Neutral Citation Number: [2013] IEHC 255

THE HIGH COURT

IN THE MATTER OF AN APPLICATION UNDER SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000,

[2011 No. 26 CA]

BETWEEN

THE COUNTY COUNCIL OF THE COUNTY OF WICKLOW

PLAINTIFF

AND

KATIE (OTHERWISE KATHERINE) FORTUNE (NO. 2)

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on 6th June, 2013

1. To those unversed to the sometimes haphazard manner by which legal doctrine and jurisprudence can evolve, it may seem remarkable that a Supreme Court decision concerning the power of Gardaí to issue search warrants in respect of a private dwelling (*Damache v. Director of Public Prosecutions* [2012] IESC 12, [2012] 2 I.L.R.M. 153) should have potentially far-reaching consequences in areas of civil law far removed from the criminal sphere, such as planning law. Yet perhaps it required a decision of this magnitude to illustrate that which in itself ought to have been obvious over the last 75 years or so, namely, that Article 40.5 of the Constitution ensures that the dwelling must be safeguarded in an extensive manner as befits a free and democratic society.

2. As Hardiman J. observed in one of the first post-Damache decisions, namely, *The People v. O'Brien* [2012] IECCA 68:

> "….Article 40.5 by guaranteeing the "inviolability" of the dwelling reflects long standing constitutional traditions in both common law and civil law jurisdictions, features of which were stressed in both Damache and Cunningham respectively. This constitutional guarantee presupposes that in a free society the dwelling is set apart as a place of repose from the cares of the world. In so doing, Article 40.5 complements and re-inforces other constitutional guarantees and values, such as assuring the dignity of the individual (as per the Preamble to the Constitution), the protection of the person (Article 40.3.2), the protection of family life (Article 41) and the education and protection of children (Article 42). Article 40.5 thereby assures the citizen that his or her privacy, person and security will be protected against all comers, save in the exceptional circumstances presupposed by the saver to this guarantee."

3. As I pointed out in my first judgment in this matter, *Wicklow County Council v. Fortune (No.1)* [2012] IEHC 406, these developments from *Damache* onwards compel us to conduct a complete re-appraisal of even familiar features of the legal system - including the operation of the planning laws - insofar as they impact on the private dwelling. This is the first case in which Article 40.5 has been relied on in a case of this kind, as remarkable as it may seem, the issue has never previously been *raised* – much less *decided* – in any application brought under s.160 of the 2000 Act in order to seek the demolition of a dwelling for non-compliance with the planning laws.

4. In that respect, the test previously articulated in cases such as *Morris v. Garvey* [1983] I.R. 319 (which, of course, concerned the precursor to the present s. 160, namely, s. 27 of the Local Government (Planning and Development) Act 1976) has accordingly to be recalibrated in the light of *Damache* and, indeed, the modern case-law regarding proportionality and the protection of constitutional rights..

5. It must also be recalled that the making of a s.160 order would have far-reaching implications for the property rights of the owner of the property, as she would in effect be required by judicial order to demolish her own house (albeit one which was illegally constructed) without compensation. It is manifest from a series of decisions ranging from *Heaney v. Ireland* [1994] 3 I.R. 590 to *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701 that the exercise of any such judicial power would also have to satisfy a proportionality test, not least given that the making of such an order would, at least, in the context of a case such as the present one significantly affect constitutional rights, not least the inviolability of the dwelling (Article 40.5) and the protection of property (Article 40.3.2). Of course, the proportionality at issue here is not simply proportionality in the narrow sense understood by Henchy J. in *Morris v. Garvey* of whether the breach of the planning laws is so insignificant that the demolition of the property would represent an excessive response to such a technical infraction, but rather proportionality in a broader sense of that term, namely, the whether, in the circumstances of any given case, the policy objectives of legislative compliance and environmental protection can be said to justify such a far-reaching interference with property rights and the inviolability of the dwelling.

6. This brings us then to the principal issue which arises at this stage of this appeal from the Circuit Court, namely, under what circumstances should a court order the demolition of an unauthorised dwelling pursuant to s. 160 of the Planning and Development Act 2000 ("the 2000 Act")?

7. The basic facts of this case are set out in my first judgment in *Fortune (No.1)*. In that case I found that the defendant had at some stage in the last 13 to 14 years constructed a small timber frame chalet of approximately 70sqm in size in a wooded area of high natural beauty near Lough Dan, County Wicklow. While this is her only home, it is nonetheless important to stress that this structure is entirely unlawful since in my first judgment I found that it had been constructed without the necessary planning permission. In the course of that judgment I also ruled that this application by Wicklow County Council pursuant to s. 160 of the 2000 Act was not time barred by reason of the operation of s. 160(6)(a)(i) of the 2000 Act.

8. In the course of preparing this judgment I had the occasion to visit the site. This was done with the consent of the parties. The site itself is close to a country road which is often used by hill-walkers on their way to Lough Dan and a major scout centre lies about

1km. distant. The site is completely hidden and obscured from the road and it is accessed only by traveling up a unpaved country lane for perhaps some 200 metres and then turning off that lane. A deep forest lies on the other side of the lane. While this to some degree is a matter of subjective observation, I found that the chalet was tastefully constructed. The chalet certainly does not impinge on the amenities or aspect of any other landowner or local inhabitant.

9. The central part of the defendant's case was that the demolition of the applicant's dwelling would compromise her constitutional guarantee under Article 40.5 of the Constitution safeguarding the inviolability of the dwelling. In that earlier judgment I rejected the argument that Article 40.5 conferred a complete immunity from legal action of this nature in the manner which had been contended by the defendant. In that regard I observed:-

> "The Constitution was not intended to bring about a situation where someone could profit from their own deliberate and conscious wrongful actions by asserting an immunity from legal action appropriate enforcement by invoking Article 40.5."

10. I then proceeded on to posit the following test:-

> "At the same time, Article 40.5 affords real protection which the courts must safeguard by word and deed. Insofar as Article 40.5 speaks of 'inviolability', the drafters must be taken to have intended to convey through the use of rhetorical and philosophically inspired language drawn…from the European constitutional tradition so that the dwelling should enjoy the highest possible level of legal protection which might realistically be afforded in a modern society. In a planning context, this does not mean that the courts cannot order the demolition of an unauthorised dwelling because it is 'inviolable'. It rather means that the courts should not exercise the s. 160 jurisdiction in such a manner as to require the demolition of such a dwelling unless the necessity for this step is objectively justified and…the case for such a drastic step is convincingly established."

11. I then concluding by observing:-

> "In this regard, it is not simply enough for the applicant council to show that – as, indeed, it really has – that the structure is unauthorised or that the householder has drawn these difficulties upon herself by proceeding to construct the dwelling without planning permission. It will be necessary to go further and show, for example, that the continued occupation and retention of the dwelling would be so manifestly at odds with important public policy objectives that demolition was the only fair, realistic and proportionate response. This might be especially so if, for example, the dwelling jeopardised or threatened the rights or amenities of others or visibly detract from an area of high natural beauty or present a real and immediate traffic or fire hazard or the structure in question so manifestly violated the appropriate development plan that the home owner had no realistic prospect of ever securing permission in respect of the dwelling."

Given the novelty of the argument based on Article 40.5 in this particular context, I then decided to adjourn the proceedings to enable the parties to make further submissions and to introduce such further evidence as they saw fit. The parties have accordingly availed of this opportunity and this judgment then addresses the distinct question of whether the court should now grant an order compelling the defendant to remove the unauthorised dwelling in the light of the principles which had been set out in that first judgment.

12. Wicklow County Council have advanced essentially three arguments as to why it would be inappropriate for this Court not to grant the order sought. First, it is said that failure to make such an order would undermine the effective protection of the environment provided for under the 2000 Act and, in essence, simultaneously reward Ms. Fortune for having unlawfully constructed this dwelling house. Second, it is said that the very fact that Ms. Fortune could continue to live in this unauthorised dwelling would itself serve as a precedent in terms of future applications for planning permission in the general vicinity, thus undermining the strict planning regime which obtains in this area of great scenic beauty. Third, it is contended that a failure to grant such a relief would compromise the status of the Wicklow Mountains candidate special area of conservation which is immediately adjoining to Ms. Fortune's site. We can now proceed to examine these individual arguments in order to examine whether, individually or collectively, they satisfy the standard which I ventured to articulate in *Fortune (No.1)*.

Undermining the effective protection of the environment

13. The Council contends that in the event that no injunction were to be granted that Ms. Fortune would effectively be rewarded for her disregard of the planning laws and that the effective protection of the environment would be compromised as a result. While this is an important and weighty consideration, it is important to bear in mind that I have already declared Ms. Fortune's chalet to be an unauthorised structure. For as long as it remains unauthorised, the property is effectively unsaleable and cannot be used as security for any lending purposes. This in itself should operate as a deterrent to those who would otherwise wish to break the law.

The precedential status of the unauthorised dwelling

14. So far as this ground is concerned, counsel for the Council, Mr. Connolly S.C., points to the fact that previous decisions of a planning authority or that of An Bord Pleanála may be relevant to subsequent planning applications. There is no doubt but that in practice the fact that planning permission has been granted in respect of a particular development is a potentially relevant consideration so far as future planning decisions are concerned. This is reinforced by s. 37(2)(b)(iv) of the 2000 Act which permits An Bord Pleanála to overturn a decision of the planning authority to refuse an application for planning permission on the grounds that a proposed development materially contravenes the development plan where the Board considers permission for the proposed development should be granted having regard "to the pattern of development, and permissions granted, in the area since the making of the development plan."

15. But the reference here is to "pattern of development", so that the context refers to the manner in which the local area has evolved since the making of the development plan. This is re-inforced by the use of the words "permissions granted", so the entire context presupposes that the Board must have regard only to developments that have *lawfully* taken place since the making of the development plan which would then justify the Board departing from the terms of that plan. Ms. Fortune's chalet does not fit into this category, since it was unlawfully erected and it is plain that when considering any future application for planning permission by reference to s. 37(2)(b)(iv) of the 2000 Act the Board could not properly pay any regard to the existence of this chalet, at least so far as the operation of this specific sub-section is concerned.

16. In this context, Mr. Connolly S.C. also laid some emphasis on the decision of His Honour Judge Gilbart Q.C. in *McCarthy v. Secretary of State for Communities and Local Government* [2006] E.W.H.C. 3287:-

> "Mr Richards and Mr Willers said that a distinction should be drawn between other lawful development and other unlawful development, on the basis that steps can be taken to remove the latter, and that it would be wrong to regard the prospect of unlawful development as a material consideration in deciding whether to grant a permission.
>
> I do not accept that argument. The reason why the setting of a precedent is a potentially material consideration is because it may lead to events occurring which have effects which are of significance in planning terms, such as an effect on the appearance of the area, on its amenities, on the use of facilities, on highway safety or on other planning considerations. If such effects would be harmful, the decision maker is entitled to take them into account as material considerations, which could, in appropriate cases, justify refusal. Why must it be any different if such development were unauthorised? Unauthorised development can itself affect the appearance of an area, or the use of the local road network, or in the case of unauthorised residential development, the provision or take up of services in an area. It would be illogical if such potential consequences were prevented from being material even if the decision maker had concluded that such events and effects were likely. Of course there may be arguments to be made to the decision maker on whether the same weight should be attached to the potential for unauthorised development, because steps can be taken to seek its removal, but that is not to deprive it of potential relevance as a material consideration, and matters of weight are for the decision maker and not for this Court.
>
> The principle is a potentially important one. Mr Richards and Mr Willers argue that the unlawful acts of others cannot be regarded as a consequence of a grant of permission, so that their being made more likely would be an immaterial consideration. If they are right, an Inspector or planning authority would be prevented (for example) from rejecting a retail service access arrangement whose defect was that it would encourage illegal parking, or from imposing a condition on a quarrying consent to take steps to erect fences or barriers to prevent others from fly-tipping. I regard that as not only unrealistic, but also quite out of step with the everyday experience of development control.
>
> In my judgement the Secretary of State and Inspector were both quite entitled to consider whether the grant of a permission would lead to the attraction of more caravans to unauthorised plots within Smithy Fen, and if so whether the consequences would cause harm, and what weight they should give that factor. I am satisfied also that the Inspector and Secretary of State had material before them to permit a finding that the grant of permission for one or more of the plots applied for would have such effects."

17. If I may respectfully say so, I think that Mr. Connolly S.C. has read too much into that decision. It merely decides that a planning authority is entitled to have regard to the fact that the grant of permission would be likely to attract a higher degree of unauthorised use from third parties. That is not the same as saying that the fact that one dwelling has been constructed in an unauthorised fashion (and, moreover, has been judicially declared to be unauthorised) is a relevant factor in determining whether another should lawfully obtain planning permission.

18. The evidence before me suggests that there may well be some five or six other unauthorised developments situate in close proximity to the defendant. It must be stressed, however, that the persons who are living in what are said to be unauthorised developments are not before the court. They would have to be heard on the question as to whether their own inidvidual house was unauthorised. It might also be the case that even if that had been the case at some stage they could plead the seven year limitation period in order to resist any enforcement action.

19. The Council's acting senior planner, Ms. Walsh, makes the point in her affidavit that different considerations might well apply to the presence of a small cluster of unauthorised developments, the existence of which might present a greater environmental danger as distinct from the case of one single unauthorised dwelling. That is undoubtedly so. But I am concerned solely with the case of Ms. Fortune alone and I must consider this case on its own individual merits. Different considerations may well apply to other developments, depending, of course, on their individual circumstances of which we have presently but imperfect knowledge.

Special area of conservation

20. There is no doubt but that Ms. Fortune's dwelling is situate in an area of outstanding natural beauty beloved of hill-walkers in the Wicklow uplands. The chalet is, as I have indicated, only a few minutes walk from a mountain road. If one continues on this road for perhaps another 2km, it leads to a hiking path from which one can first gaze down upon Lough Dan and across then to Luggala with Djouce Mountain further in the distance. It is not surprising that this area enjoys the highest level of protection under the Wicklow County Development Plan.

21. It would appear from the affidavit of Ms. Walsh that the chalet lies about 240m distant from the boundaries of a Natura 2000 protected site which has been designated as such under the Habitats Directive. It would seem equally clear that were Ms. Fortune to apply afresh for planning permission, the planning authority would have to carry out a screening for an appropriate assessment of the proposal to assess if the proposed development "individually or in combination with another plan or project" is likely to have a significant effect on the relevant European site: see s. 177U(1) of the 2000 Act (as amended). It is accordingly likely that in the event that such an application was made that a screening report would have to be carried out, so that a detailed assessment of whether the project or structure upon the Natura 2000 site.

22. All of this is doubtless true, yet much of this argument remains purely theoretical. Ms. Fortune has been in occupation on the site itself since 1999 and the chalet has been constructed at some point thereafter, even if as I pointed out in the first judgment, Ms. Fortune has not actually told the court forward the precise dates on which this happened. At all events, it is clear that the chalet has been in existence for perhaps the best part of a decade. Yet no concrete evidence has been advanced by the Council to show that her occupation of the dwelling has had or is likely to have any appreciable effect on the Natura 2000 site.

Effluent treatment system

23. It would appear that Ms. Fortune installed an effluent system in 2006 with a reed bed and a septic tank. According to an affidavit sworn by Mr. Paul Brophy, a senior planning official within the Council, this system was installed without the benefit of planning permission and it is seriously defective, albeit that it was certified by the company which installed it. In passing it should be observed that planning permission for this effluent treatment system was refused by the Council in August 2007 on the ground that there was no evidence that the site was "suitable for septic tank effluent percolation". This refusal was part of a series of applications for retention permission brought by Ms. Fortune (which included an application in respect of the chalet). It is of some interest that on the second occasion that she was refused in March 2008 this ground was not mentioned.

24. At all events, the objections raised by Mr. Brophy can scarcely be seriously disputed. Indeed, a report prepared for Ms. Fortune by O'Sullivan Scientific Ltd. in January 2008 acknowledged that this system as installed did not meet with the (then existing)

Environmental Protection Agency guidelines. This was in part because the reed bed should be at least 40 sqm in dimension rather than the existing 25m², the use of a meshed material beneath the gravel rather than a liner to contain the effluent and the absence of soil polishing filter. O'Sullivan Scientific concluded that provided that the system was "constructed properly, it will work well regardless of house occupancy".

25. Mr. Brophy expressed concern that due to these deficiencies:

> "…the likelihood is that groundwater will flood any percolation area or filter system…or cause the septic tank and distribution box which feeds effluent to the percolation area to float. This will result in untreated effluent entering the groundwater directly causing contamination."

26. The operation of this effluent treatment system is external to the dwelling itself and is not, as such, comprised within the scope of the constitutional guarantee itself. In these circumstances, the Council are entitled to an order (which would have to be made subject to a suitable stay) requiring Ms. Fortune to operate the effluent system in a manner compatible with existing EPA guidelines. I would invite counsel to address the form of order best appropriate to achieving this objective.

Conclusions

27. It is at this juncture that we can return to the fundamental question, namely, has the case for an order requiring the demolition of the chalet been convincingly established? To my mind, it has not. If I might venture to re-state the test I posed at the conclusion of my judgment in *Fortune (No. 1):-*

> "It would be necessary to go further and show, for example, that the continued occupation and retention of the dwelling would be so manifestly at odds with important public policy objectives that demolition was the only fair, realistic and proportionate response. This might be especially so if, for example, the dwelling jeopardised or threatened the rights or amenities of others or visibly detracted from an area of high natural beauty or presented a real and immediate traffic or fire hazard or the structure in question so manifestly violated the appropriate development plan that the homeowner had no realistic prospect of ever securing permission in respect of the dwelling."

28. It is plain from what I have already narrated that Ms. Fortune's chalet does not jeopardise or threaten the rights or amenities of other parties. While it is located close to an area of outstanding natural beauty, it cannot be said that the chalet, entirely hidden away from view as it is, detracts from any of the great vistas which are one of the glories of the Wicklow uplands. It is true that the Council refused retention permission on the ground of the "narrow width and the poor alignment and unsurfaced nature of the road network" and this ground of objection was upheld by the Board on appeal, it cannot nonetheless be said that the entrance presents "a real and immediate traffic…hazard" in the sense envisaged in my first judgment. I must stress here that I am not here for one instant questioning the conclusions of the Board in this regard. That is not my function and I could not, in any event, claim to have the necessary expertise to make such an assessment.

29. Yet in evaluating whether the case for demolition has been convincingly established, some measure of realism must also enter the equation. Even though the lane leading to the site (which I found to be just over 4m. wide) was unsurfaced, it was otherwise in good condition. The volume of traffic using the lane is obviously small. The actual entrance to Ms. Fortune's site was nevertheless some 12m. wide and the view of the driver of any vehicle entering or exiting the site was not obscured in any significant way in either direction.

30. While the planning specialist could doubtless discern the existence of a potential traffic hazard, the same could be said of virtually every country road and *botharín* in the entire county of Wicklow. If this were the test, the same objection could be levelled in respect of virtually every rural dweller in the county, nearly all of whose dwellings lead onto small country roads and lanes, many of them with even less room for manoeuvre and more restricted sight lines than I could discern in the present case. In these circumstances, one does not need to be a planning or traffic specialist to see that the site does not present a real and immediate traffic hazard in the sense which I had envisaged in the first judgment.

31. As, moreover, I have already indicated, the Council's argument based on moral hazard and rewarding those who take the law into their own hands is diluted by the fact that I have already declared the structure to be unauthorised. This, in itself, should act as a deterrent to those who might otherwise take the law into their own hands. Nor is the argument based on precedent compelling, since as I have pointed out, the planning authorities could not be obliged to take account of unauthorised structures in assessing whether to grant planning permission to third parties seeking to develop in the locality. Nor has any compelling evidence been advanced that the site would compromise the protection of the Natura 2000 site.

32. None of this is to suggest that the arguments advanced by the Council are not important and weighty. In other cases, arguments of this kind might well prevail. But in the end I cannot ignore the solemn words of Article 40.5 which this Court is committed to uphold. The making of a s. 160 order on the particular facts of the present case would represent a drastic interference with the inviolability of the dwelling and with Ms. Fortune's property rights. If I may re-echo that which I already said in *Fortune (No.1),* such an order could only be justified if compelling evidence requiring such a step had been advanced by the Council. As, for the reasons I have ventured to set out, I am not satisfied that such compelling evidence has been advanced, I will refuse to make the order requiring the demolition of the chalet. I will, however, make an order requiring Ms. Fortune to operate the effluent system which is external to the dwelling in a manner compatible with existing EPA guidelines.