

THE HIGH COURT

[2015 No. 153 C.A.]

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED

AND IN THE MATTER OF ORDER 56 OF THE RULES OF THE CIRCUIT COURT

BETWEEN

THE COUNTY COUNCIL OF THE COUNTY OF WICKLOW

APPLICANT

AND

SEAN WHELAN, TERESA ENRIGHT AND MICHAEL ENRIGHT

RESPONDENTS

JUDGMENT of Ms. Justice Heneghan delivered on the 7th day of July, 2017

1. This matter comes before this Court by way of an appeal from the order of the Circuit Court dated 27th July, 2015. In the Circuit Court the applicant was granted an order pursuant to s.160 (1) of the Planning and Development Act 2000, as amended, restraining the respondents from carrying on or continuing with the unauthorised development of lands being carried on in Folios 7062F, 26578F and 33734F of the County of Wicklow. Further, the respondents were directed to remove a gate, a shed, materials and vehicles from the said lands and were further directed to restore the lands to their condition prior to the commencement of the unauthorised development, pursuant to s.160(2) of the Planning and Development Act 2000.

Background

2. Mr. Whelan and Ms. Enright were registered as full owners of Folio 7062F on 8th December, 1988. Wicklow County Council was registered as full owner of Folio 33734F on 25th May, 2009. Wicklow County Council was also registered as full owner of Folio 26578F on 9th November, 1998.

3. Proceedings were issued by way of originating notice of motion, dated 13th August, 2012, against the three named respondents, Mr. Sean Whelan, Ms. Teresa Enright and Mr. Michael Enright. The motion was first listed for hearing on the 2nd October, 2012 in the Circuit Court. The reliefs sought in the Notice of Motion are as follows:-

"1. An order pursuant to s. 160 (1) of the Planning and Development Act 2000, as amended, restraining the respondents and each of them from carrying on or continuing with the unauthorised development of the hatched area of land on the map attached thereto (forming part of the lands comprised within Folios 7062F County Wicklow, 26578F County Wicklow and 33734F County Wicklow) in the form of

(a) the erection of a gate

(b) the erection of a shed

(c) the storage of materials

(d) the storage of commercial vehicles and

(e) further requesting the removal of the said gate, shed, materials, and vehicles, and restoring the lands to their condition prior to the commencement of the unauthorised development.

2. An Order pursuant to Section 160(2) of the Planning and Development Act 2000, directing the Respondents and each of them to remove the said gate, shed, materials and vehicles, together with a further Order pursuant to Section 160(1) of the Planning and Development Act, 2000, directing the Respondents and each of them to restore the said lands to their condition prior to the commencement of the aforesaid unauthorised development."

4. On the 27th July, 2015, at Wicklow Circuit Court sitting in Bray, the hearing proceeded and was determined. The orders sought by the applicant were granted in the terms of the notice of motion, together with an order measuring costs and an order directing that the applicant be entitled to 25% of the said costs plus vat against the respondents with a stay on the order in the event of an appeal.

5. Prior to the hearing in the Circuit Court, twenty three affidavits had been filed in these proceedings, sixteen on behalf of the applicant and seven on behalf of the respondents. Those affidavits were sworn on various dates commencing in August 2012, and concluding with the fourth affidavit of Ms. Enright sworn on the 18th May, 2015. Legal submissions by the applicant are dated 9th June, 2015, legal submissions by the respondent are dated 7th June, the applicant's response to the respondents' submissions are dated 15th June, 2015 and supplemental submissions of the respondents are dated 16th June, 2016.

6. The respondents filed a notice of appeal dated 29th July, 2015, the applicant cross-appealed, by notice dated 4th August, 2015, in respect of the costs order. The respondents thereafter applied to the High Court in advance of the hearing of the appeal proceedings for leave to adduce fresh evidence by way of affidavits from 3 further named persons. By order of the High Court dated 11th March, 2016, the respondents were granted leave to adduce fresh evidence at the hearing of the appeal, specifically the affidavits of Mr. Micheal Enright, Mr. Ned Duffy and Mr. Eftim Ivanoff, all filed on the 23rd November, 2015, as referred to by Ms Enright in her affidavit grounding the application.

7. The appeal hearing in this Court commenced on the 9th November, 2016, and was resumed on the 30th November, 2016. Despite the order of the High Court granting leave for fresh evidence to be adduced to include the affidavit of Mr. Enright, it is significant that no affidavit of Mr. Enright, the third named respondent, was ever put before the court.

8. The applicant filed a notice to cross-examine Mr. Duffy, dated 22nd March, 2016, on foot of his affidavit sworn on the 13th October, 2015 and filed on the 23rd November, 2015. The applicant filed a further notice to cross-examine Mr. Ivanoff on the 26th

May, 2016, on foot of his affidavit sworn on the 9th October, 2015 and filed on the 23rd November, 2015. It is significant that at the appeal hearing, neither Mr. Duffy nor Mr. Ivanoff were produced for the purposes of cross-examination. The court was advised of correspondence between the solicitors for the parties, wherein on the 22nd March, 2016, the applicant's solicitors served a notice of intention to cross examine Mr. Duffy and further requested if the affidavit of Mr. Ivanoff was to be withdrawn, as it stated therein that he is a director of Somoza Ltd. with whose authority and consent he makes the affidavit, Somoza Ltd. having being dissolved since the 14th December, 2009 was not therefore a legal entity. By reply dated 23rd March, 2016, solicitor's for the respondent stated:-

"With regard to Eftim Ivanoff, we will seek instructions. We imagine Mr. Ivanoff was referring to him (sic) directorship of the company at the relevant time and this may have been a simple error in the drafting of the Affidavit. We see no basis at all for your suggestion that Mr. Ivanoff would withdraw his Affidavit. It would seem far more appropriate and sensible that he would be given the opportunity to file a corrective Affidavit. We will come back to you shortly in this regard."

By further letter from the applicant's solicitors, dated 1st April, 2016, it was stated: -

"In relation to your point 3 therein in which you referred to Mr. Ivanoff's directorship of the company 'at the relevant time'. In this regard we refer you to your clients exhibited letter which is dated 26 November, 2012. Thus at the relevant time of 26 November, 2012, Somoza Limited stood dissolved since 14 December, 2009 and accordingly we disagree with you that the same is a 'simple error' in the drafting.

Accordingly we again request that Mr. Ivanoff withdraw his Affidavit where in paragraph 1 of Mr. Ivanoff's Affidavit is patently untrue."

By further letter dated 24th May, 2016, the applicant's solicitors *inter alia* again called on the respondent's solicitors to withdraw the affidavit of Mr. Ivanoff, and by replying e-mail dated 1st June, 2016, solicitors on behalf of the respondent advised *inter alia* as follows:-

"We do not act for either Mr. Duffy or Mr. Ivanoff."

By letter of the same date, the applicant's solicitors wrote to respondent's solicitors, as follows:-

"In the light of your obfuscation, please confirm that you will not be relying on the affidavits of Mr. Duffy or Mr. Ivanoff. To suggest that you do not act on behalf of either deponent completely ignores the fact that you have chosen to procure affidavits from same on behalf of your clients."

By further letter from the applicant's solicitors to the respondent's solicitors dated 16th August, 2016, it was stated *inter alia*, with respect to Mr. Duffy and Mr. Ivanoff as follows:-

"In the event that the two deponents in question will not be available for cross examination on 9 November next, we shall be objecting to the admission of their respective affidavits."

Neither affidavit was withdrawn, the court will return to this matter later in the judgement.

9. The evidence comprised largely the affidavit evidence, however, following oral submissions by counsel for both parties, and on the second day of the appeal hearing, Ms. Enright was called to give evidence and she was briefly cross-examined.

Review of the Affidavit Evidence

10. Ms. Rosemarie Dennison, administrative officer employed in the planning enforcement section of Wicklow County Council, avers in her affidavit, grounding the notice of motion that in the summer of 2011, a representation was made to Wicklow County Council about a storage unit being built on part of the lands comprised in the said folios. On the 2nd September, 2011, an inspection (first inspection) was carried out of the said lands by Mr. Paul Brophy, a technician employed in the planning enforcement section of Wicklow County Council, this inspection revealed a 2m. high gate erected across the old N11, and behind the gate, there was a shed containing various items including turf, a motorbike and household items. To the side and rear of the shed there was a large pile of timber including broken pallets, piping, security, fencing, and general bric-a-brac. Also behind the gate there was a commercial van with a trailer, a commercial truck, a small van and a car. In her second affidavit Ms. Dennison exhibits certificates from the valuation office with respect to the lands concerned.

11. Following the inspection findings, a warning letter pursuant to s.152 of the Planning and Development Act 2000, as amended, was sent to Mr. Whelan and Ms. Enright on the 9th September, 2011, inviting a written submission or observation concerning the alleged unauthorised development. This Court was informed at the appeal hearing that the said Mr. Whelan is now deceased. On 30th September, 2011, the second named respondent attended at the offices of the applicant, and on 6th October, 2011, she wrote to the applicants, wherein *inter alia* she advised she was in a possession of a letter from the council stating that the piece of road in question was being put on her map at that time, and requesting an explanation why that did not happen. The letter further stated she did not have any shed on her property that contained commercial vehicles. In a subsequent letter to the applicant, the second named respondent advised that she did not know that planning permission was needed for a tin shed to keep her fuel dry.

12. A further inspection (second inspection) was carried out by Mr. Brophy on 12th December, 2011, he states in his first affidavit that by this time doors had been added to the front of the shed, but otherwise there was no change on site. Mr. Brophy avers that he met the second named respondent on this occasion and that he asked her several times whether or not there was a commercial element to the vehicles and objects being stored on the land, he stated that he found her reply to be evasive. He avers she told him that the shed had been in place for a number of years. The second named respondent referred Mr. Brophy to a letter written to her circa 2001, by a Mr. Andrew Lawless, advising that that section of the land would be transferred to her. Mr. Brophy took a number of photographs, which were adduced in evidence and which he avers revealed a gate across the road, the shed with vehicles behind the gate; namely a car, a van, a truck and trailer, and materials including firewood, building materials piping and ladders stored outside and around the shed. From a review of Google Earth photograph dated 21st June, 2010, Mr. Brophy states that he believes the erection of the shed started in June 2011, because it is not visible on the Google Earth map from June 2010. An earlier photograph in 2005, in his opinion, does not appear to show any barrier or gate in place.

13. Mr. Brophy recommended an enforcement notice be issued, pursuant to s.154 of the Planning and Development Act 2000, and the same was sent to each of the respondents with an accompanying letter dated 30th December, 2011. The letter advised that the erection of the shed, the fencing off of the public lands, the storage of commercial vehicles, machinery and waste constituted a

development which was not an exempted development; rather planning permission was required but was absent. The letter also advised it was understood that the business in question was trading as "Green Fingers". Pursuant to the s.154 Notice, the respondents were given a period of six weeks to cease the use of storage, to restore the land to its prior condition and to remove the shed and the gate. There followed an exchange of correspondence between solicitors for the respondents, and the applicant.

14. Mr. Brophy carried out a further inspection (3rd inspection) on 15th March, 2012, which revealed the gate and the shed remained in place, the amount of objects being stored had been reduced and restored to an orderly and tidy manner and was covered with protective covers, all vehicles and trailers had also been removed. Mr. Brophy spoke to Ms. Enright, and he avers she mentioned, in passing, that there had been a smaller shed in the area of the current shed. Further photographs were taken by Mr. Brophy and adduced in evidence. Because of non-compliance with the enforcement notice, Mr. Brophy recommended that s.160 proceedings be issued. There was a further exchange of correspondence between the solicitors for the respective parties, together with a letter from a named T.D. on behalf of the second named respondent

15. Another inspection (fourth inspection) was carried out by Mr. Brophy on 27th July, 2012 he found the gate, the shed, the storage of building materials and other bric-a-brac, and the parking of commercial vehicles and trailers in addition to a car, remained in place and was ongoing on the site. Further photographs were taken by Mr. Brophy, and all of the photographs were proved in evidence at the hearing of these proceedings. Mr. Brophy avers that planning permission is required for the construction of the gate, the shed, the storage of commercial vehicles and various materials and no such permission had been obtained. Mr. Brophy further avers that he believed that the lands were being used for the purpose of a waste business by Mr. Enright, "Green Fingers" planning permission was required for the same, and no such planning permission existed. In particular, Mr. Brophy noted the storage of a vehicle bearing registration number 04 WW 5067, and he noted this was one of the vehicles specified in the letter from the Council to the third named respondent, dated 23rd September, 2008, in relation to a revised waste collection permit. Mr. Brophy further avers that the third named respondent was carrying on business from this same address.

16. Mr. Tom O'Leary, senior executive engineer in Wicklow County Council, also inspected the site in question on two occasions, 23rd September, 2011 and 16th December, 2011 (fifth and sixth inspections). He stated that on his first inspection, it was clear to him that some form of business activity was being carried out and he believed it was related to a garden maintenance business due to the presence of a diesel powered strimmer, a diesel power extended chainsaw and a budget spray can. He avers he met Ms. Enright, who said she had acquired the roadway in front of her property from the county council. On his second inspection, Mr. O'Leary noted various motor vehicles including a trailer parked on the said lands. He took photographs; those photographs were proved and adduced in evidence at the hearing.

17. Mr. Andrew Lawless, senior executive engineer of Wicklow County Council, avers in his first affidavit, that on 18th October, 2000 he sent a letter to the second named respondent together with a draft drawing bearing the number N 11/ABP/S 83/54. He stated that he did not ever recall receiving a response to the said letter and he avers he does not believe that a disposal resolution was ever put before members of the County Council, nor does he believe that the portion of land on the far side of the old N11 was ever transferred to the Ms. Enright.

18. In his first affidavit, Mr. Michael Doyle, general services supervisor with the County Council, avers that he last worked at this particular location on 31st August, 2005, repairing a roadside gully. He recalls a barrier across the site with machinery parked behind it, and whilst he does not recall seeing any shed, he does recall there were pallets erected on their edge with a cover over them. He avers that the photograph of a gate taken by Mr. Brophy on 2nd September, 2011, is not the same as the barrier he saw in 31st August 2005, which he states consisted of a horizontal metal pole and two uprights.

19. In her first affidavit, Ms. Enright, the second named respondent, avers that the proceedings have been taken by the applicant in respect of a portion of land that was ceded to her by the Council in 1999, following works adjacent to lands in the construction of the Arklow bypass. She avers that the effect of those works was to close off the road to the front of her property. She stated that the works were a cause of nuisance and she had threatened proceedings in respect of same. She avers that the lands were ceded to her by way of compromise of the pending litigation. She refers to the letter from Andrew Lawless dated 18th October, 2000, but avers that the map attached to that letter is not the map that she returned to Wicklow County Council and is not the same map as she had received. She avers that she has proceeded to use the said spur of property as her own since 1999.

20. In relation to the erection of a gate, Ms. Enright avers that the barrier referred to by Mr. Michael Doyle when he worked near her property on the 31st August, 2005 is still there to this day and the only change to it is a green mesh netting to screen off her property and any vehicles there. In relation to the erection of a shed, Ms. Enright states that she has had a shed and storage there since 2001. In relation to storage of materials, Ms. Enright avers that she has used the property entirely as her own since the opening of the bypass in 1999 and denies the storage of commercial vehicles. She avers that her son, Mr. Enright resides with her and has accumulated some very ordinary garden machinery as a result of his work, a small pickup truck and van. She also stated that he is an enthusiastic collector of cars and has a few old Honda cars. Ms. Enright avers that the developments complained of have been in existence for in excess of seven years and further are exempted developments which do not require planning permission.

21. In his second affidavit, Mr. Brophy avers that Mr. Michael Doyle has confirmed in his affidavit that the gate shown in the photographs taken by him on 2nd September, 2011 is not the same as the barrier which he saw in August 2005. In relation to the shed, he states that Ms. Enright has referred to "a shed" that she says has been there since 2001, but that she does not address the Google Earth photograph or the previous averments by Mr. Brophy that doors had been added to the front of the shed between the time of his inspection in September and his second inspection December 2011. Mr. Brophy refers to his previous affidavit, and avers that it is his belief that the lands are being used for the purposes of the waste business operated by the third named respondent, and that the storage of materials and commercial vehicles has not been addressed by Ms. Enright in her affidavit. He avers that the records of the Council show that the first waste permit granted to Mr. Enright, the third named respondent, trading as "Green Fingers", was in 2005 and the second in 2008. He avers that the Isuzu vehicle on the site and the Honda Civic on the site are registered to Mr. Enright and the Ford Van is registered in the name of Ms. Enright. He further avers that no application has been made to the Council seeking a determination in relation to exempted development.

22. In his second affidavit, Mr. Lawless addresses the issue raised by Ms. Enright in relation to the ceding of land as a compromise of pending litigation and while he recalls the works connected with the Arklow bypass were disruptive, and a complaint was made by Ms. Enright regarding noise, he completely rejects the assertion that the "proposed transfer of land" as averred, was done as a compromise in the face of pending litigation. He avers that Ms. Enright did raise with him an issue in relation to the extension of her garden but his understanding was it was only to be to the front of the property, and not to the end spur as alleged by Ms. Enright. He refers to his letter of 18th October, 2000, and avers therein he specifically referred to the number of the drawing, wherein the proposed land to be transferred was confined to an area directly opposite Ms. Enright's property. He exhibits a memo of 9th February, 1999 of the proposed treatment of land in the area following discussions with Ms. Enright. He does not recall the issue of the transfer

at that stage, although he does recall Ms. Enright subsequently seeking the same. He states he did not recommend the same and no land has ever, in fact, been transferred by the council to Ms. Enright.

23. Mr O'Leary states in his second affidavit, in response to Ms. Enright's averment that she returned a map to Wicklow County Council with a note thereon, that there is no record in the roads department of the Council of a response ever having been received from Ms. Enright. Further, Mr. O'Leary states there is no record of any letter of acknowledgement or response thereto and there is no record of a solicitor making enquiries on behalf of Ms. Enright. He avers that no lands were ceded to Ms. Enright. Further he avers that having examined the files for the roads department, there is no record of a threat of legal proceedings from Ms. Enright and there is no record that the Council were prepared to cede lands to Ms. Enright in respect of a threat of legal proceedings.

24. Ms. Enright in her second affidavit avers that the proceedings by the Council are an attempt to deny her ownership and use of the property which was ceded to her in 1999. She avers that she had a shed and storage on the property since 2001, that the roof put on the shed structure at the time comprised of tarpaulin covers. In this affidavit Ms. Enright exhibits a letter dated 26th November, 2012 from Mr. Eftim Ivanoff verifying the purchase of same (This is the letter dated 26th November, 2012 referred to above which is signed by Mr. Eftim Ivanoff on behalf of Somoza Ltd, almost three years after the said company was dissolved in December 2009 – Ms. Enright's solicitors stated in correspondence on the 1st June, 2016 that they did not act for Mr. Ivanoff and he was not produced in court for the purposes of cross examination in relation to material matters sworn in his affidavit). Ms. Enright also exhibits an agreement dated 15th January, 2001 in relation to the purchase of 20 telegraph poles from Eircom Ltd. Ms. Enright further exhibits a letter from a Mr. Duffy confirming her son Mr. Enright got a quantity of galvanised cladding from him in 2004 "when we were upgrading the shed concerned" (Ms Enright's solicitors stated in correspondence on the 1st June, 2016 that they did not act for Mr. Duffy and he was not produced in court for the purposes of cross examination in relation to material matters sworn in his affidavit).

25. Ms Enright exhibits a letter from a Mr. Doyle dated 11th February, 2013, a neighbour, in relation to his knowledge of a shed which he states he has seen in the corner in front of the Enright house for approximately eight to nine years. Ms. Enright avers she has exhibited the same because of his knowledge of "our upgraded shed over the past 8 to 9 years".

26. Ms. Enright referring to the replying affidavit of Mr. O'Leary accepts the words "legal proceedings" are not used in letters from her solicitors in 1999 and 2000, but she avers that the same is implicit if her demands for compensation were not met. She avers that the letters are entirely consistent with her averments that the council ceded a section of the old road to her as a result of complaints against the council.

27. Ms. Enright refers to the second affidavit of Mr. Lawless and in particular the exhibited internal memo dated 9th February, 1999 indicating the old road would be blocked off by a bund. Ms. Enright states the memo is completely inconsistent with work the Council had done a month before and she exhibits a photograph dated 28th January, 1999 and avers the bund is still there to this day. Ms. Enright avers the bund is at least 50 feet away from her property leaving her with the section of the closed road which she has enjoyed as her own since the bund was erected and it is on this piece of property that she has long since erected the shed.

28. Ms. Enright refers to the replying affidavit of Mr. Brophy and she avers that the only change to the gate was in and about 2010 when green coloured mesh was attached to the barrier to make it of a more pleasing appearance and to screen off sight of "our vehicles, shed and machinery". She avers that the only waste her son was ever involved with was garden waste which is entirely consistent with the gardening business which she stated he does in a small way. She rejects the averment in the affidavit of Mr. Brophy that he found her replies evasive and in relation to the Google Earth photograph dated 21st June, 2010, she avers the same is indecipherable.

29. Mr. Brophy avers in his third affidavit that it is his belief that the shed, presently on the site, was erected in and around 2011 and that it is a metal shed in its entirety, and does not consist of telegraph poles, cladding and tarpaulin covers. He avers that on his initial inspection in September 2011 the subject shed was under construction with a ladder in place to install the final section of the roofing, there was no cladding on its front elevation, which consisted only of a framework with space for an access door already in place. He avers that the green metal cladding was bright, shiny, clean and new in appearance, that the unpainted underside of the roof had the same unblemished appearance, as the similarly unpainted internal panels. The front side and rear cladding was also unblemished. The lack of staining indicated the shed had been newly constructed and it did not appear to be a shed that had been used previously and disassembled prior to its erection at this location. He avers that at the time of his next inspection 12th December, 2011, the front elevation had been completed by the addition of further green cladding and an access door, and that at no time during his inspections did he see any telegraph poles or tarpaulin.

30. In his third affidavit, Mr. Lawless avers that there was no connection between a proposal that certain lands would be transferred/ceded to Ms. Enright and the correspondence sent on her behalf by her then solicitors.

31. In his third affidavit Mr. O'Leary avers categorically that while it was envisaged that certain land would be transferred to Ms. Enright, this never actually took place, that the proposal did not arise from the threat of issued proceedings, but arose in relation to an entirely different matter.

32. Ms. Enright in her third affidavit refers to the 3rd affidavit of Mr. O'Leary and avers that he :-

"continues to seek to deny that Wicklow County Council ceded ownership of property to me in the year 2000 and evidenced by my sole and exclusive possession (with my partner Sean Whelan) ever since then".

Ms. Enright avers positively that Mr. Lawless wrote to her on 18th October, 2000 confirming the agreement to transfer, or to cede, the property to her and Mr. Whelan and that she and Mr. Whelan have used the property as their own ever since.

33. It is appropriate at this juncture to set out the full content of the letter of 18th October, 2000, which is exhibited in the first affidavit of Mr. Lawless as follows:-

"Dear Ms Enright,

As part of the Arklow By-pass we discussed transferring part of the disused N 11, outside your property, into your name. This will be done by means of a Disposal Resolution to be put before the Members of the County Council.

I would be grateful if you would examine the attached draft Drawing No. N11/ABP/S 83/54 and advise me, as soon as possible, if you are happy with it. In particular, I only have your name included but not your husband's, and I would like you to tell me what corrections you want."

Ms. Enright refers to the third affidavit of Mr. Lawless and avers she does not understand Mr. Lawless' attempt to differentiate between her solicitor's correspondence and the end result of same, which was to have the piece of land in question ceded to her. She avers the whole series of events was completely connected and to suggest otherwise would be illogical.

34. In response to the affidavit of Mr. Brophy, Ms. Enright denies the shed is metal in its entirety and avers that the old wooden poles with which the shed was first erected in 2001 can be seen still as an integral part of the shed. She avers that the cladding and the rear is old galvanised cladding and that "the rest of the cladding has been done in bits and pieces including the newer cladding at the front" to which Mr. Brophy refers.

35. Mr. Semple, an engineer on behalf of the respondents, avers he inspected the sheds and surrounds on 30th July, 2013. He refers to photographs and avers that old telegraph poles form the structure of the shed. He states that different types of cladding have been used in different areas indicating the sheeting of the shed was developed over a period of time. He also states that an averment by Mr. Doyle in his first affidavit that in August 2005, while repairing a road side gully, he did not go behind the barrier and that he did not recall seeing any shed but did recall that there were pallets erected on their edge with a cover over them, must be incorrect.

36. Mr. Doyle, in his second affidavit, avers that if the shed constructed of telegraph poles and white tarpaulin was in place on 1st November, 2002, the same should be visible on a photograph taken by him on that date, however, its absence in the photograph shows the subject shed is a new construction.

37. Mr. Brophy, in his fourth affidavit, avers it is not evident that the post and telegraph poles are the same poles as those claimed to have been bought in 2000 which serve as an internal support for the current shed. He avers that the presence of at least one section or off-cut of a telegraph pole suggests that it may have been done only recently. Mr. Brophy avers he inspected the cladding at the rear of the shed on the 6th September, 2013 (seventh inspection) and found that it was not of uniform construction or finish, unlike the other external elevations. He avers he was prevented from accessing the shed to inspect the interior of the rear elevation. He again took photographs and the same were adduced in evidence. In reply to the affidavit of Mr. Semple, Mr. Brophy avers it is not evident the post and telegraph poles claimed to have been bought in 2000 are the same poles that serve as an internal support for the current shed.

38. Mr. Semple in his second affidavit refers to the second affidavit of Mr. Doyle and in particular photographs taken by Mr. Doyle in 2002. He states that he believes the photographs cannot be used validly to suggest anything one way or another about the respondents' shed at the time.

39. In his third affidavit, Mr. Semple avers that it is not possible to ascertain from the Google Earth photograph whether or not the shed was in situ in 2010. Mr. Semple refers to the exhibits of a letter and map exhibited in the first affidavit of Mr. Lawless and he avers that whilst there appears to be confusion about which map represents the plot, that the bund was erected by the council not adjacent to the respondents' south boundary but 110ft. beyond the defendant's boundary. He concluded this was consistent with Ms. Enright's averments concerning the length of time she has been using the entire plot of land and is also entirely consistent with his own observations of the age of the telegraph poles which form the structure of the shed.

40. Mr. Brophy, in his fifth affidavit, avers that the Google Earth photograph taken on 21st June, 2010 does not show the shed because it was not present at the time, and no shadow in the photograph attributable to the shed is present.

41. Mr. O'Leary, in his fourth affidavit, avers he has checked the files of Wicklow County Council, and has come across a photograph which he believes was taken in the summer of 2005, showing a traffic sign having been installed, he avers that if the shed had been constructed and had been in place at that time it should be visible, however, no shed can be seen in said photograph.

42. In her fourth and final affidavit Ms. Enright refers to the fourth affidavit of Mr. O'Leary and avers that the "X" marked by Mr. O'Leary on his exhibited map is in an area of large trees which would clearly make it impossible to see her shed which has been in situ since 2001.

43. Ms. Enright refers to the fifth affidavit of Mr. Brophy and avers she believes he is prepared to swear anything against her. She avers her shed has been there since in about 2001 and her use of the property as a storage area, including the shed, is entirely consistent with the fact that Wicklow County Council gave her the property for her own use and benefit absolutely in 1999, and confirmed same by their letter of 18th October, 2000.

The affidavit of Ned Duffy

44. Mr. Duffy swore an affidavit dated 13th October, 2015, wherein he avers that at the end of 2004 he dismantled sheds as all lands, and provided a portion of cladding from the dismantled sheds to Mr. Enright, the third named respondent, for the purpose of reinforcing a metal shed at or near the Enright property.

45. The court must disregard the evidence of Mr. Duffy, in circumstances where solicitors for the applicant advised in open correspondence, of 1st June, 2016, that they do not act for Mr. Duffy and in circumstances where Mr. Duffy was not produced in court for cross-examination on matters contained in his affidavit.

The Evidence – The affidavit of Eftim Ivanoff

46. Mr. Ivanoff swore an affidavit on 9th October 2015, wherein he avers that in or about January 2001, Somoza Ltd. supplied two white 40ft. covers to Ms. Enright and he refers to a letter dated 26th November, 2012 exhibited in the second affidavit of Ms. Enright and avers and confirms the contents of the said letter are true and correct.

47. The court must likewise disregard the evidence of Mr. Ivanoff, in circumstances where solicitors for the applicant advised in open correspondence, of 1st June, 2016, they do not act for Mr. Ivanoff and in circumstances where Mr. Ivanoff was not produced in court for cross-examination on matters contained in his affidavit. There is a much more troubling matter of concern to the court in relation to this witness, which is the averment in his affidavit that Mr. Ivanoff was a director of a company which in fact was dissolved some three years prior to the swearing of his affidavit. In her second affidavit Ms. Enright exhibits, and seeks to rely on, a letter from Mr. Ivanoff wherein he again represents he is signing a letter on behalf of the company dissolved some three years earlier. Ms. Enright in the course of these proceedings made no effort to dissociate herself from the content of that letter and no explanation whatsoever was offered to the court for the clearly misstated facts in the letter, and the clearly incorrect averments in the affidavit of Mr. Ivanoff which was procured by the respondents for the purposes of defending these proceedings.

Review of the Oral Evidence

48. Ms. Enright, in examination in chief, stated that the barriers and shed were erected in 2001 by her partner and her two sons, Mr.

Michael Enright, the third named respondent, and Mr. Patrick Enright. It was put to her in cross examination that in the five affidavits she has sworn in these proceedings, that this was the first time this information had been provided to the court, she was asked would there have been any difficulty in including those details in relation to the construction of the structures by her partner and her sons, she said that she did not see any question anywhere asking her to put this information on affidavit.

The Law -

49. Section 160 (1) of the Planning and Development Act 2000 provides as follows:-

"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;".

Section 2 of the Act defines the interpretation of certain words and/ phrases as follows: -

'unauthorised development' means, in relation to land, the carrying out of any unauthorised works (including construction, erection or making of any 'unauthorised structure') or the making of any unauthorised use;

'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 Act or under section 34 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 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 the 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 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 the permission is subject;...

'works' includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application and removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior exterior of the structure."

Section 3 (1) provides:-

"In 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."

Section 3 (2) provides:-

"For the purposes of subsection (1) and without prejudice to the generality of that subsection-

(b) where land becomes used for any of the following purposes -....

(iii) the deposit of vehicles whether or not usable for the purpose for which they were constructed I last used, old metal, mining or industrial waste, builders' waste, rubbish or debris, the use of the land shall be taken as having materially changed".

50. Schedule 2 of class 3, part 1 of the Planning and Development Regulations 2001 provides:-

"The construction, erection or placing within the curtilage of a house of any tent, awning, shade or other object, greenhouse, garage, store, shed, or other similar structure'.

(1) No such structure shall be constructed, erected or placed forward of the front wall of a house

(3) The construction, erection or placing within the curtilage of a house of any such structure shall not reduce the amount of private open space reserved exclusively for the use of the occupants of the house to the rear or to the side of the house to less than 25 square metres."

51. Class 5 of the Regulations provides Planning and Development Regulations 2001 provides:- ...

"The construction, erection or alteration, within bounding the curtilage of a house, of the gate, gateway, railing or wooden fence or a wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete....

(3) No such structure shall be a metal palisade or other security fence"

Applicant's submissions

52. It is submitted by the applicant in relation to para. (a) the erection of a gate, that the same constitutes "works" within the meaning of s. 2 of the Planning and Development Act 2000, for which planning permission is required. It is submitted that while class nine of the Planning and Development Regulations 2001 provides for circumstances in which gates/ barriers can enjoy exempted status, the gate in this question falls foul of the "conditions/ limitations" of class nine in circumstances where the gate/ barrier is not within or bounding the curtilage of the house but is on the road outside. Moreover it is submitted it has the purpose of a security measure as referred to at para. 9 of the second affidavit of Ms. Enright. It is submitted that Mr. Doyle, on behalf of the applicant, has sworn in his first affidavit that the barrier/ gate shown in the photograph taken by Mr. Brophy on 2nd September, 2011 is not the same as the barrier which he saw in August of 2005. It is submitted that the onus remains upon the respondents to establish that such barrier/ gate was in place on, or prior to, the 13th June, 2005, and that they have failed to do so.

53. In relation to para. (b) the erection of a shed, it is submitted on behalf of the applicants that the same constitutes "works" within the meaning of s. 2 of the Planning and Development Act 2000, and further constitutes development within the meaning of s. 3 of the Act. It is submitted that whilst construction of a shed can in certain circumstances enjoy the benefit of exempted status, pursuant to class 3 of part 1 of schedule 2 of the Planning and Development Regulations 2001, the shed in this particular case falls foul of the "conditions/ limitations" attached to class 3 in circumstances where it is located to the front of the house is question. It is submitted and contended by the applicants, that the said shed cannot be said to be within the "curtilage of the house" and the applicant further contends that the shed in itself is *inter alia* used for commercial purposes.

54. It is submitted that even if the court were to find that the shed is a replacement of or/ successor to an earlier shed, for which no planning permission was obtained, that the applicant is relying on the judgment of O'Neill J. in the case of *Sligo County Council v. Gavin Martin* [2007] IEHC 178, as authority for the proposition that replacement of an earlier unauthorised structure, which might otherwise have been immune from enforcement if left in situ, constitutes "works" for which planning permission is required.

55. It is submitted by the applicant that whilst the respondents rely upon the defence of the proceedings being statute barred, that the onus is now upon them to show that the various unauthorised developments features of which the council complains have been in place for more than seven years and 63 days prior to the issue of the within proceedings.

56. It is submitted Mr. Brophy in para. 5 of his first affidavit, avers that he spoke to the second named respondent on 15th March, 2012, and that she "also mentioned in passing that there had been a smaller shed in the area of the current shed". It is submitted that in subsequent affidavits, Ms. Enright has singularly failed to address this admission.

Mr. Brophy further avers at para. 4 that he believes "that the erection of the shed started around June of 2011, since the shed in question is not visible on the Google Earth 2010 photograph", that he carried out inspections on 2nd September, 2011 and again on 12th December, 2011, at which time he avers "doors had been added to the front of the shed". It is submitted in his third affidavit, Mr. Brophy refers to an inspection which he carried out in September, 2011, during which he found "a ladder in place to install the final section of the roofing".

57. It is submitted that in his fifth affidavit, Mr. Brophy firmly rebuts averments as set out in the third affidavit of Mr. Semple, the engineer on behalf of the respondents, that "the greyish cover showing to the south-west of the defendant's house could indeed show the defendant's shed". Mr. Brophy avers that he had actually taken photographs of the greyish area in question, and as no further replying affidavit was sworn by Mr. Semple, the matters as set out in the fifth affidavit of Mr. Brophy remain uncontroverted.

58. It is submitted that the Ms. Enright had been in a position to produce photographs going back to 1999, however despite request, she had been unable to furnish or exhibit any photographs showing the shed in its current state and being in situ for more than seven years and 63 days prior to the proceedings. In particular, it is submitted that there was no response to the letter of 4th February, 2013, as exhibited in the affidavit of Mr. Brophy. It is submitted that photographs were taken by Mr. Brophy on his first inspection, in September, 2011, which show the shed in its current format, behind the barrier, but whilst Mr. Doyle on behalf of the plaintiff was in the locality in August, 2005 and could recall seeing a barrier, he could not recall seeing any shed.

59. It was further submitted by the applicant that it would have been within the power of the respondents to procure an affidavit from the person or persons who erected the shed in its current state, setting out when the works precisely were done, and exactly what works in question took place, and the respondents had failed to do so.

60. It is submitted in relation to (c) the storage of materials, and (d) the storage of commercial vehicles, that the said materials and commercial vehicles were indeed being stored on the lands in question, and that the same were associated with the commercial business of "Green Fingers" operated by Mr. Enright.

61. It is submitted that the materials and or commercial vehicles are shown in the various photographs and are such as one would not expect to be associated with the ordinary use of a domestic dwelling. It is submitted that the said lands were being used for the purposes of the waste business of Mr. Enright, and that the photographs show a wide variety of waste material. It is submitted that Mr. Enright registered the name of "Green Fingers" as a business name in September, 2005, and was granted his first waste permit in December, 2005. It is submitted that each of these dates are within the period of seven years and 63 days prior to the issue of the proceedings.

62. It is submitted that the applicant has an entitlement to challenge unauthorised development features which it has identified, irrespective of whether the same occurs on public or private property. It is submitted that s.160 itself provides that an application can be made by "a planning authority or any other person, whether or not the person has an interest in the land", and that there has been a clear contravention of planning laws. It was also submitted that Ms. Enright has failed to identify precisely when the shed and

the gate in their current structure were constructed. It is submitted that a primary factor behind the various unauthorised development features as a whole is the commercial business operated by Mr. Enright. The applicant's case is that no application was made for planning permission in respect of any of the stated unauthorised development features, nor has an application been made for a determination that any of the features is exempted been sought under s.5 of the Act of 2000.

63. It is submitted that the respondents' submission that the respondents acted in good faith and genuinely believed that they did not require planning permission, is not supported by the affidavit evidence of the second named respondent, who relies solely upon the defence that the developments are statute barred and/or are exempted development and do not require planning permission.

Respondent's submissions

64. It is submitted on behalf of the respondents that the applicant is out of time to bring the within application and in that regard the applicant relies on the terms of s.160(6) of the Planning and Development Act 2000. It is submitted that the lands in question were intended to be ceded to the second named respondent, and whilst it is accepted that was not formally done, that the then putative action by the second named respondent was compromised in that she believed the area had been ceded to her and that she went into occupation, or in the alternative was an adverse possession.

65. In relation to sub-paragraph (a), it is submitted that the same is exempted development, and comes within the height, shape and size of exempted development. It is submitted that the second named respondent was given to understand in 1999 that the said lands were ceded to her by the applicant, as these were lands that were previously open to the public habitually, that the said gate was erected in 2000 and that whilst Mr. Brophy on behalf of the applicant did inspect the area in August 2005, he referred to seeing a barrier and that the second named respondent states that the post is the same with the exception that there is a mesh grill now attaching and that the same has been there for a very long period of time. It is submitted in the circumstances the court cannot make an order in respect of the gate even if it was not within the meaning of exempted development.

66. It is submitted in relation to sub-paragraph (b), the shed, that this is a corner site and it was accepted that the shed is located marginally to the front of the building line, and that it is *de minimis* at best, and that this Court is now being asked to remove it not withstanding that it is located no more than 20 or 30ft. from where it would qualify as exempted development.

67. It is submitted in relation to paras. (c) and (d) that there must be some material change of use, that gives rise to some level of planning concern, it is submitted that no such change of use arises, and that therefore the court should not be concerned whatsoever with para. (c) and para. (d). It is submitted that before a court order can be sought by the applicant in this regard, that the applicant has to establish that the activity now is a different user to the previous activity, and that that somehow gives rise to some planning problem. The respondent referred to the photographs, and submitted that there was no industrial undertaking going on and that as far as commercial activity was taking place, that the third named respondent's bus was parked in the area but that he had been doing that since well before 2005. It is submitted that there is no requirement in planning law for ordinary items such as landscaping or gardening items to be parked at a domestic property, and it is submitted that the same applies to the parking of commercial vehicles. It is submitted that what is identified in the photograph by the applicants is no different from what could be seen in any domestic property around the country. It is submitted that objections in relation to category (c) and category (d) have not been made out by the applicant, and therefore the court does not need to concern itself with those two latter items in the notice of motion.

68. It is submitted that Ms. Enright, the second named respondent, did not understand the nuance of planning permission, and that under normal circumstances one would apply for retention in such a situation, but Ms. Enright, the second named respondent, was prevented from doing so in circumstances where the applicant would say that the said shed is on bare lands, that the relief would certainly be refused by the applicant, and that the same would apply to An Bord Pleanála, as it was accepted that before one applies for planning permission one must first prove that they own the lands in question. It is submitted that there were gaps in the records of the applicant as to whether a resolution was ever passed ceding the land to Ms. Enright, the second named respondent. It is submitted because there are gaps, the result is inconclusive, and that the court must make a determination in this of its own accord.

69. It is submitted that the reason the statute provision of seven years and 63 days exists is that it is very difficult to prove receipts after a period of twelve years, that it is difficult or impossible for people to keep records, and that is the reason why the time limit of seven years and 63 days is in being. It is submitted that on the balance of probabilities the court must be satisfied the gate or the barrier was erected in 2000, when the applicant wrote to the second named respondent enclosing a map.

70. It is submitted that whilst Ms. Enright, the second named respondent, had difficulties with the works being carried out by the applicant, and made complaints thereto, that her version of events was that by the ceding of the land to her, matters were compromised between the applicant and Ms. Enright, the second named respondent.

71. It is submitted that the evidence of Ms. Enright, the second named respondent, must be preferred to the evidence on behalf of the applicant, and the second named respondent's evidence is that the shed has been in existence for years, that the panels were replaced from time to time, but it is not an unauthorised development within the meaning of the Act, and the court should not make an order requiring removal of the structure.

72. It is submitted in relation to the said works, that the gate is exempted, and sub-paragraphs (c) and (d) are gone, that then leaves just the shed, that has been there in some form since 2000, and the only order the court could make would be to return it to the condition it was in 2005, and that same would be a useless order.

Discussion

73. It is now well established by the case law that the seven year limitation period is a matter of defence and the onus of proof lies with the party asserting it. In the affidavits filed in these proceedings by Ms. Enright, she raises the issue that on the 6th October, 2011 she wrote to the applicant and advised *inter alia* she was in possession of a letter from the council stating that the piece of road in question was being put on the map in relation to the suggested ceding by officials on behalf of the applicant of a certain portion of land to Ms. Enright in 2000. In that letter Ms. Enright requested an explanation why that did not happen. Yet, in her first affidavit in these proceedings sworn on the 22nd October, 2012 (one year later) Ms. Enright positively avers these proceedings have been taken by the applicant in respect of a portion of land that was ceded to her by the respondent in 1999. In her second affidavit sworn on the 25th March, 2013, Ms. Enright again positively avers the proceedings by the respondent are an attempt to deny her ownership and use of the property which was ceded to her in 1999. It is quite clear that the averments in the subsequent affidavits are contradictory when taken alongside Ms. Enright's letter of October 2011 to the respondent. At the hearing of these proceedings it is submitted, by counsel on behalf of the respondents, that it is accepted that this issue of the ceding of land is not directly relevant to the issue of unauthorised development, but it is submitted it is relevant to an understanding of the relationship between the parties and the history of the specific site location. This Court can not accept that submission. It is clear to this Court that whilst

there may have been, at one stage, an intention to cede a portion of the land to Ms. Enright, she herself was requesting an explanation in 2011 as to why this did not happen. Further this Court notes the uncontroverted evidence of Mr. Lawless is that no disposal resolution was ever put before members of Wicklow County Council and the land in question was never ceded to Ms. Enright.

74. The court notes that no evidence whether by affidavit evidence or oral evidence was offered to this Court by the third named respondent, despite the references to his alleged use of the land by Ms. Enright in her affidavits, and despite Ms. Enright having applied and been granted leave by the High Court in the aftermath of the determination of these proceedings by the circuit court to adduce additional evidence, specifically the affidavit evidence of the third named respondent, Mr. Michael Enright.

75. The court is also troubled, as previously stated, by the false averments in the affidavit of Mr. Ivanoff. This affidavit was not withdrawn, notwithstanding a number of requests from the respondents' solicitors in that regard. The court is also troubled that a letter from Mr. Ivanoff containing similar false information was exhibited and relied upon by Ms. Enright in her affidavit evidence. An averment in an affidavit that one is a director of a company that has been dissolved almost three years previously is a matter that a court must consider a gross attempt to mislead a court, and cannot be excused in any way as being a "simple error" in the drafting of the affidavit.

Decision

76. (a) the erection of a gate;

This court is satisfied having considered all of the affidavit evidence, the oral evidence of Ms. Enright and the respective submissions by counsel for the applicant and counsel for the respondents, that Ms. Enright, the second named respondent, has failed to satisfy this Court on the balance of probabilities that the gate in question was in place on or prior to the 13th June, 2005. Furthermore the court is satisfied that the erection of the gate constitutes works within the meaning of s.2 of the Planning and Development Act 2000, and no planning permission was sought or obtained by the respondents in that respect. The court is further satisfied the gate in question does not constitute exempted development.

(b) the erection of a shed

Again, this Court is satisfied having considered all of the affidavit evidence, the oral evidence of Ms. Enright, the second named respondent, and the respective submissions by counsel for the applicant and counsel for the respondent, that Ms. Enright, the second named respondent, has failed to satisfy this Court on the balance of probabilities that the shed in question was in place on or prior to the 13th June, 2005. In particular the court rejects the evidence of the second named respondent that the shed has been in existence since 2001. The court notes that despite the oral evidence of the second named respondent that the shed was erected by her partner and two sons, no evidence whatsoever was offered by either of her two sons to support that contention. The court further notes the content of two affidavits sworn by Mr. Duffy and Mr. Ivanoff which must be disregarded by the court for the reasons already stated.

(c) and (d) the storage of materials and commercial vehicles

This Court having considered all of the evidence is satisfied on the evidence of the applicants that the respondents were indeed storing materials and commercial vehicles on the lands in question and that on the balance of probabilities the said lands were being used for the purposes of the waste business of Mr. Enright, the third named respondent.

Conclusion

The respondents have failed to satisfy this Court that the proceedings by the applicant are statute barred. For all the reasons elaborated above, the court will dismiss the appeal of the respondents and reaffirm the orders made by the Circuit Court in terms of paras. 1 and 2 of the originating notice of motion. The court will accede to the appeal by the applicant in respect of the order for costs made in the Circuit Court and will hear from the parties further in relation to the final determination of the court in relation to the costs of the proceedings in both courts.