protection Guidelines *for Planning Authorities*."

### **Respondents' submissions on issue 3**

**189.** The respondents contend that the woodlands are not part of the curtilage of the protected structure, a point not strenuously argued in any event as referred to above.

**190.** On the attendant grounds argument, the respondents submitted:

" ... the appellant must demonstrate that the Record of Protected Structures specifies the trees which lay on the respondent's lands are a special feature within the attendant grounds of Claremont House.

In support of this argument, the appellant again relies on a single line from the appraisal, “located south of Banagher town in a mature wooded parkland”. The trial judge concluded that the Record of Protected Structures does not make reference to the trees on the respondent’s lands as a specified feature in the appraisal of Claremont House. Rather, the Appraisal is largely concerned with Claremont House itself and its outbuildings, entrance gates and gate lodges.

This assessment by the trial judge is supported when the ‘located in a mature wooded parkland’ statement is read in the context of the text of the appraisal ... When read in its context, the appraisal cannot be said to have designated the woodland as a specified feature within the attendant grounds.”

**191.** On the issue of whether there would be an effect on the character of the structure, the respondents submitted:

“Even if this Court departs from the finding of the trial judge, it is respectfully submitted that the appellant cannot demonstrate that there has been or would be a material effect on the character of the structure.

The Court noted at paragraph 151 of the judgment that appellant had not put any evidence of a conservationist before the Court. In this context, the respondent again repeats its serious concerns about the report of Mr Costin and respectfully submits that his he is not suitably qualified to give expert evidence to support the contention that the respondent’s tree felling (and replanting) would materially affect the character of Claremont House. Beyond the assertions of the appellant, there is in fact no actual evidence before the Court from which it could reach that conclusion.”

### **Analysis of issue 3**

**192.** Section 57(1) of the 2000 Act provides as follows:

(1) Notwithstanding section 4(1)(a) , (h) , (i) , (ia), (j) , (k) , or (l) and any regulations made under section 4(2), the carrying out of works to a protected structure, or a proposed protected structure, shall be exempted development only if those works would not materially affect the character of—

(a) the structure, or

(b) any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest.

**193.** Section 57 takes priority over the exemptions set out in s. 4 of the 2000 Act, or as put by Clarke J. in *Córas Iompair Éireann v. An Bord Pleanála* [2008] IEHC 295, [2008] 6 JIC 1902 (Unreported, High Court, 19<sup>th</sup> June, 2008) at para. 4.20: “s. 57 has the effect of de-exempting any development which would otherwise be exempted unless the development concerned meets the criteria for not materially affecting relevant features of the protected structure as set out in that section”.

**194.** Hence, even though felling of trees may potentially fall into the category of exempted development under s. 4(1)(i) of the 2000 Act (it is suggested by David Browne B.L. in *Simons on Planning Law*, 3<sup>rd</sup> ed. (Dublin, Round Hall, 2021) para. 2-218, that this is because of a separate consent regime under the Forestry Act, 2014), the provisions of s. 57(1) impose “an *additional requirement* which must be met to qualify as exempted development when one is interfering with a protected structure”, as the appellant correctly puts it in written submissions.

**195.** Protected structure is defined by s. 2(1) of the 2000 Act as follows: ““protected structure” means— (a) a structure, or (b) a specified part of a structure, which is included in a record of protected structures, and, where that record so indicates, includes any specified feature which is within the attendant grounds of the structure and which would not otherwise

be included in this definition”. “Structure” is defined by the 2000 Act as including any land lying within the curtilage of the structure. “Attendant grounds” is defined as including lands lying outside the curtilage of the structure and “protected structure” is defined as a structure or specific part of a structure which is included in a record of protected structures, and, where the record so indicates, includes any specified feature which is within the attendant grounds of the structure and which would not otherwise be included in this definition.

**196.** Section 51 of the 2000 Act requires a local authority to prepare a record of protected structures which shall be part of the development plan: “51.—(1) For the purpose of protecting structures, or parts of structures, which form part of the architectural heritage and which are of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest, every development plan shall include a record of protected structures, and shall include in that record every structure which is, in the opinion of the planning authority, of such interest within its functional area. (2) After consulting with the Minister for Arts, Heritage, Gaeltacht and the Islands, the Minister shall prescribe the form of a record of protected structures. (3) Subject to any additions or deletions made to the record, either under this Part or in the course of a review of the development plan under Part II, a record of protected structures shall continue to be part of that plan or any variation or replacement of the plan.”

**197.** Section 52 provides for ministerial guidelines, which while not directly binding are nonetheless a material consideration and of assistance in understanding the way in which the question of safeguarding recorded protected structures is to be approached. Subsection (1) provides: “(1) The Minister for Arts, Heritage, Gaeltacht and the Islands shall, after consulting with the Minister, issue guidelines to planning authorities concerning development objectives— (a) for protecting structures, or parts of structures, which are of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest, and (b) for preserving the character of architectural conservation areas, and any such guidelines

shall include the criteria to be applied when selecting proposed protected structures for inclusion in the record of protected structures.”

**198.** Chapter 13 of the relevant guidelines are exhibited at GD12 of the appellant’s affidavit of 21<sup>st</sup> June, 2018. Paragraph 13.2.1 states that “the attendant grounds of a country house could include *the entire demesne*, or pleasure grounds, and any structures or features within it such as follies, plantations, earthworks, lakes and the like” (emphasis added).

**199.** Under the heading “General Principles”, the guidelines note at para. 13.3.2(l) that among the matters that should be considered is: “[a]re there designed landscape features within the curtilage or attendant grounds connected with the protected structure or its ancillary buildings? These may include ornamental planting, earth works, avenues, gardens, ponds, *woodlands* or other plantations” (emphasis added).

**200.** It seems to me under this heading that the learned judge focused unduly on the fact that the woodlands were not “formally designed gardens” under para. 13.2.19 of the guidelines (para. 137 of her judgment), which isn’t the issue.

**201.** The guidelines do have a “sample format for the record of protected structures” which includes a heading “Notes (including features of attendant lands)”. Admittedly, the record prepared by the County Council here are not set out in exactly this format, but rather had a heading of “Appraisal” which corresponds to the section headed “Appraisal” in the NIAH. However, nothing much turns on that form of the record. Features noted in the appraisal are features noted on the record.

**202.** Section 58 of the Act provides that an owner or occupier has a duty to ensure that any element of the protected structure which contributes to its special interest is not endangered. Subsections (1) to (3) provide as follows: “(1) Each owner and each occupier shall, to the extent consistent with the rights and obligations arising out of their respective interests in a protected structure or a proposed protected structure, ensure that the structure, or any element of it which

contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest, is not endangered. (2) The duty imposed by subsection (1) in relation to a proposed protected structure arises at the time the owner or occupier is notified, under section 55 or under Part II, of the proposal to add the structure to the record of protected structures. (3) Neither of the following shall be considered to be a breach of the duty imposed on each owner and each occupier under this section— (a) development in respect of which permission under section 34 has been granted; (b) development consisting only of works of a type which, in a declaration issued under section 57(3) to that owner or occupier, a planning authority has declared would not materially affect the character of the protected structure or any element, referred to in subsection (1) of this section, of that structure.”

**203.** Section 57(1) of the 2000 Act provides that development that materially affects the character of a protected structure or any element of the structure which contributes to the structure’s special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest requires approval from the planning authority before such works commence. Accordingly, that constitutes another qualification to the sense in which tree-felling is exempted development. The appellant argued firstly that the trees felled were part of the structure. The definition of protected structure includes special features within the attendant grounds. The wording of the record of protected structures has been quoted above and refers to the woodlands.

**204.** As noted above, I don’t think that the lands can be regarded as part of the curtilage of Claremount House, so I agree with the trial judge on that point.

**205.** As regards whether the woodlands are part of the attendant grounds, this wasn’t disputed below as found in para. 153 of the trial judge’s judgment, so I don’t think it can be disputed now. But even if it can be, I think it is clear that the lands do form part of the attendant grounds. As noted above, the record of protected structures in County Offaly refers to the

house as “[l]ocated south of Banagher town in a mature wooded parkland, the house, outbuildings, entrance gates and gates lodge form an important group of related structures.” The historic map of the property at exhibit GD11 to the appellant’s affidavit of 21<sup>st</sup> June, 2018, part of the record of the Heritage Gardens maintained on the NIAH, shows the association between the house and the surrounding woodland areas which are clearly part of the demesne. The trial judge didn’t think the OSi map was a basis to hold the lands part of the curtilage (para. 151), and I agree with that aspect, but she didn’t say anything to question that map supporting the lands being part of the attendant grounds, which I think it does.

**206.** The holistic way in which the demesne is treated in the NIAH and the record of protected structures which draws from it, with specific reference to the woodlands, clearly constitutes identification of the woodlands as a special feature within the attendant grounds. The trial judge approached the matter on the basis that, “no compelling case has been made by the plaintiff that the woodlands in issue in these proceedings have been specified by Offaly County Council in its RPS as a protected feature” (para. 154). Insofar as this puts the onus on the appellant, I have addressed that issue above. She also says that, “other than describing the house as being located in a mature wooded parkland” the appraisal is largely concerned with structures (para. 155). The words “other than” are crucial - the appraisal *does* identify the woodlands. It doesn’t get the respondents very far to say that other than the reference to woodland, there is no reference to woodlands.

**207.** As regards whether interference with such a feature materially affects the character of the structure which contributes to the interest of the structure, there can’t really be any dispute about that given the specific identification of the woodlands. Removal or semi-removal of the woodlands removes a feature that affects the character of the structure that contributes to the interest of the structure. That is reinforced by Mr. Costin’s point about the loss of symmetry referenced at para. 136 of the judgment below, a point which is self-evident from the nature of

the physical and geographical relationship between the trees and the main house, as illustrated by the maps and photographs, and doesn't depend on recognising Mr. Costin as an expert. Indeed, the symmetry point is responded to by the second respondent's affidavit of 1<sup>st</sup> June, 2018 at para. 33(d) only in terms of the ownership of the lands, not the visual appearance of it, so the point isn't actually contested anyway. In all the circumstances, it seems to me that the development is not exempted under this heading as well, or certainly the respondents haven't proved otherwise.

**What remedy by way of remediation is appropriate**

**208.** Having regard to the foregoing findings, it is necessary to move on to the question of the appropriate order, particularly in terms of remediation.

**Parties' submissions on remediation**

**209.** The appellant's submissions did not deal with remediation in any detail although the notice of appeal clearly sought full remediation and replacement with trees of similar type and maturity.

**210.** The respondents dealt with the issue as follows:

"The learned trial judge held that the applicant had failed to demonstrate that unauthorised development had occurred. If this Court accepts any the appellant's arguments that unauthorised development has occurred, the respondent respectfully submits that it should exercise its discretion against the making of any order against the respondents. This submission is made without prejudice to the respondents' position that no unauthorised development occurred. The factors effecting a Court's discretion on the granting or withholding of relief under Section 160 are set out at paragraph 90 of the decision in *Meath County Council v Murray*. In the present case, the following factors weigh against the making of any order under Section 160:



- (a). The fact that the respondents have already committed to replanting the woodlands.
- (b). The nature of any breach being technical due to the respondent's reasonable reliance on the exception provided by Section 4 of the PDA 2000.
- (c). The conduct of the respondent as acting in good faith and the reason for any infringement being through mistake.
- (d). The attitude of the planning authority as not regarding the tree-felling as being unauthorised development. In fact, the planning authority issued the notice pursuant to which much of the tree-felling took place.
- (e). The conduct of the appellant as having been found to have been "less than forthcoming" with the Court.
- (f). The hardship on the respondents who could be forced to pay the substantial cost of procuring and planting the exact number and species of trees which the respondent seeks to have this Court compel them to plant, being: *139 Ash trees, 66 Beech trees, 55 Oak trees, 28 Sycamore trees, 23 Hawthorn trees with the same species of tree of semi-mature and / or mature age*. The respondents have already stated their intention to replant the woodlands to supplement natural regeneration."

### **Analysis of remediation**

**211.** It is true that even if the prerequisites for an order under s. 160 are satisfied, the court has a discretion whether to make such an order (*Murray* at para. 90).

**212.** However, this requires a dispassionate analysis of the objective interests involved and not simply giving decisive weight to *ad misericordiam* or other pleas in mitigation. As noted above, it is suggested by the respondents that the following factors weigh against the making of any order under s. 160:

- (i). Firstly, it is argued that the respondents have already committed to replanting the woodlands. Unfortunately, I don't consider they have "committed" to it in any effective sense. But even if they had, the only replanting they have in mind is of young saplings which create a completely different landscape to mature trees.
- (ii). It is then suggested that any breach was technical due to the respondents' reliance on the exception provided by s. 4 of the 2000 Act, which it is suggested was reasonable. I don't accept that a developer, or anyone, is reasonably entitled to rely on one section of legislation without considering all other relevant sections or provisions. The situation here was far removed from straightforward removal of a fatally diseased or dead tree in circumstances that raised no issues around exempted development.
- (iii). It is also argued that the conduct of the respondents was relevant, it being alleged that they were acting in good faith and that the reason for any infringement was through mistake. Unfortunately, I don't accept the picture of sweet innocence being presented here. The respondents have not shown compliance with the Forestry Act 2014 by proceeding to cut trees before getting a licence, despite signing a form stating expressly that this was not to happen. They have not shown compliance with the Wildlife Act 1976 by cutting trees and hedgerows during the breeding season. And more fundamentally, they are not the real moving parties here. Having bought the land in trust, some other party, likely the first respondent's father, is in the background making the decisions and the respondents are merely the public face of the operation. The alleged good faith and reasonableness of a third party who has stayed as much as he can in the shadows as far as the litigation is concerned (his affidavit

throws no light whatever on his role), can in no way be assumed. Furthermore, the first respondent is not unversed in her father's business activities, in that she holds directorships of four companies (para. 17 of appellant's affidavit of 8<sup>th</sup> June, 2018).

- (iv). It is said in submissions that the attitude of the planning authority "as not regarding the tree felling as being unauthorised development" is relevant and is claimed that "[i]n fact, the planning authority issued the notice pursuant to which much of the tree felling took place." Unfortunately, neither proposition stands up. It isn't correct to assert as established fact that the Council thought the tree-felling was not unauthorised development. All one can say is that they didn't take enforcement action. As noted above, that omission may have been for any number of reasons, and there is no evidence capable of being rationally interrogated as to why they didn't get involved. It's true that there have been High Court decisions where a Council's failure to act can be taken into account (*Grimes v. Punchestown Development Co. Ltd.* [2002] 1 I.L.R.M. 409, *Smyth v. Dan Morrissey Ireland Ltd.* [2012] IEHC 14, [2012] 1 JIC 2501 (Unreported, High Court, Hedigan J.), 25th January, 2012, *An Taisce v. McTigue Quarries Ltd.* [2016] IEHC 620, [2016] 11 JIC 0809, 2016 WJSC-HC 1447 (Unreported, High Court, Barrett J., 8<sup>th</sup> November, 2016), *Piggott v. Delaney* [2019] IEHC 789, [2019] 5 JIC 2109 (Unreported, High Court, 21<sup>st</sup> May, 2019), *per* Faherty J. at para. 290). However, any such High Court decisions to the extent that they place emphasis on the lack of action by a relevant local authority under s. 160 as a significant basis for refusing relief sought by a private applicant must now be read as superseded by the judgment of this court in *Bailey v. Kilvinane Windfarm Ltd.* [2016] IECA 92, [2016] 3 JIC 1602, 2016 WJSC-CA 1837

(Unreported, Court of Appeal, 16<sup>th</sup> March, 2016), where Hogan J. (Finlay Geoghegan and Irvine JJ. concurring), said that the attitude of the Council in not acting was “largely a neutral factor and it is certainly not one which could deprive an otherwise meritorious applicant of his or her entitlement to obtain s. 160 relief where the unauthorised status of a particular development had been clearly established”. If the Council’s lack of action were in practice a bar to an injunction or something close to such a bar, that would amount to a nullification of the clear statutory intention that private actors can invoke the court’s jurisdiction even if the Council doesn’t. Section 160 deliberately involves the general public in planning law by providing a mechanism which might be described as akin to crowdsourcing the enforcement function. That democratic approach reflects the crucial importance of environmental protection, provides a salutary check and balance to any failure to act by local authorities for whatever reasons, and reflects in a domestic law context the open-textured nature of the standing rules of European environmental law. Indeed not only by-standers, but commercial competitors of a respondent are entitled to seek planning injunctions (*e.g.*, *Warrenford Properties Ltd. v. TJX Ireland Ltd. trading as TK Maxx* [2010] IEHC 310 (Unreported, High Court, Finlay Geoghegan J., 30<sup>th</sup> July, 2010)). Hogan J.’s approach for this court in *Bailey* was recently followed in *Lagan Asphalt Ltd. v. Hanly Quarries Ltd.* [2021] IEHC 450, [2021] 7 JIC 0702 (Unreported, High Court, Simons J., 7<sup>th</sup> July, 2021) and *Dunne v. Guessford Ltd.* [2021] IEHC 583, [2021] 9 JIC 2101 (Unreported, High Court, Simons J., 21<sup>st</sup> September, 2021).

- (v). Further, it isn’t correct to assert that much of the felling took place under the Council’s notice. That only applied to one folio, and required a survey

followed by the removal of diseased trees. Mr. Mounsey's vague report and map couldn't possibly constitute the sort of survey that the notice requires, which would necessarily involve the preparation of a detailed document identifying specific diseased trees on a tree-by-tree basis. Even if I'm wrong about that, the notice only came mid-way through the tree clearing operation, in circumstances that haven't been clarified. The notice also provides no support for removal of trees merely at risk of disease. It is limited in effect to diseased trees on the specified folio during the 28-day period from the date of the notice. There is in short no evidence to support the notion that "much" of the tree-felling was done under this notice. The respondents haven't demonstrated which precise trees were actually dangerous and on any view the view that "the number of trees felled by the defendants was far in excess of the requirements of the Notice" (Mr. Costin's view cited at para. 59 of the judgment), must be correct.

- (vi). In the supplemental submissions, reliance is placed on the departmental licence as varied by the Forestry Appeals Committee. But again, the felling considered by the High Court wasn't conducted under this licence. And the licence only authorises thinning with replanting. According to the departmental submission on appeal it only relates to "unsuitable" trees. What has occurred has gone far beyond that. In addition, the licence doesn't resolve the planning issues for the reasons discussed.
- (vii). The respondents now also rely on the proposition that they were implementing the common duty of care and in particular duties under the Roads Act 1993 and Occupiers' Liability Act 1995. I address those matters in more detail below but suffice to say that the clear-felling went far beyond anything that could be

warranted by any of these duties, and certainly the respondents haven't proved that they limited themselves to the minimum pruning of diseased trees that could cause a clear and present public danger.

- (viii). It is suggested that the conduct of the appellant as having been found to have been "less than forthcoming" by the High Court is relevant. This complaint lies uncomfortably in the mouth of the respondents who had to correct the false sworn claim that the tree-felling occurred on foot of a statutory notice (affidavit of second respondent of 1<sup>st</sup> June, 2018 at para. 12). But even leaving aside that the trial judge thought his having failed to mention certain matters was not such as to deprive him of the entitlement to relief (para. 51 of her judgment), whatever shortcomings might be attributed to the appellant are outweighed by the conduct of the respondents in disregarding statutory codes and, in my view, their failure to be forthcoming in evidence on certain key matters relevant to the s. 160 proceedings. But in any event, remediation is a measure to protect the environment, not to punish or reward parties for litigation conduct.
- (ix). Finally, the respondents rely on the alleged "hardship on the respondents who could be forced to pay the substantial cost of procuring and planting the exact number and species of trees which the respondent seeks to have this Court compel them to plant." But hardship is too strong a term here, given that the moving party in the tree-felling operation is a substantial property developer with 37 other planning applications in Offaly alone and 11 company directorships. Sure, there is a cost, but if the respondents were worried about that they should have been more cautious before cutting down large number of mature trees. It is also argued that "[t]he respondents have already stated their intention to replant the woodlands to supplement natural regeneration", but I've

dealt with this above. The concept of “supplementing natural regeneration” rings hollow when one looks at the photographs of whole densely wooded areas bulldozed into earth. There’s not going to be much natural regeneration there to be “supplemented”. The alleged intention to replant is becoming rather stale at this stage in any event. In some cases that turn on their special facts, such as the High Court judgment in *Ferry*, hardship in terms of loss of employment was viewed as a factor, but at the general level to place strong weight on such factors over-emphasises the impact on the polluter or environmental wrongdoer over the impact on the environment.

**213.** All of these points need to be judged in the context of the factors going to the inherent shortcomings of the respondents’ affidavits which I have set out earlier in this judgment.

**214.** Even if I am wrong in not regarding the respondents’ points of being of great weight, any such points are massively outweighed by the significant counter-balancing factors that militate in favour of an order for full remediation, as follows:

- (i). The context is the need for a high level of environmental protection, as a principle of EU law (to use the terms of art. 37 of the EU Charter of Fundamental Rights, this being a context where a member state is implementing EU law on EIA (see art. 51(1)). As Simons J. put it in *Dunne* at para. 157, relying on Baker J. in *McCoy v. Shillelagh Quarries Ltd.* [2015] IEHC 838, [2015] 10 JIC 1608 (Unreported, High Court, Baker J., 16<sup>th</sup> October, 2015) at paras. 84 and 85, “the exercise of the court’s discretion under section 160 of the PDA 2000 should be informed by reference to EU environmental law”, This led to a conclusion at para. 165 that “having regard to the EU law issues identified above, it would not be a proper exercise of the court’s discretion to refuse relief”.

- (ii). As Hyland J. stated in *McElligott* at para. 103 in considering any discretion under s. 160, “In relation to the public interest, there is a strong public interest in upholding the integrity of the planning and development system.”
- (iii). Power J. recently emphasised this point for this court: “the interests of the public will be ‘ever present on the enforcing side’ and most likely ‘to stand first in the queue’ for consideration” (*Ferry*, para. 75).
- (iv). The starting point must be a presumption of full remediation. Also relevant are EU law principles that the polluter pays, which has a broad reach on a wide range of matters including remediation and costs: as to the latter see *per* Costello J. (Birmingham P. and Whelan J. concurring), in *Wicklow County Council v. O'Reilly; Brownfield Restoration Ireland Ltd. v. Wicklow County Council* [2019] IECA 257, [2019] 10 JIC 1607 (Unreported, Court of Appeal, 16<sup>th</sup> October, 2019), where this court expressed firm views on unauthorised environmental damage in a context where the High Court had ordered full remediation. Certainly there is nothing in that judgment to suggest that full remediation was inappropriate; quite the reverse.
- (v). The court has to have regard to the damage to the environment that would be caused by not ordering reinstatement, the impact on the protected structure and the heritage garden and the continued loss of symmetry if the forest is not replanted.
- (vi). Relevant under this heading is the failure to show compliance with the 1976 and 2014 Acts.
- (vii). Also relevant is the fact that the respondents haven’t actually replanted anything since the felling works ended in May, 2018.



- (viii). Even if one is to consider the respondents to be economically constrained, which I don't, there should be no free pass for environmental damage simply because one's means don't cover the situation. That really would create one law for the rich and another for the poor.
- (ix). Finally there is the point made in *Bailey v. Kilvinane Windfarm Ltd.* [2016] IECA 92, at para. 110, that over-reliance on discretion so as not to require remediation of environmental damage could be destructive of environmental law. In that spirit, the court required a detailed remediation plan in *Fowler v. Keegan Quarries Ltd.* [2020] IEHC 608, [2020] 11 JIC 2404 (Unreported, High Court, White J., 24<sup>th</sup> November, 2020). More generally, a transgressor-centred approach to remediation is inappropriate in the light of the evolving importance of environmental considerations, reinforced by measures such as the environmental crime directive (Directive 2008/99/EC of the European Parliament and of the Council of 19<sup>th</sup> November, 2008 on the protection of the environment through criminal law) and the regulation on timber logging (Regulation (EU) No. 995/2010 of the European Parliament and of the Council of 20<sup>th</sup> October, 2010 laying down the obligations of operators who place timber and timber products on the market). The EU-funded WWF document, EU Forestry Crime Initiative: EU summary of the gap analysis (2021) complains that in one of the regions studied, “[v]iolations of legislation are not systematically sanctioned and cases of forestry crime or illegal logging transferred by forest authorities to law enforcement agencies are either not being investigated, not considered by courts (possibly due to lack of reliable and actionable evidence to formulate the accusation), given too little importance or handled too leniently” (p. 13). Overall, the approach to environmental wrongs

and their remediation needs to move from a transgressor-centred viewpoint to an environment-centred viewpoint.

**215.** On balance it seems to me that the case for an order requiring full remediation is significantly stronger than that against, and accordingly I am of the view that the court should order such full remediation as sought by the appellant which would require an order to restore the lands concerned to their condition before March, 2018.

**216.** The question of what the works exactly were (and hence what precisely full remediation would look like), falls within Hogan J.'s category of matters within the peculiar knowledge of a party. It was the respondents that cut down the trees and they carry the burden of proving exactly what they did, a burden they certainly haven't discharged. Mr. Mounsey's vague reports and map don't come close. Accordingly, I would accept the appellant's version under this heading as not having been adequately rebutted (particularly where there is evidence that Mr. Costin spent an entire day on site and re-counted 247 tree stumps, 80 of which were stumps of large trees (affidavit of appellant of 8<sup>th</sup> June, 2018 at para. 24)). Insofar as there is conflict on this, I would resolve it against the party bearing the onus in that regard, being the respondents as this is within their peculiar knowledge, reinforced by the lack of detail and lack of satisfactory reply to the point. I would, therefore, grant the relief sought in the notice of motion, including as to particulars of which species of tree are required to be replanted and in what numbers, subject to what follows.

### **Post-hearing developments**

**217.** An order to restore the lands concerned to their condition before March, 2018 necessarily involves rectifying any further tree-felling since the commencement of the proceedings. However, it is worth recording that while judgment was reserved in this court, the respondents resumed tree-felling without prior notice to the appellant or for that matter the court.

**218.** On 29<sup>th</sup> March, 2021, the appellant’s solicitors wrote to the respondents to complain in that regard. The respondents’ solicitors replied on 30<sup>th</sup> March, 2021 stating that no undertaking had been furnished not to cut further trees. The matter was mentioned to the court on 16<sup>th</sup> April, 2021 and an undertaking was furnished at that point. The court has received two affidavits, one from the appellant’s solicitor and one from the second respondent. While it is not necessary to resolve all the issues raised by the exchange of affidavits, there are a number of distinctly unsatisfactory features arising from the respondents’ position.

**219.** The respondents seem to think it was appropriate for them to resume felling trees after judgment was reserved, without giving any advance indication of this to the court. I’m afraid that I don’t accept that. Such an approach, even if it was legally correct, which it wasn’t, doesn’t convey any great deference to the legal process. If anything, the removal of trees without notice to the court while an injunction is pending, especially in the context of a *fait-accompli*-type submission that the court’s discretion should be used against replanting even if the felling is unlawful, is suggestive of the sort of practice condemned by the Supreme Court in *Mahon v. Keena & Kennedy* [2009] IESC 78, [2010] 1 I.R. 336, of trying to create “facts on the ground” that would inappropriately constrain how the court might deal with a matter.

**220.** Secondly, para. 4 of the affidavit of Conor Doran states that when the matter was called over in this court on 9<sup>th</sup> October, 2020, counsel for the respondents was asked about an undertaking and said in response to a question from the court that no felling was taking place on the lands. This is contradicted by para. 11 of the affidavit of the second respondent to the effect that the court was informed that no further tree-felling had taken place. I don’t think it’s necessary to resolve this conflict (which presumably could be readily resolved anyway by reference to the DAR) because even assuming the latter wording is correct, that creates an impression that the *status quo* is being maintained. If felling was to resume contrary to such

an impression given to the court, there was an obligation to tell the court that before putting the change in position into operation.

**221.** Thirdly, the respondents gave no indication to the court at any stage, prior to being challenged about the post-hearing felling, that there was further work to be done on foot of the Council's notice. Thus, their claim to be merely implementing the notice rings very hollow.

**222.** Fourthly, the notice issued in 2018 is limited to requiring action to be taken within a period of 28 days, in respect of one folio only. The notion of purporting to rely on it 3 years later at a time when judgment is reserved in order to resume tree-felling is misconceived and inappropriate.

**223.** Fifthly, the respondents now attempt to introduce an entirely new concept which did not figure in the case to date, namely the alleged relevance of the Occupiers' Liability Act 1995. That doesn't affect the issue before the court which is whether unauthorised development has been, is being or will be carried out, because the 1995 Act doesn't allow a landowner to do something that would otherwise be unlawful simply because that action is taken in order to reduce her potential exposure to civil claims in her capacity as such an occupier.

**224.** The respondents doubled down on this position in supplementary written submissions, introducing yet further new legal bases for tree cutting as follows: "Section 70(2)(a) of the Roads Act 1993 obliges the owner or occupier of any land to take all reasonable steps to ensure that a tree, shrub, hedge, or other vegetation on the land is not a hazard to persons using the public road and that it does not interfere with the safe use of the public road" (para. 168). This submission continues at para. 169: "Section 76 of the Roads Act 1993 contains provisions requiring owners or occupiers of land adjacent to a public road to take all reasonable steps to ensure that water, soil or other material is prevented from flowing or falling onto a public road from his land". This submission is contextualised as follows: "The Respondent (*sic*) has been

highly stressed by the fact that dangerous roadside trees remain in place. He (*sic*) is conscious of the danger to the public and the risk that he could be held responsible if someone were injured by a tree falling onto the road” (para. 164).

**225.** But general statutory duties don’t displace the need to obtain planning permission where that is required. It seems unlikely after the large amount of trees clear-felled that there could be any remaining “dangerous roadside trees” and the respondents certainly haven’t proved there to be any. Even if there is some element of “danger” it hasn’t been shown to be immediate and pressing or anything other than medium-term and theoretical. I don’t need to deal with any form of legal defence of necessity here such as to obviate a clear and present danger of real harm, because no such issue arises on the proven facts. The Roads Act 1993 is unfortunately just another forensic lifeboat launched by the respondents in an endeavour to find some legal vehicle to support the wide-scale clear-felling of trees they carried out without any planning justification.

**226.** However, I should make clear that the post-hearing developments are not particularly relevant, other than incidentally because the order to restore the lands to their original condition before March, 2018 will necessarily require the respondents to rectify felling since then, whether before or during the proceedings (felling after the proceedings doesn’t arise because of the injunction being granted). That must include felling during the appellate stage of the proceedings. Any findings of law or fact on the issues in the appeal as set out in this judgment are independent of those post-hearing developments. Had the appellant not otherwise succeeded I would have looked to those developments to see whether they cast light on the intentions or credibility of the respondents, or as to the appropriateness of an order for remediation, but that isn’t necessary in view of my findings otherwise. The respondents haven’t got any new planning justification for the post-hearing felling that they didn’t try to

advance at the hearing, and their alleged concerns about the Roads Act 1993 and the Occupiers' Liability Act 1995 don't provide a planning justification.

**Proposed order**

**227.** For the reasons set out in the judgment, the order I propose is:

- (i). an order allowing the appeal and setting aside the High Court order dated 23<sup>rd</sup> June, 2020;
- (ii). an order under s. 160 of the 2000 Act restraining the respondents jointly and severally and any other person having notice of the order from carrying out any removal of trees, hedgerows or other vegetation from the lands the subject matter of the application or other unauthorised development (including carrying out any tree removals under the felling licence under the Forestry Act 2014 as varied by the Forestry Appeals Committee or the notice from Offaly County Council or purportedly for the purposes of the Roads Act 1993 or the Occupiers' Liability Act 1995 or otherwise) save under and in accordance with a grant of planning permission;
- (iii). an order under s. 160 of the 2000 Act requiring the respondents jointly and severally within 4 months from the perfection of the order to restore the lands concerned to their condition before the first felling of trees in March, 2018 including but not limited to:
  - (a). the replacement of 139 Ash trees, 66 Beech trees, 55 Oak trees, 28 Sycamore trees and 23 Hawthorn trees with the same species of tree of semi-mature or mature age and the replacement of hedgerows and other vegetation removed with vegetation of the same species and age; and

- (b). the replacement of all other trees and vegetation removed in 2021 with the same species and age of tree or vegetation;
- (iv). an order that the respondents should serve the appellant with detailed plans for remediation in accordance with this order within 6 weeks from the date of the order, and in the event of disagreement, that there be liberty to apply to this court;
- (v). a declaration that the works carried out by the respondents in or after March, 2018 were unauthorised development; and
- (vi). a declaration that the said works required evaluation by way of environmental impact assessment prior to their carrying out.

**Proposed provisional order as to costs**

**228.** Subject to any contrary argument, I would provisionally propose that costs should follow the event, that the no order as to costs in the High Court be set aside and that the appellant would have an order for costs in the High Court and this Court including reserved costs and the costs of written and supplementary submissions. I would also strongly urge the parties to resolve whatever differences they still have, particularly in the plenary proceedings now remitted to the Circuit Court. In an attempt to facilitate this, I would also provisionally propose that execution (as opposed to adjudication) on foot of the present costs order would be stayed until the determination of the plenary proceedings that have been remitted to the Circuit Court, in the hope of encouraging a global resolution of matters. If parties wish to propose any alternative order, they should do so by written submission within 14 days.

**Views of other members of the court**

**229.** I have had the advantage of reading in draft, and agree with, the judgment of Ní Raifeartaigh J. in which she expresses her agreement with this judgment. As the judgment is

being delivered electronically, Pilkington J. authorises me to say that she also agrees with this judgment.