

THE HIGH COURT

2010 3160 P

BETWEEN

FOREST FENCING LIMITED TRADING AS ABWOOD HOMES AND GEORGE SMULLEN

PLAINTIFFS

AND

THE COUNTY COUNCIL OF THE COUNTY OF WICKLOW

DEFENDANT

JUDGMENT of Mr. Justice Herbert delivered the 4th day of February 2011

By an originating notice of motion dated the 12th May 2003, the defendant at para. 1(i) of the motion paper sought an order of the Circuit Court, Eastern Circuit, County of Wicklow, pursuant to the provisions of s. 160(1)(a) and (3) of the Planning and Development Act 2000, restraining the plaintiffs and each of them from carrying on or continuing the operation of a manufacturing plant at Timmore, Newcastle, Co. Wicklow and, restraining them from extending such unauthorised development onto adjoining property. As appears from the extensive and careful judgment of His Honour Judge McCartan, delivered on the 10th February 2004, the prior planning and development history of these and adjoining lands of the plaintiffs commencing as far back as 1992, is long and complex. The learned Circuit Court judge held, *inter alia*, that the defendant was entitled to orders in the above terms. An order to this effect was made on the 20th February 2004. By a notice of appeal dated the 26th February 2004, the plaintiffs appealed from this Order to the High Court sitting in Dublin pursuant to the provisions of s. 37(1) of the Courts of Justice Act 1936, as the case had been heard and determined on affidavit without oral evidence. Section 2 of that section provides that the appeal be heard by way of rehearing.

In the course of this appeal an Affidavit, sworn on the 16th April 2007, by Mr. Tim Walsh, a Senior Executive Planner in the Enforcement Section of the Planning Department of Wicklow County Council was filed in evidence by special leave of the court on the 18th June 2007. In it he avers that on the 10th April 2007, he carried out an inspection to ascertain the then present position with regard to each unauthorised development. At para. 3(1) of this affidavit Mr. Walsh states as follows:-

" . . . The buildings marked in pink on the said Map 1 are still in the ownership and usage of the first named respondent. They are located on the eastern side of the re-aligned N11 and do not form part of the main operation of the respondents' business, which is now to the West of the N11. They do not have the benefit of planning permission but are in existence for in excess of 7 years and accordingly, no relief is being sought by the County Council in respect of the same."

These buildings, "marked in pink", on the indicated map were the subject matter of the decision and order of His Honour Judge McCartan hereinbefore referred to, restraining the plaintiffs and each of them from carrying on or continuing the operation of a manufacturing plant at Timmore, Newcastle, Co. Wicklow.

This appeal came on for hearing before Charleton J. on the 19th, 20th and 26th June 2007. Judgment was delivered by Charleton J. on the 13th July 2007. This judgment at pp. 33 and 34, paras. 50 and 51 concludes as follows:-

"50. To fail to grant injunctive relief in these circumstances, on these facts, would be to cause a situation to occur where the Court is effectively taking the place of the planning authority. The Court should not do that. This is a major development, for which there is no planning permission. It is in material contravention of the County Wicklow Development Plan. It is built entirely to suit the developer and with almost no reference to legal constraints. I am obliged to decide in favour of the injunctive relief sought.

Result

51. In the result, I will grant injunctive relief pursuant to s. 160 of the Planning and Development Act 2000; as to the first notice of motion ["12th May 2003, to Circuit Court"] with the exception of the first two paragraphs, ["relating *inter alia* to the buildings marked in pink"] which are no longer sought"

The Order giving effect to this decision of Charleton J. was made and perfected on the 19th July 2007. The speaking part of this Order directs as follows:-

"(i) That the said Order of the Circuit Judge herein dated the 20th February 2004, be varied by the deletion of paragraph bearing Number (1)(i) ["relating to the buildings marked in pink"] and (ii).

(ii) That the said Order do stand affirmed save as hereinbefore provided.

(iii) (Not relevant to the matters at issue in the instant case).

(iv) That the Respondents do pay to the Applicant the costs of this hearing when taxed and ascertained.

And it is Ordered that the execution on foot of the aforesaid Order be stayed for a period of nine months from the date hereon"

By a notice of motion dated the 12th June 2008, Wicklow County Council moved the court to attach and commit to prison the second named plaintiff for failure to comply with the Order of the High Court made on the 19th July, 2007. By Order made and perfected on the 6th October 2009, the hearing of this motion was adjourned to the 12th February 2010, with liberty to the parties to bring further and counter motions and to deliver affidavits and papers within a specified time frame.

By notice of motion dated the 30th October 2009, Wicklow County Council sought an Order against the plaintiffs in the terms of para. (1)(i) of their original notice of motion dated the 12th May 2003, and, for such further or other relief as the High Court should deem appropriate. This application was grounded upon an Affidavit of Mr. Tim Walsh sworn on the 12th November 2009. The application was heard and determined by Charleton J. on the 10th February, 2010. In this Grounding Affidavit sworn on the 12th November 2009, Mr. Tim Walsh refers, at para 12, to the Affidavit sworn by him on the 16th April 2007, following a personal inspection of the *locus in quo* carried out by him on the 10th April 2007, and then continues as follows:-

"(b) In swearing this Affidavit, I was absolutely convinced that the Respondents had moved their manufacturing business to the western side of the N11, from what had been their manufacturing base on the eastern side of the N11. Accordingly, I was not overly concerned with continued existence of the buildings marked pink, which I felt in any event, had been in existence for in excess of 7 years at that time. Insofar as any use was being made of these buildings at this stage, it only comprised storage of some materials. While I accept that the buildings, which I have numbered 2 continued to contain band saws, I never saw them being used during the times I inspected the shed between 2004 and 2007. In relation to shed No. 3, I was aware that there had been some improvement works carried out to it from March 2005, involving the laying of a concrete floor, the carrying out of re-cladding works and the provision of a roller shutter doorway, but I saw these works as minor in the overall context.

(c) In all the circumstances, I was content as aforesaid to indicate in my Affidavit sworn on the 16th April 2007, that the County Council was no longer seeking relief in respect of the "continued operation of Abwood Homes Manufacturing Plant at Timmore, Newcastele, Co. Wicklow without planning permission.

Against a background where as far as I was concerned the manufacturing base had been relocated to the western side of the N11 and reliefs were being sought in respect of the buildings erected on that side for the purpose of such manufacture"

At para. 5 of this Grounding Affidavit sworn on the 12th November 2009, Mr. Walsh makes reference to para. 13 of a replying affidavit sworn by the second named plaintiff, George Smullen on the 20th June 2003, in the proceedings before His Honour Judge McCartan at Wicklow Circuit Court. In this para. 13, Mr. Smullen had averred as follows:-

"Unfortunately Abwood Homes is no longer able to operate its business at its existing premises due to the proposed improvement of the N11 National Primary Route. In fact, the new road alignment will pass through the middle of the property occupied by Abwood Homes, rendering it impossible to continue the existing timber shed manufacturing activities on this site."

It was common case between the parties in the instant proceedings that these "existing premises" included the buildings marked in pink. It is significant in my judgment that no reservation was made by Mr. Smullen as regards the manufacture of any other timber garden products in these buildings marked in pink.

At para. 7 of this Grounding Affidavit sworn on the 12th November 2009, Mr. Tim Walsh refers to a second Replying Affidavit sworn on the 28th November 2003, by Mr. Smullen in the proceedings before His Honour Judge McCartan in Wicklow Circuit Court. At para. 5 of this Affidavit Mr. Smullen averred that the two structures marked in pink, "are used for the manufacture and storage of timber" and that one of them was erected in or about March 1996, and that the other was older.

At para. 13 of this Grounding Affidavit sworn on the 12th November 2009, Mr. Walsh stated as follows:-

"The decreasing level of intensity of the user of the lands on the eastern side of the N11 is borne out by the fact that in June 2007, the County Council received a complaint that building 3 was then being used by a construction plant hire business operated by a company known as J.O.C. Construction Hire Limited. This complaint was investigated and I myself inspected building 3 on the 27th August 2007, which was subsequent to judgment being delivered by this Honourable Court on foot of both appals. On this occasion, I found that building 3 was being used as a retail unit for the rental of mini plant and garden maintenance equipment such as small diggers, dumpers, strimmers and cement mixers: the yard area in the vicinity of the buildings was also being used in conception with this operation for customer parking the loading and unloading of equipment."

At paras. 14, 16 and 17 of this Grounding Affidavit sworn on the 12th November 2009, Mr. Tim Walsh averred as follows:-

"14. Thereafter, building 3 and its adjoining yard reverted to user by Abwood Homes, with I believe, the rate of intensity of the use of buildings 2 and 3 and the adjacent yard increasing in tandem with the decommissioning of the operations of Abwood Homes on its lands on the western side of the N11 throughout 2008, and up to the end of May 2009, in accordance with the orders made by this Honourable Court.

16. Early in 2009, the County Council became concerned that the business of Abwood Homes as a whole was going to be relocated to the eastern side of the N11, and a letter was written by the solicitors retained by the County Council in this regard to Lavelle Coleman, Solicitors for the Respondents, (dated the 12th February 2009). In a response dated the 13th February 2009, Lavelle Colman stated as follows:

'Our Client does not intend to relocate the business to the display area or to the area to the east of the new N11 as suggested by you. We are at a loss to understand your reference to radio interviews given by our Client. Mr. Smullen has never given a radio interview and no representatives of Abwood have given radio interviews for some considerable time.'

However, when I carried out an inspection on the 22nd May 2009, I found that manufacturing operations were carried out in both buildings 2 and 3 which I believe constituted a resumed manufacturing use of these buildings."

The plaintiffs put in replying affidavits claiming that timber manufacturing had always continued on the east side of the re-aligned N11 and particularly in buildings 2 and 3 marked in pink.

At the hearing of the instant application Ms. Butler, Senior Counsel for Wicklow County Council informed the Court that the Planning Authority accepted that due to the expiry of the statutory limitation period of seven years the existence of the unauthorised structures at buildings 2 and 3 marked in pink could not now be challenged. The Planning Authority did not take issue with the use of

these buildings for storage of timber and of timber garden products. However, the use of these buildings or either of them for the manufacture of timber garden products was an unauthorised use and one to which Planning Authority was wholly opposed.

The plaintiffs on the 10th February, 2010, through their then Senior Counsel, Mr. Michael Howard raised a preliminary issue before Charleton J. as to the jurisdiction of the High Court to hear and determine this notice of motion dated the 30th October 2009. Shortly stated, the basis of this objection was that by virtue of the provisions of s. 39 of the Courts of Justice Act 1936, the decision of Charleton J. made on the 13th July 2007, and the consequent Order made and perfected on the 19th July 2007, were final, conclusive and not appealable. Additionally, Senior Counsel for the plaintiffs submitted that the subject matter of the notice of motion was *res judicata* by virtue of the said decision of Charleton J. or alternatively, it was an abuse of process by virtue of the rule stated by Wigram V.C. in *Henderson v. Henderson* [1843] 3 Hare 100 at 114/115, for Wicklow County Council to seek in October 2009, a remedy which it could and which it should have sought in June 2007, but which it had elected not to pursue.

At the hearing before me, Mr. O'Reilly, Senior Counsel for the plaintiffs/moving parties and Ms. Butler, Senior Counsel for Wicklow County Council accepted that an Attendance made by Mr. Brian Robinson, Solicitor of Rory P. Benville and Company, Solicitors for Wicklow County Council was a full and accurate record of what had taken place before Charleton J. on the 10th February 2010, and, also of the ex-tempore judgment delivered by him on that day.

Charleton J. ruled that the motion was properly before the Court and refused to state a case for the consideration of the Supreme Court on this point. He ruled that an Order restraining the plaintiffs from carrying on the manufacture of timber products at buildings 2 and 3 marked in pink had always been a part of what he described as "the package of issues before the Court". He accepted the Wicklow County Council had elected to abandon the relief sought in respect of these buildings and granted by the Order of His Honour Judge McCartan made on the 20th February 2004.

By Order (Charleton J.), made and perfected on the 9th March, 2010, the Court *inter alia* dismissed the plaintiffs' application that the Notice of Motion dated the 30th October, 2009, by Wicklow County Council was *res judicata* and declined to state that issue for appeal by way of Case Stated to the Supreme Court. It was further ordered that the Order of His Honour Judge McCartan dated the 20th February, 2004, stand affirmed with respect to para. (1)(i) of the Notice of Motion dated the 12th May, 2003, whereby the plaintiffs were and each of them was enjoined from continuing the operation of Abwood Homes manufacturing plant at Timmore, Newcastle, Co. Wicklow, without planning permission.

To the extent that the attendance of Mr. Robinson is a complete record of the ex tempore judgment delivered by Charleton J. on the 10th February, 2010, this Court must accept that he did not expressly find that his judgment delivered on the 13th July, 2007, and the consequent Order made and perfected on the 19th July, 2007, were not final and conclusive because Wicklow County Council had discharged the burden on them of establishing exceptional circumstances, without fault on their part which would render such finality a fundamental denial of justice, (see *L.P. v M.P. (Appeal)* [2002] 1 I.R. 219). This Court is satisfied that in the absence of such a finding the judgment and order of Charleton J. dated the 13th July, 2007, and the 19th July, 2007, respectively, were final and conclusive as between Wicklow County Council and these plaintiffs. It is provided by s. 39 of the Courts of Justice Act 1936, (No. 48 of 1936) that:-

"The decision of the High Court . . . on an appeal under this Part of this Act shall be final and conclusive."

The appeal by these plaintiffs against the February 2004 Judgment and Order of His Honour Judge McCartan was such an appeal taken by them pursuant to the provisions of s. 37 of the said Act of 1936.

With a similar reservation this Court must accept that Charleton J. did not expressly find that Wicklow County Council were not precluded by issue estoppel from raising in the Notice of Motion dated the 30th October, 2009, a point which they had elected not to pursue at the hearing of the Appeal before him in June 2007, namely that the Order of the Circuit Judge dated the 20th February, 2004, be confirmed as to paragraph 1(i) thereof, dealing with buildings 2 and 3 marked in pink.

Neither did Charleton J. expressly identify the special circumstances which he considered were sufficient to permit Wicklow County Council to reopen this same subject of litigation, which he held had always been a part of the, "package of issues before the court". Charleton J. did not expressly find that Wicklow County Council had not been guilty of negligence, failure to exercise reasonable diligence, inadvertence or accidental omission in failing to bring forward this point at the hearing of the Appeal in June 2007.

However, this Court must carefully consider in its entirety the ex-tempore judgment of Charleton J. to the extent that it is recorded in Mr. Robinson's Attendance. Once this is done there can, in my judgment, be no doubt whatsoever but that Charleton J. did in fact consider and determine each of these issues.

It is essential to a full and proper understanding of what was in fact held by Charleton J. to recall that the remedy initially granted by His Honour Judge McCartan and which Wicklow County Council elected to waive at the hearing of the Appeal related solely to buildings 2 and 3 marked in pink on Map 1 exhibited in the affidavit of Mr. Tim Walsh sworn on the 16th September, 2007. These buildings are on the original site of the first named plaintiff's operations on the east side of the realigned N11. As appears from the Attendance of Mr. Robinson, it was submitted by Mr. Kennedy, Senior Counsel for Wicklow County Council, to the Court on the 10th February, 2010, that the first time a case had been made by the plaintiffs to the Court that Abwood Homes had "always traded" from buildings 2 and 3 marked in pink had been in May 2009. Mr. Kennedy submitted that these buildings lacked planning permission and, that the evidence before the Circuit Court and before the High Court had been that the enterprise of Abwood Homes had been relocated to the other, -western, - side of the realigned N11. This he said was evident from the affidavits, written submissions and conduct of both parties. If the second named plaintiff was contending that the first named plaintiff had remained trading from the buildings on the eastern side of the realigned N11 this amounted to concealment.

Mr. Howard, then Senior Counsel for the plaintiffs, submitted that the matter could only be reopened by the High Court (Charleton J.) if there was an issue of deception or fraud. He submitted that Mr. Tim Walsh did not state in any of his affidavits that the respondents had misled, or concealed information from Wicklow County Council. Mr. Tim Walsh, he said, had referred at para. 7 of his Grounding Affidavit to the averment by the second named plaintiff in his Affidavit sworn on the 28th November, 2003, that these two structures marked in pink were used for the manufacture and storage of timber. Mr Howard submitted that Wicklow County Council had on Appeal withdrawn the relief sought, (and granted by the learned Circuit Court Judge), in respect of buildings 2 and 3 marked in pink. The decision of the High Court (Charleton J.), on Appeal was therefore, he said, final and conclusive.

At the start of his judgment in the Appeal, delivered on the 13th July, 2007, Charleton J. held as follows:-

"1. In this case, Wicklow County Council seek injunctions under s. 160 of the Planning and Development Act 2000, to put

an end to a development near the N11 roadway that the developers claim is authorised by a default planning decision. Injunctions under that section, which arise on two different motions claiming a total of eight different infringements of the planning code, were granted by the Circuit Court in Wicklow, through Judge McCartan, on the 10th February, 2004, but were stayed by reason of an appeal to this Court.

2. The developments in question are at a place called Timore Lane, which is near the village of Newtownmountkennedy and stretch over an area of just under three hectares to the eastern side of the N11 roadway. The activity carried on by the developer used to be on the western side of that road and it was by reason of the relocation of the N11 route that the respondents, who are the appellants in this case, Forest Fencing Limited and others had to make some readjustments of their business."

(NOTE: at the hearing before me these cardinal points were reversed and, throughout this judgment I have maintained that designation).

"They claim that they have a default decision to develop the site as a factory, display area, storage area, car parking area and a general working area for the manufacture, display and sale of various timber products. Wicklow County Council plead that there is no default permission and that there has been a flagrant breach of the Planning and Development Act 2000.

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4. Because of the building of the N11, the majority of the buildings previously operated by the respondents/appellants were demolished. Some structures continue to exist on a small area to the far side of the new carriageway. A tiny triangular shaped area subsists on the site of the new development. The relevant land was compulsorily purchased for the N11 and, I understand from the submissions of counsel, the disruption to the existing business was valued together with the land purchase price at a sum of €4m. By reason of this dispute between the parties, such portion of that sum as requires to go to arbitration has yet to be decided upon and, in consequence, the amount has yet to be paid. On the very far portion of the site, away from the new N11 road, beside where the old N11 road used to run, there is a small wedge-shaped building to which a default planning permission granted by the Circuit Court in 1994 applies. That permission, however, only covers the activity of sale and display in respect of the relevant products in that area and does not cover office use.

5 When one takes out these two tiny portions of the disputed area, which I will consider separately, we find a situation of complete controversy between the parties. As a matter of what is occurring on the ground, I am satisfied from the evidence, including photographs, that the respondents/appellants have built four substantial buildings, one of which is now demolished, leaving three buildings in controversy; have set out an area which has turned a green field site into a large hardcore surfaced display area; have put car parking in a large area which was previously undeveloped; have extended the storage area for timber products along the front of the N11 carriageway, having moved this area from the other end of the site; and have put an advertisement indicating the nature of the activity carried on in a prominent position on the top of one of the disputed buildings. The respondents/appellants seek to justify all of this on the basis of a default planning permission."

As regards appeals from the Circuit Court to the High Court in civil cases heard without oral evidence, - which was the situation in the instant case, - s. 37(2) of the Courts of Justice Act 1936, provides that such appeals should be heard by way of rehearing of the action or matter. Nonetheless in the context of the stark issues which have emerged from this litigation, I believe that it is instructive to note what His Honour Judge McCartan in his judgment delivered on the 10th February, 2004, stated with regard to the history of manufacturing and related activities by the plaintiffs. The learned Circuit Court Judge stated as follows:-

"Mr. George Smullen (the developer) commenced business manufacturing timber garden products in the early 1990s. Planning Permission was applied for the retention of this business and related buildings and was granted by the Council in July 1993 under Planning File ref. No. 92/7745. The permission was granted though the existing land was zoned agriculture under the county plan. This planning permission was issued subject to the first condition that it was for a limited period of three years only for the stated reason that 'Roads Authority have yet to determine the layout for road improvements in the area and it is likely that this site could be affected'. It can be assumed that if the road plans did not affect the lands then continued and indefinite approval would have been forthcoming for the enterprise.

In the event the new road plans did involve disruption and the business was moved to adjoining lands then used as a golf course and in the ownership of Mr. Michael Byrne. These lands were purchased by George Smullen on the 15th December, 1997 and registered in his name in the Land Registry on the 28th April, 2000. He leased the lands to Forest Fencing Limited by lease dated the 16th February, 1998, for a period of 21 years from that date. The premises being described in the lease as 'the factory offices and yard at Timore (sic) Newcastle, Co. Wicklow' - a possible indication that production had continued beyond the three year limit and that the structures and business had been moved to the new and present location. The original lands were compulsorily acquired for the new road realignment and possession was handed over in time for the construction by the National Roads Authority.

In an attempt to seek planning approval for the move to the new location, an application was lodged in January 2002, under application No. 02/6030. This failed and an appeal to An Bord Pleanála was not pursued to a determination. A second application was submitted to the Council under ref. No. 02/6876 and that application is awaiting finalisation. The Council was alerted to work being carried out on the site by letter dated 12th November, 2002, and the response has led to this litigation."

The Notice of Motion dated the 30th October, 2009, came on for hearing before Charleton J. on the 10th February, 2010. It was grounded on the Affidavit of Mr. Tim Walsh sworn on the 12th November, 2009. In that Affidavit, Mr. Walsh referred to para. 13 of the Affidavit of the second named plaintiff sworn on the 20th June, 2003, where the second named plaintiff had averred that Abwood Homes was no longer able to operate its business at its existing premises which was then on the eastern side of the realigned N11 and, included buildings 2 and 3 marked in pink. Mr. Walsh did indeed refer to the Affidavit sworn by the second named plaintiff on the 28th November, 2003, where he stated that these two buildings were being used for the manufacture and storage of timber. Mr. Walsh stated that following an inspection by him on the 10th April, 2007, he was convinced that all manufacture had ceased at these two buildings which were then used only for storage which was acceptable to Wicklow County Council. He averred that in June 2007, Wicklow County Council had received a complaint that building No. 3 marked in pink was being used by J.O.C Construction Hire Limited for the purpose of its plant rental business. He had carried out an inspection on the 27th August, 2007, and had established that this

was so.

At para. 21(d), (e) and (f) of his said Grounding Affidavit sworn on the 12th November, 2009, Mr. Tim Walsh stated as follows:-

"(d) At the time the Appeals of the Circuit Court Orders came on for hearing, there was only limited use (in the form of storage) being made of the two buildings (coloured pink) which were made on the eastern side of the N11. For all intents and purposes, Abwood's business had moved to the western side of the N11, and as aforesaid claimed that it had a default permission in this regard. Against this background, without realising or anticipating that Abwood might in the future relocate its manufacturing business (or any part of it) to the eastern side of the N11. The County Council was accordingly content not to seek an Order being made in terms of paragraph 1(i) of the Notice of Motion in these proceedings at the hearing of the Appeals.

(e) It is clear, however, that with the closure of the manufacturing base at the western side of the N11, part of the manufacturing business of Abwood has been relocated back to the eastern side.

(f) In these circumstances, the County Council has no option but to seek to re-enter that part of its Notice of Motion whereby it sought a S. 160 Order in respect of the continued operation of Abwood Homes' manufacturing plant at Timmore, Newcastle, Co. Wicklow, without planning permission."

In his *ex-tempore* judgment delivered on the 10th February, 2010, in the matter of the Notice of Motion dated 30th November, 2009, whereby Wicklow County Council was seeking to re-enter the claim for relief in respect of the continued operation of manufacturing by the plaintiffs at buildings 2 and 3 marked in pink, which had not been pursued by them at the hearing of the Appeal, Charleton J. stated that the Appeal had been concerned with the entire operation being carried out by the plaintiffs to the east and west of the new N11, apart from a small defined area in respect of which a default permission had been granted by the Circuit Court. The learned judge stated that he had read all the papers and had heard all the arguments and had been convinced of the situation at that time. At that time he was convinced that the facts put forward on Affidavit were put forward in good faith. However, he was no longer of that view. It is indisputably the case that Charleton J. was referring to all the Affidavits filed on behalf of the plaintiffs, since the Originating Notice of Motion dated 12th May, 2003.

Charleton J. referred to the fact that in an Affidavit sworn on the 20th June, 2003, the second named plaintiff had averred that Abwood Homes were no longer able to continue their business on the eastern side of the new N11. He held that the Affidavits filed on behalf of Wicklow County Council were to the effect that the business of the plaintiffs had been relocated to the western side of the realigned N11. He referred to the following extracts from a letter dated the 12th February, 2009, from the Solicitors for Wicklow County Council to the Solicitors for the plaintiffs:-

"Unfortunately, we are not in a position to consent to the adjournment requested, as you know any adjournment is a matter for Mr. Justice Charleton and no doubt you will make the appropriate application on the 16th instant. However, we would say that our client is surprised that works do not appear to have even commenced in relation to compliance with Mr. Justice Charleton's Order.

In relation to your client's relocation of the business, our client has some concerns in relation to same. Accordingly, you might kindly confirm where your client proposes to relocate the business. In this regard, our client has concerns that your client may try to relocate the business to the former display area for office and sales use beside the old N11. Alternatively, our client is concerned that your client may attempt to relocate the business to the east of the new N11. These concerns have arisen out of radio interviews given by your client where some suggestions have been made in this regard."

Charleton J. then referred to a reply dated the 13th February, 2009, from the Solicitors for the plaintiffs and quoted the following passages:-

"You have asked us to confirm where our client proposes to relocate the business. We cannot answer this question. The difficulty, as we have outlined in our letter to you of the 9th instant, is that our client has been unable, despite extensive searches by himself and his estate agent, to find an alternative premises. Our client is engaged in attempting to locate a suitable alternative premises on a daily basis.

Our client does not intend to relocate the business to the display or to the area to the east of the new N11 as suggested by you. We are at a loss to understand your reference to radio interviews given by our client. Mr. Smullen has never given a radio interview and no representatives of Abwood have given radio interviews for some considerable time."

The learned Judge stated that he was shocked by this. This reply was very similar to the Affidavits which had been lodged, none of which he accepted. They had been carefully drafted to the advantage of the plaintiffs and, did not deal with the core issue. He regarded this as common deceit.

Charleton J. referred to the following extract from para. 12 of the Affidavit of Mr. Tim Walsh sworn by him on the 16th April, 2007, dealing with the question of movement from east to west, which he held had not been contradicted:-

"In swearing this Affidavit, I was absolutely convinced that the respondents had moved their manufacturing business to the western side of the N11 from what had been their manufacturing base on the eastern side of the N11. Accordingly, I was not overly concerned with the continued existence of the buildings marked pink, which I felt in any event, had been in existence for in excess of seven years at that time. Insofar as any use was being made of these buildings at that stage, it only comprised storage of some materials. While I accept that the building, which I have numbered 2 continued to contain band saws, I never saw them being used during the times I inspected the shed between 2004 and 2007. In relation to shed No. 3 I was aware that there had been some improvement works carried out to it from March 2005, involving the laying of a concrete floor, the carrying out of re-cladding works and the provision of a roller shutter doorway. But I saw these works as minor in the overall context.

(c) In all the circumstances, I was content as aforesaid to indicate in my Affidavit sworn on the 16th April, 2007, that the County Council was no longer seeking relief in respect of the "continued operation of Abwood Homes Manufacturing Plant at Timmore, Newcastle, Co. Wicklow, without Planning Permission" against a background where as far as I was concerned the manufacturing base had been relocated to the western side of the N11 and reliefs were being sought in respect of the buildings erected on that side for the purpose of such manufacture."

Charleton J. also quoted para. 13 of this Affidavit regarding the use of building No. 3 marked in pink by J.O.C. Construction Hire Limited from June 2007, onwards, which Mr. Tim Walsh stated he had investigated and confirmed on the 27th August, 2007. The learned Judge noted that this had not been dealt with in the Replying Affidavits filed on behalf of the plaintiffs.

Charleton J. directed that manufacturing cease forthwith with regard to the pink buildings. He would allow storage to be permitted in buildings 2 and 3 marked in pink and noted that this was also the view of Wicklow County Council. He held that the Court had been deceived. He stated that the Court was shocked by the content of the correspondence, Affidavits and what had happened throughout the conduct of the whole proceedings. He directed that an Order be agreed between the parties and drawn up which would be finalised on the 9th March, 2010.

In my judgment it is abundantly clear from this decision of Charleton J. on the 10th February, 2010, that the reason why he allowed the Motion and, permitted Wicklow County Council to re-enter the issue relating to buildings 2 and 3 marked in pink, despite the provisions of s. 39 of the Courts of Justice Act 1936, and, his Judgment of the 13th July, 2007, is that he was satisfied that Wicklow County Council had shown exceptional circumstances why in the interests of fundamental justice it was necessary to vary his otherwise final decision of July 2007. The learned Judge was clearly satisfied that a deliberate deception of the Court on a material point by a party to litigation, particularly in circumstances where that party obtained an advantage thereby at the expense of the other party was an "exceptional circumstance" which required him to vary an otherwise final and conclusive decision if the other party was not to be denied fundamental justice.

I cannot accept the argument on behalf of the plaintiffs that another remedy was available to Wicklow County Council in that they could have commenced new Enforcement Proceedings against the plaintiffs in respect of buildings 2 and 3 marked in pink. This would be to give the plaintiffs the benefit of their deception and, would place the Planning Authority at a most serious disadvantage with regard to time limits in the Planning Code.

It is also clear from his Decision of the 10th February, 2010 that Charleton J. concluded that the reason why Wicklow County Council had elected, on the Appeal by the plaintiffs from the Decision of His Honour Judge McCartan, not to pursue the remedy sought in the Notice of Motion dated the 12th May, 2003, at para 1(i), in respect of buildings 2 and 3 marked in pink and, to waive the relief granted by the learned Circuit Court Judge on foot of that paragraph, was that they were deceived by the plaintiffs into believing that all manufacturing had been relocated to the western side of the N11 and, that buildings 2 and 3 marked in pink were used only for the storage of timber which was acceptable to Wicklow County Council. The learned Judge was clearly satisfied that this important issue in the litigation was not brought forward by Wicklow County Council in the Appeal for this reason only. I am satisfied that Charleton J. determined that in such "special circumstances" Wicklow County Council should be permitted to reopen this issue in the Notice of Motion dated the 30th October, 2009, and that the rule in *Henderson v. Henderson* [1843] 3 Hare 100 at 114-115, as applied in this jurisdiction in *A.A. v. The Medical Council* [2003] 4 I.R. 302, did not work an estoppel in such circumstances. There is nothing in the judgment of Charleton J. delivered on the 10th February, 2010, to indicate any finding of negligence, inadvertence, accident or lack of reasonable diligence on the part of Wicklow County Council in relation to this matter.

His Honour Judge McCartan in his judgment delivered on the 10th February, 2004, held that Wicklow County Council was entitled to an Order restraining the plaintiffs and each of them from carrying on or continuing the manufacture of timber products at buildings 2 and 3 marked in pink. This was reflected in the Order of the Circuit Court made on the 20th February, 2004. At the hearing of the Appeal before Charleton J. on the 19th, 20th and 26th June, 2007, Wicklow County Council elected not to claim this remedy and waived this relief. Charleton J. directed that the Order of the learned Circuit Court Judge be varied accordingly. Therefore the point was not raised and specifically determined by the High Court on appeal: it was omitted entirely from the Appeal. In my judgment, Wicklow County Council could not have been estopped by the principle of *res judicata* from raising the matter on the 10th February, 2010, as if it had been brought forward and actually decided at the hearing of the Appeal. In fairness, this aspect of the rule of issue estoppel was not strongly advanced by Mr. O'Reilly, Senior Counsel for the plaintiff, either in his written preliminary submissions or in his oral submissions before me at the hearing of this application.

In *L.P. v. M.P.* [2002] 1 I.R. 219, the Supreme Court did not endeavour to set out a list, much less an exhaustive list, of the sort of matters which could properly be regarded as "exceptional circumstances". This is clearly something which will have to be determined on a case by case basis. Murray J. (as he then was) at p. 229, held that rulings on law and on procedural issues made by a court in the course of an action would not come within the definition of "exceptional circumstances". He did however hold that a very heavy burden lies on an applicant seeking to establish "exceptional circumstances", which must consist of something, which through no fault of the applicant goes to very root of the fair and constitutional administration of justice.

In *Taylor v. Laurence* [2002] 2 All E.R. 353 at 364, Lord Woolf C.J. held that actual "fraud" has always been treated as an exceptional case, and in my judgment there is no real distinction in this respect between such fraud and conscious and deliberate deceit. I would adopt what was held in *R. v. Kelly* (Edward) [2000] Q.B. 198 at 208 by Lord Bingham of Cornhill C.J. in construing s. 2 of the Crime (Sentences) Act 1997, which refers to exceptional circumstances which justify the non imposition of a life sentence, where he said:-

"To be exceptional, a circumstance need not be unique or unprecedented or very rare, but it cannot be one that is regularly, or routinely, or normally encountered."

Similarly, in *A.A. v. The Medical Council* [2003] 4 I.R. 302, the Supreme Court did not seek to define "special circumstances" but did indicate that negligence, inadvertence, accident or a failure to exercise reasonable diligence by a party could not amount to "special circumstances". What amounts to "special circumstances" cannot properly be determined in advance and will fall to be decided on the facts of each individual case. In *Manson v. Voughl* [1998] Times, 20th November, May L.J. considered that in this context "special circumstances" may for practical purposes be the same thing as deciding that there is no abuse of process. The Honourable Mr. Justice K.R. Handley, (Court of Appeal of New South Wales), author of the 4th Ed. of "*Res Judicata*" Spencer Bower and Handley, (Lexis, 2009) states at p. 121, para. 8.33, that there have been very few cases where "special circumstances" have been established. He points to cases in other Common Law Jurisdictions where illegality and where a denial of procedural fairness by an administrative tribunal have been held to amount of "special circumstances".

In my judgement nothing could strike more at the root of the fair and constitutional administration of justice than that a party found to have deliberately and consciously deceived and mislead a court, should be able to rely upon a statutory provision imposing finality with respect of the decision of that court or, on the legal principle of issue of estoppel, so as to preclude an innocent affected party from seeking to rescind or vary the judgment and order obtained by that deception. I would adopt what was held by Buckley J. in *Dsane v. Hagan* [1962] Ch. 193 at 200-201:-

"I do not disregard the salutary maxim 'interest rei publicae ut sit finis litium' but the Court has never allowed that maxim to prevent [it] . . . protecting itself from being deceived"

Insofar as that part of the Order of the High Court (Charleton J.), made in the Appeal, that the Order of the Circuit Judge dated the 20th February, 2004, be varied by the deletion of para. 1(i), did not follow a hearing and determination of that issue on the merits by the High Court and, should therefore be regarded as a Consent Order, similar considerations apply. There can be no doubt but that in his Judgment delivered on the 10th February, 2010, Charleton J. found that the agreement and consent of Wicklow County Council to this variation of the Order of the Circuit Court was procured by deliberate and conscious deception on the part of the plaintiffs. In my judgment it would be an absolute travesty of justice if Wicklow County Council were to be precluded by issue estoppel from re-entering before Charleton J. the issue of whether the manufacture of timber products was being carried on by the plaintiffs at buildings 2 and 3 marked in pink without planning permission.

It was not necessary for Wicklow County Council to seek to rescind the entire judgment of Charleton J. delivered on the 10th February, 2010: it was only necessary for them to have this single and severable issue re-entered and determined on its merits by the court. No objection was taken by the plaintiffs to the form of procedure adopted by Wicklow County Council.

While accepting that in most circumstances separate proceedings would have to be taken to set aside an Order passed and perfected, - *Re. Greendale Developments (No. 3)* [2002] 2 I.R. 530, - if this would involve the parties in unnecessary additional litigation and expense and if without causing practical difficulties it is possible to establish that the Court has been deceived and misled in the course of an Appeal in my judgment the court may reopen the Appeal where there is no alternative effective remedy. (See *Wood v. Gahlings* [1996] J.L.R. 684 C.A.: *Taylor v Laurence* [2002] 2 All E.R. 353 at 369 a - d per Lord Woolf C.J.)

I am satisfied that Charleton J. did find and, that it was properly open to him to find, in his Judgment delivered on the 10th February, 2010, that Wicklow County Council and the Court had been deliberately and consciously deceived and misled by the plaintiffs on a material issue at the hearing of the Appeal and that this enabled him to exercise the inherent jurisdiction in the High Court to vary his decision and order of July 2007, and, to hold that Wicklow County Council was not estopped from raising the issue by the extended rule in *Henderson v. Henderson*.

Finding as I do that Charleton J. acted entirely within jurisdiction his *ex-tempore* judgment delivered on the 10th February, 2010 and the Order made consequent upon that judgment on the 9th March, 2010, are final and conclusive by virtue of the provisions of s. 39 of the Courts of Justice Act 1936, as re-enacted by the Courts (Supplemental Provisions) Act 1961. I therefore have no jurisdiction and, no other court has jurisdiction to hear an Appeal from that judgment and Order.