THE COURT OF APPEAL

2015 No. 214

Peart J.
Hogan J.
Cregan J.

BETWEEN/

KILLROSS PROPERTIES LTD.

PLAINTIFFS/RESPONDENTS

- AND -

ELECTRICITY SUPPLY BOARD

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 11th day of July 2016

1. Where a planning authority or, as the case may be, An Bord Pleanála, determines pursuant to s. 5 of the Planning and Development Act 2000 ("the 2000 Act") that certain works constitute exempted development and, accordingly, do not require planning permission, is it open to this Court to in the course of an application to restrain unauthorised development pursuant to s. 160 of the 2000 Act to arrive at a different conclusion? This, in essence, is the important legal issue which arises on this appeal from the decision of Hedigan J. in the High Court delivered on 28th August 2014.

2. The background to these proceedings is as follows: the appellant, Killross Properties Ltd. ("Killross"), seeks an order pursuant to s. 160 of the 2000 Act restraining what it contends is unauthorised development on the part of the respondent, namely, the Electricity Supply Board. The development in question consisted of the entry by the respondents onto lands of Killross for the purposes of upgrading certain pre-existing electricity lines.

3. In the motion seeking s. 160 relief, Killross contends that the upgrading of the capacity of six electricity lines in the general East Kildare area amounts to unauthorised development for which separate planning permission is required. These electricity lines were, however, already situated on these lands at the time they were acquired by Killross in 2007. The main object of these works was to replace (or to "restring") existing overhead lines with higher conducting capacity. These works do not affect the voltage which remains at 110kV. The existing pylons were, it is true, replaced in some cases. But where this happened the lower portions and the foundations of the pylons remained unaltered, although admittedly in some instances the pylons themselves were moved to immediately adjacent locations.

4. A critical fact, however, is that all of the works which are the subject of the s. 160 application were the subject of references to the relevant planning authority or, as the case may be, An Bord Pleanála. Three of these six references had been instigated either by Killross or by its agents. It had, accordingly, been determined by either the relevant planning authority or An Bord Pleanála (as the case may be) in all such six such references at the time of the commencement of the s. 160 proceedings that the developments in question constituted exempted development. Three of these determinations were challenged in subsequent judicial review proceedings heard by Hedigan J. in conjunction with the present s. 160 application. He rejected the challenge to the validity of those determinations and did not grant leave to the applicant to appeal in respect of these three judicial review applications to this Court pursuant to s. 50 of the 2000 Act.

The individual s. 5 determinations
5. The six individual s. 5 determinations can be summarised as follows:

Reference FS5W/08/2012 (Corduff-Ryebrook, Fingal)
6. Fingal County Council issued a s. 5 determination on 6th November 2012 to the effect that the renewing and altering of the portion of the 110kV overhead electricity transmission line within its administrative area was exempted development for the purposes of s. 4(1)(g) and s. 4(1)(h) of the 2000 Act. This decision was not referred to the Board and the time for challenge to the validity of such decision in judicial review proceedings has expired.

Reference ED/00439 (Corduff-Ryebrook. Kildare)
7. Kildare County Council issued a s. 5 determination on 1st March 2013 to the effect that the portion of the proposed renewing and altering of the existing Corduff/Ryebrook 110kV overhead electricity transmission line situated with the administrative area of Kildare County Council, constitutes development and is exempted development under section 4(1)(g) and (h) of the 2000 Act. This decision was not referred to the Board for its review and is outside the time for any challenge by way of judicial review.

Reference ED/00440 (Maynooth-Ryebrook)
8. Kildare County Council issued a s. 5 determination on 1st March 2013 to the effect that the proposed renewing and altering of the existing Maynooth-Ryebrook 110kV overhead electricity transmission line is development and is exempted development under s. 4(1)(g) and s. 4(1)(h) of the 2000 Act. Following an appeal by Rossmore Properties Ltd. (a sister company of the applicant), An Bord Pleanala decided on 25th April 2014 that the development was exempted development under s. 4(1)(g) of the 2000 Act and that neither an Appropriate Assessment nor an Environmental Impact Assessment was required. Although the validity of the this reference was subsequently challenged in judicial review proceedings, this was rejected by Hedigan J. As I have indicated, no leave to appeal to this Court was granted by the High Court pursuant to s. 50 of the 2000 Act.

Reference ED/00441 (Rinawade Tee)
9. Kildare County Council issued a s. 5 determination on 1st. March 2013 to the effect that the renewing and altering of the existing equipment within Rinawade 110kV substation, and the renewing and associated alternation of the existing busbar equipment along the Rinawade Tee 110kV overhead line, is development and is exempted development under s. 4(1)(g) and s. 4(|)(h) of the 2000 Act. This decision was not referred to the Board for its review and the time for challenge by way of judicial review has long since expired.

Reference ED/00451 (Maynooth-Ryebrook)
10. On 24th April 2014 the Board determined pursuant to s. 5 that the renewal and alteration of the Maynooth-Ryebrook 110kV was exempted development under s. 4(1)(g) of the 2000 Act and that neither an Appropriate Assessment nor an Environmental Impact Assessment was required. A challenge to the validity of this determination was refused by Hedigan J. in the judicial review proceedings. Again, no leave to appeal to this Court pursuant to s. 50 of the 2000 Act was granted by the High Court.

Reference ED/00464 (Temporary Line Diversion)
11. This was an application for a determination made by Mr. Lar McKenna on behalf of the appellant to Kildare County Council relating to the status of the proposed 0.5 kilometre temporary diversion (or by-pass) line on double wood polesets in connection with Maynooth-Ryebrook 110kV line update. This matter was subsequently referred to the Board. On 25th April 2014, the Board decided that the development was exempted development under Class 16 of Part 1 of Schedule 2 of the Planning and Development Regulations 2001 (as amended) and that neither an Appropriate Assessment nor an Environmental Impact Assessment was required. A challenge to the validity of this determination was rejected by Hedigan J. in the judicial review proceedings. No leave to appeal to this Court pursuant to s. 50 of the 2000 Act was granted by the High Court.

The effect of the failure to grant leave to appeal to this Court in the judicial review proceedings
12. As we have just seen, three of these s. 5 references had been challenged in judicial review proceedings before Hedigan J. (who heard these applications in conjunction with the s. 160 proceedings) and three other references were never the subject of a judicial review application. It is important to note that Hedigan J. rejected the challenge in the judicial review proceedings to the vires of the three s. 5 references. He further refused to grant leave to appeal to this Court pursuant to s. 50 of the Planning and Development Act 2000. In effect, therefore, the position so far as the appeal to this Court is concerned is that the determinations in all six s. 5 references must be presumed to be valid and unimpeachable.

13. The logical corollary of that decision is that the planning authorities have determined in the s. 5 references that the developments in question are exempted development and do not need planning permission. This, then, squarely presents the issue as to whether this Court can determine in s. 160 proceedings that the developments are unauthorised. In order to answer to that question, it is necessary first to consider the jurisdiction of this Court under s. 160 in relation to unauthorised developments. Before doing so, it may be convenient to summarise the decision of Hedigan J..

The decision of the High Court
14. In his judgment Hedigan J. took the view that the High Court could not in s. 160 proceedings determine matters which had in substance already been determined in the s. 5 references. He noted first that s. 50(2) of the 2000 Act had provided that challenges to the validity of decisions of planning authorities or the Board:

> "may not be questioned as to their validity save by way of judicial review. This was a deliberate decision by the Oireachtas to withdraw a then existing right of appeal to the High Court from planning decisions."

15. Hedigan J. then went on to consider the impact of s. 5 of the 2000 Act and then concluded:

> "The inescapable conclusion from the above is that this Court has no jurisdiction to entertain the s. 160 proceedings brought herein, because to do so would be to allow an impermissible collateral challenge to the decisions by Fingal County Council, Kildare County Council and An Bord Pleanála that the works in question are exempt development."

16. The appellant was, of course, entitled to appeal this aspect of the decision of the High Court as of right to this Court and no leave of the Court pursuant to s. 50 of the 2000 Act was required for this purpose. To repeat, therefore, the issue presented squarely on this appeal is that the extent to which the High Court can – so to speak – look behind a s. 5 determination in the course of exercising its s. 160 jurisdiction. It is to that issue to which we can now turn.

The jurisdiction of the High Court in s. 160 proceedings
17. One of the difficulties in this general area is that at the core of our planning laws there are a variety of different enforcement mechanisms, each of which gives rise to the potential for overlap, anomaly and even confusion in terms of the different roles of the planners and the courts. Nowhere is this more evident than in the case of the inter-action of the s. 5 procedure on the one hand and the s. 160 statutory injunction procedure on the other. Section 160 vests the courts with a jurisdiction to restrain "unauthorised" development, while s. 5 enables the planning authority (or, as the case may be, An Bord Pleanála) to determine "what, in any particular case, is or is not development or is or is not exempted development…."

18. In some ways, many of the difficulties I am about to describe have their origins in the broad definition of the concept of development in s. 3 of the 2000 Act: "development" is defined as meaning the carrying out of works or the making of any material change in the use of any structures or other land. If s. 3 stood alone, then even minor works and, adopting Simons's graphic phrase, some "unexceptionable changes of use" would all require planning permission: see *Planning and Development Law* (Dublin, 2007) (2nd ed.) at 92.

19. Section 4 of the 2000 Act therefore allows for certain categories of exempted development, of which, perhaps, s. 4(g) is the most relevant in the present context, permitting as it does the "repairing, renewing, altering or removing…cables, overheard wires, or other apparatus…." Section 4(h) is also of some importance since it provides that structural repairs and other maintenance work are exempt provided that there is no material change in the external appearance of the structure as a result. Both s. 4(g) and, in some instances, s. 4(h), were invoked by the planning authorities and, as the case may be, by the Board in the course of the various s. 5 determinations.

20. The essential difficulty which is presented here is that the concepts of development, exempted development and unauthorised use are all, to some extent, inter-related. It is true that, as Finlay Geoghegan J. held in *Roadstone Provinces Ltd. v. An Bord Pleanála* [2008] IEHC 210, the Board has no jurisdiction on a s. 5 reference to determine whether or not there was unauthorised development. Yet if the Board (or, as the case may be, a planning authority) rules that a particular development is not exempted development, the logical corollary of that decision is that planning permission is required. In practice, there is often only a very slender line between ruling that a development is not exempted development since this will generally – perhaps, even, invariably – imply that the development is unauthorised on the one hand and a finding that a particular development is unauthorised on the other. Conversely, where (as here) the Board (or the planning authority) rules that the development is exempt, this necessarily implies that the development is lawful from a planning perspective since, by definition, it has been determined that no planning permission is required.

21. This brings us to the question of whether the Court enjoys a jurisdiction in s. 160 proceedings to declare that a particular development is unauthorised even where the development in question has been ruled to be an exempted development following a s. 5

reference. As I pointed out in a judgment delivered by me as a judge of the High Court in *Wicklow C.C. v. Fortune (No.3)* [2013] IEHC 397, the resolution of this question is a difficult one and one which is not straightforward.

22. The starting point of any analysis of this question may be found in the judgment of the Supreme Court in *Grianán an Aileach Interpretative Centre Co. Ltd. v. Donegal County Council* [2004] IESC 41, [2004] 2 I.R. 625. In that case the High Court had originally granted a declaration that the holding of certain evening social events at an interpretative centre did not constitute a material change of use and represented exempted development. The Supreme Court, however, set aside this decision, holding that the courts enjoyed no free-standing jurisdiction to grant a declaration in respect of what user did or did not constitute exempted development. As Keane C.J. explained ([2004] 2 I.R. 625, 638-639):

> "Thus, in the present case, if the jurisdiction of the planning authority or An Bord Pleanála under s. 5 were invoked and they were invited to determine whether the uses in controversy were within the uses contemplated by the planning permission or constituted a material change of use for which a new planning permission would be required, either of those bodies might find itself in a position where it could not exercise its statutory jurisdiction without finding itself in conflict with a determination by the High Court. No doubt a person carrying out a development which he claims is not a material change of use is not obliged to refer the question to the planning authority or An Bord Pleanála and may resist enforcement proceedings subsequently brought against him by the planning authority on the ground that permission was not required. In that event, if the enforcement proceedings are brought in the High Court, that court may undoubtedly find itself having to determine whether there has been a material change of use or whether a development is sanctioned by an existing planning permission, as happened in *O'Connor v. Kerry County Council* [1988] I.L.R.M. 660. But for the High Court to determine an issue of that nature, as though it were the planning authority or An Bord Pleanála, in proceedings such as the present would seem to me to create the danger of overlapping and unworkable jurisdictions referred to by Henchy J. [in *Tormey v. Ireland* [1985] I.R. 289].
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> The decision of the House of Lords in *Pyx Granite Company Ltd. v. Minister of Housing and Local Government* is, in my view, distinguishable from the present case. That was a case in which a company engaged in quarrying claimed to be entitled to carry it out under the provisions of a private and local Act of Parliament, *i.e.*, the Malvern Hills Act, 1924. Since the relevant legislation in England provided that planning permission was not required for development authorised by local or private Acts, the company further claimed that they were not obliged to invoke the procedure under the planning legislation whereby the Minister of Housing and Local Government could determine whether planning permission was required. The Minister raised a preliminary objection to the court determining the company's claim, on the ground that its jurisdiction had been ousted by the provisions of the planning legislation entitling the Minister to decide whether planning permission was required. That submission was rejected by the House of Lords on the ground that the right of a person to have recourse to the courts for a determination of his rights was not to be excluded except by clear words.
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> That, however, was a case in which the company claimed that they were not in any way affected by the provisions of the planning code, having regard to the provisions of the local and private Act of Parliament authorising their operations. One could well understand why that was thought to be an issue which could be resolved only by the courts. No such considerations arise in this case, where the plaintiffs are admittedly required to obtain planning permission for any operations which constitute "development" within the meaning of the 2000 Act and are not exempted development.
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> In the present case, the trial judge, quite understandably, was concerned to resolve issues which had been brought before the High Court in a manner which was fair to both the planning authority and the public interest which it represents on the one hand and the legitimate interests of the plaintiffs on the other hand. This resulted, however, in the granting of a declaration in a form which had not been sought by either party and which clearly creates further difficulties. Can it be said that the prohibition on "weddings"(presumably intended to exclude the social function which normally takes place in a hotel or restaurant following the wedding itself) extends to other social functions and, if so, how are they to be defined? Does the prohibition on "non-cultural activities" extend to every form of pop or rock concert? What precisely is meant by "use as a nightclub"?
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> Some responsibility may be attributed to the planning authority for the difficulties that have arisen in determining to what uses the premises may be put without a further planning permission: they might well have been avoided by the use of more precise language when the permission was being granted. I am satisfied, however, that the High Court cannot resolve these difficulties by acting, in effect, as a form of planning tribunal. As I have already indicated, if enforcement proceedings were brought in the High Court, that court might find itself having to determine whether particular operations constituted a "development" which required permission and the same issue could arise in other circumstances, *e.g.* where a commercial or conveyancing document containing a particular term dealing with compliance with planning requirements was the subject of litigation. But in every such case, however it came before the court, the court would resolve the issue by determining whether or not there had been or would be a development within the meaning of the planning code. The only circumstance in which the court could find itself making a declaration of the kind ultimately granted in this case would be where it had been drawn into a role analogous to that of a planning authority granting a permission."

23. It is true that the underlying issues in *Grianán an Aileach* were slightly different than those presented in the present appeal. It seems clear, nevertheless, from this statement of principle that the Supreme Court envisaged that the courts should be careful not to trespass into the exclusive domain of the planning authorities as envisaged by the s. 5 jurisdiction.

24. This question was, however, considered by me as a judge of the High Court *in Wicklow C.C. v. Fortune (No.3)* [2013] IEHC 397. In that case one of the issues was whether in s. 160 proceedings the High Court had a jurisdiction to determine whether a particular development constituted exempted development where the relevant local authority had already determined following a s. 5 reference that the development in question was not exempted development. I nevertheless expressed the view that the effect of *Grianán an Aileach* was that:

> "…this decision must be taken impliedly to preclude the High Court from dealing with this matter in enforcement proceedings in these precise circumstances where a s. 5 application for a certificate of exemption has been refused and has not been quashed in judicial review proceedings.
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> Here it must be recalled that a s. 5 refusal forms part of the formal planning history and the details of the refusal are entered on a public register: see s. 5(3) of the 2000 Act. If this Court could grant a form of declaration in enforcement proceedings that the development was exempt, there would be in existence two contradictory official determinations of this question, with the real potential for confusion and uncertainty of the very kind which so exercised the Supreme Court in *Grianán an Aileach.*"

25. A similar issue confronted O'Malley J. in *Wicklow C.C. v. O'Reilly* [2015] IEHC 667. In that case the respondent had applied for a s. 5 declaration to the effect that a recycling facility constituted exempt development. This declaration was refused on the ground that the activity represented a material change of use from earlier activity on the site. No challenge was brought by way of judicial review to the determination by the Council to this effect.

26. The Council later brought s. 160 proceedings and the respondent sought to argue that the use was, indeed, an exempt one. O'Malley J. would not, however, permit the respondent to rely on this defence since it had already been determined by the planning authority:

> "The respondent did not appeal the refusal of the declaration and did not take any step to quash it. In the circumstances I agree with the reasoning of Hogan J. [in *Fortune (No.3)*] and can therefore not accede to the argument that no planning permission was required for the respondent's business. It follows that, in my view, the learned Circuit Court judge was correct to find that there had been no unauthorised development."

27. In my view, it is clear both from a consideration of these authorities and an examination of this question from first principles that the High Court cannot go behind a determination in a s.5 reference in the course of a s. 160 application. One can arrive at this conclusion for a variety of different – if overlapping - reasons.

28. First, it can be said that as the planning authorities (or, the Board, as case may be) determined that the works in question represent exempted development, it necessarily follows that no planning permission is required. The logical corollary of this conclusion is that the development in question cannot by definition be "unauthorised" within the meaning of s. 160 if no planning permission is required so that consequently any such s. 160 application is bound to fail.

29. Second, it could equally be said that the s. 160 application represents a collateral attack on the decision of the planning authority, since it effectively invites the Court to re-visit the merits of the issue which had already been determined in the course of the s. 5 determination. This is further re-inforced so far as the present proceedings are concerned, since Killross elected to challenge the validity of three of the s. 5 determinations in judicial review proceedings and failed in that endeavour.

30. Third (and related to it the second argument), could be said that the s. 160 proceedings represents an attempt indirectly to challenge the validity the s. 5 determinations otherwise than by means of the judicial review requirement specified by s. 50 of the 2000 Act.

Conclusions

31. In many ways while these arguments run into each other, the ultimate conclusion is clear: the High Court cannot go behind an otherwise valid s. 5 determination to the effect that the development in question represent exempted development in the course of a s.160 application. The effect of such a determination is that planning permission is not required, so that by definition the development cannot be unauthorised. It follows that the High Court cannot grant the relief claimed in the s. 160 proceedings.

32. As that is the situation in the present case, it follows, therefore, that the developments at issue must be adjudged to have been lawful so that no planning permission was required. In these circumstances, the High Court was correct not to grant the s. 160 relief sought by Killross. I would accordingly dismiss the appeal and affirm the decision of Hedigan J.