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THE HIGH COURT

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

[2011 No. 26 CA]

BETWEEN

THE COUNTY COUNCIL OF THE COUNTY OF WICKLOW

PLAINTIFF

AND

KATIE (OTHERWISE KATHERINE) FORTUNE (NO. 3)

DEFENDANT

[2011 No. 25CA]

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

COUNTY COUNCIL OF THE COUNTY OF WICKLOW

PLAINTIFF

AND

JOHNNY FORTUNE AND KATIE FORTUNE

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 5th day of September 2013

PART 1 - INTRODUCTION

1. This is now the third judgment dealing with aspects of the planning status of certain structures onlands owned by members of the Fortune family at Carrigeenshinnagh, Lough Dan, Roundwood, Co. Wicklow. The first two judgments dealt with the question of whether a statutory injunction should be granted pursuant to s. 160 of the Planning and Development Act 2000 ("the 2000 Act")(as amended) requiring Ms. Kate Fortune to demolish a small chalet constructed by her without planning permission which she uses as her principal private dwelling. In *Wicklow County Council v. Fortune (No.1)* [2012] IEHC 406, I articulated the test which a planning authority would be required to satisfy in those s. 160 cases where the demolition of a private dwelling was sought and in *Wicklow County Council v. Fortune (No.2)* [2013] IEHC 255, I applied that test in the course of rejecting the Council's argument that Ms. Fortune's chalet should be demolished.

2. As will shortly be seen, it will prove necessary to re-visit aspects of that latter judgment in the course of this judgment. It must also be recalled that in *Fortune (No.1)* I ruled that the onus of proof rested with any defendant asserting that a planning authority's entitlement to seek a s. 160 order was statute-barred by reason of the lapse of the statutory seven-year period. This is an issue which also arises in the case involving Johnny Fortune and Katie Fortune (2011, No. 25 CA).

PART 2: THE PROCEEDINGS INVOLVING

JOHNNY FORTUNE AND KATE FORTUNE

3. The principal relief sought against Mr. Fortune and Ms. Fortune (who are siblings) in the proceedings bearing Record No. 2011 No. 25CA are orders restraining the use of certain lands for the keeping of certain vehicles and the parking of a caravan on the site as well as an order providing for the demolition and removal of two wooden timber shed structures. For the sake of convenience, I will describe the larger shed as "the large shed" and the other shed as "the garden shed". There is some dispute as to the exact location of the large shed and it seems to straddle lands owned by Ms. Fortune (Folio No. 22766F) as well as lands which are beneficially owned by her brother, Mr. Fortune (Folio No. 32316F). I will proceed for present purposes on the basis that the vehicles and structures in question are situate wholly on Mr. Fortune's lands and that he will take responsibility in this regard. Should this prove not to be the case, it is a matter which can be addressed at a later stage following the delivery of this judgment. Subject to this proviso, therefore, the question of making any order against Ms. Fortune in proceedings bearing record number 2011 No. 25CA does not arise.

The storage of vehicles on the lands

4. As far back as May 2006, an official from Wicklow County Council, Mr.Brophy, visited Mr. Fortune's land. He found five wrecked cars, a yellow caravan (which was apparently being lived in), a jeep, a lorry and two cars which were apparently in current use. Mr.Brophy reported these findings to the Planning Department of the Council and a warning letter was duly sent under s. 152 of the 2000 Act to Mr. Fortune.

5. Mr.Brophy next visited the site in late August 2006. Apart from a van parked in one of the sheds, the caravan had been removed

and there were two cars parked on the site. The remains of a lorry was situate in the north-eastern portion of the lands. By this stage, there had been intermittent correspondence with Mr. Fortune and he made an application for retention permission in January 2007, seeking permission to construct a two-car garage on the site. A request for further information was made by the Council on 13th March 2007, but this request was not responded to. The Council then deemed this application to have been withdrawn.

6. In the wake of these developments, a third inspection took place on 27th November 2007. Mr.Brophy found seven vehicles: five cars, a mini-van and one van in various states of repair. This prompted a further warning notice which was sent on 11th December 2007. While Mr. Fortune indicated to the Council that he intended to apply for full planning permission for the construction of a house at the site, it appears that no such application ever materialised. A further inspection of the lands was then conducted by Mr.Brophy on 31st January 2008. This showed that the unauthorised user was still continuing. The Council then issued an enforcement notice on 20th February 2008. This notice required Mr. Fortune to cease the use of the site for the storage of vehicles and to demolish and remove the timber garage.

7. While there was further correspondence and discussions between the parties in relation to the sheds (a topic to which I shall later revert), the present proceedings were ultimately commenced in September 2009. Mr. Fortune has explained that the accumulation of vehicles came about by reason of his son's interest in the restoration of old vehicles. Shortly after Mr. Fortune constructed this shed, his son began to use it in order to restore these vehicles. It should be said that the son has a real aptitude in this regard and won an award in a British television series in recognition of this talent. Nevertheless, as the vehicles accumulated, Mr. Fortune became concerned that this activity was unsightly and directed his son to stop which he did.

8. Critically, therefore, by the date of the commencement of these proceedings, this user had ceased. Mr. Fortune does not dispute but that this particular user involving the storage of these vehicles was unauthorised. Yet it appears to be common case that the user has been discontinued. In these circumstances, I will merely grant a declaration that the use of the lands for the purposes of the storage of vehicles would represent an unauthorised user and there does not appear to be any necessity for an injunction at the present time. Of course, if this situation were ever to change, then the Council would be free to apply to re-enter the proceedings before the Circuit Court.

The large shed

9. The large shed is a timber framed structure with a concrete floor. It is almost 5m high and has a floor area of 38 square metres. We have already noted that an abortive application for planning permission was made in early 2008. It is clear from the affidavit sworn by Ms.Casey, an official attached to the Council, that there is no planning permission in existence for this development, or, for that matter, any of the other developments on that site. Mr. Fortune maintained that the large shed was to be used for the keep of horses, whereas the Council officials maintained that from their inspections there was no evidence of this, other than the presence of manure and two or three bales of hay in the large shed.

10. Mr. Fortune did, however, make an application for certificate of exemption in respect of the large shed on the basis that it was to be used for horses and livestock. This was refused by decision of the Council's decision dated 23rd April 2008, and the validity of this decision was never challenged in judicial review proceedings. Several reasons were given for this conclusion which were expressed as follows:

> "Planning and Development Act, Part 1, section 2 and Part 1, section – definition of "agriculture and development"
>
> Part 2, Article 9 of the Planning and Development Regulations 2001-2006
>
> Schedule 2 , Part 3, Class 6 of the Planning and Development Regulations 2001-2006 "limitations and conditions"
>
> Planning History (PPR 07/83)
>
> Lack of information relating to the agricultural holding to be served by the proposed building
>
> The existing use of land surrounding the structure observed during site visit
>
> The location of the development in an area of outstanding natural beauty and interference with a listed prospect as indicated in the Wicklow Development Plan."

11. While I will return shortly to the adequacy of the reasons given, the fact that a certificate of exemption was applied for and refused now presents an unusual and difficult jurisdictional problem. In *Grianán an Aileach Interpretative Centre Co. Ltd. v. Donegal County Council* [2004] IESC 41, [2005] 1 I.L.R.M. 41, the Supreme Court held that this Court enjoyed no free-standing jurisdiction to grant a declaration in respect of what user did or did not constitute exempted development. As Keane C.J. explained:

> "Thus, in the present case, if the jurisdiction of the planning authority or An Bord Pleanála under s. 5 were invoked and they were invited to determine whether the uses in controversy were within the uses contemplated by the planning permission or constituted a material change of use for which a new planning permission would be required, either of those bodies might find itself in a position where it could not exercise its statutory jurisdiction without finding itself in conflict with a determination by the High Court. No doubt a person carrying out a development which he claims is not a material change of use is not obliged to refer the question to the planning authority or An Bord Pleanála and may resist enforcement proceedings subsequently brought against him by the planning authority on the ground that permission was not required. In that event, if the enforcement proceedings are brought in the High Court, that court may undoubtedly find itself having to determine whether there has been a material change of use or whether a development is sanctioned by an existing planning permission, as happened in *O'Connor v. Kerry County Council* [1988] ILRM 660. But for the High Court to determine an issue of that nature, as though it were the planning authority or An Bord Pleanála, in proceedings such as the present would seem to me to create the danger of overlapping and unworkable jurisdictions referred to by Henchy J. [in *Tormey v. Ireland* [1985] IR 289].
>
> The decision of the House of Lords in *Pyx Granite Company Ltd. v. Minister of Housing and Local Government* is, in my view, distinguishable from the present case. That was a case in which a company engaged in quarrying claimed to be entitled to carry it out under the provisions of a private and local Act of Parliament, i.e. the Malvern Hills Act, 1924. Since the relevant legislation in England provided that planning permission was not required for development authorised by local or private Acts, the company further claimed that they were not obliged to invoke the procedure under the planning legislation whereby the Minister of Housing and Local Government could determine whether planning permission was required. The Minister raised a preliminary objection to the court determining the company's claim, on the ground that its

> jurisdiction had been ousted by the provisions of the planning legislation entitling the Minister to decide whether planning permission was required. That submission was rejected by the House of Lords on the ground that the right of a person to have recourse to the courts for a determination of his rights was not to be excluded except by clear words.
>
> That, however, was a case in which the company claimed that they were not in any way affected by the provisions of the planning code, having regard to the provisions of the local and private Act of Parliament authorising their operations. One could well understand why that was thought to be an issue which could be resolved only by the courts. No such considerations arise in this case, where the plaintiffs are admittedly required to obtain planning permission for any operations which constitute "development" within the meaning of the 2000 Act and are not exempted development.
>
> In the present case, the trial judge, quite understandably, was concerned to resolve issues which had been brought before the High Court in a manner which was fair to both the planning authority and the public interest which it represents on the one hand and the legitimate interests of the plaintiffs on the other hand. This resulted, however, in the granting of a declaration in a form which had not been sought by either party and which clearly creates further difficulties. Can it be said that the prohibition on "weddings"(presumably intended to exclude the social function which normally takes place in a hotel or restaurant following the wedding itself) extends to other social functions and, if so, how are they to be defined? Does the prohibition on "non-cultural activities" extend to every form of pop or rock concert? What precisely is meant by "use as a nightclub"?
>
> Some responsibility may be attributed to the planning authority for the difficulties that have arisen in determining to what uses the premises may be put without a further planning permission: they might well have been avoided by the use of more precise language when the permission was being granted. I am satisfied, however, that the High Court cannot resolve these difficulties by acting, in effect, as a form of planning tribunal. As I have already indicated, if enforcement proceedings were brought in the High Court, that court might find itself having to determine whether particular operations constituted a "development" which required permission and the same issue could arise in other circumstances, *e.g*. where a commercial or conveyancing document containing a particular term dealing with compliance with planning requirements was the subject of litigation. But in every such case, however it came before the court, the court would resolve the issue by determining whether or not there had been or would be a development within the meaning of the planning code. The only circumstance in which the court could find itself making a declaration of the kind ultimately granted in this case would be where it had been drawn into a role analogous to that of a planning authority granting a permission."

12. While in this passage Keane C.J. envisaged that this Court could determine the question of exempted development in enforcement proceedings, yet *Grianán an Aileach* does not quite address the precise question is presented here, namely, whether the Court has jurisdiction to consider in s. 160 proceedings whether particular development is exempted development where the relevant local authority has already refused to grant a s. 5 declaration. Bound as I am by this decision, it seems to me, nevertheless, that this decision must be taken impliedly to preclude the High Court from dealing with this matter in enforcement proceedings *in these precise circumstances* where a s. 5 application for a certificate of exemption has been refused and has not been quashed in judicial review proceedings.

13. Here it must be recalled that a s. 5 refusal forms part of the formal planning history and the details of the refusal are entered on a public register: see s. 5(3) of the 2000 Act. If this Court could grant a form of declaration in enforcement proceedings that the development was exempt, there would be in existence two contradictory official determinations of this question, with the real potential for confusion and uncertainty of the very kind which so exercised the Supreme Court in *Grianán an Aileach*.

14. It follows, therefore, that I must conclude that I have no jurisdiction to determine the question of exempted development in these precise circumstances in the course of this appeal from the Circuit Court. In strictness, therefore, the Council should be entitled to the appropriate s. 160 order. I have nevertheless concluded that in the particular circumstances of this case it would be unfair to allow the matter to rest there having regard to the reasons given by the Council for that refusal.

15. While it is true that the actual validity of the decision is not under challenge, yet one cannot help thinking that the reasons given for the decision are not altogether satisfactory. Thus, for example, the decision-maker refers generally to Article 9 of the Planning and Development Regulations 2001, and the "restrictions on exemption" as if this was all self-evident. But no information is given *at all* as to which restrictions on the exemption are relevant to Mr. Fortune's application and why. One factor which might be highly relevant is whether it was accepted that the shed was being put to agricultural use – a factual matter on which the Council officials and Mr. Fortune differed in affidavits filed in the course of these proceedings – yet no views are offered on this topic by the decision-maker. One might also observe that the specific application of Article 9 to given fact situations is by no means straightforward, as my own judgment in *Cunningham v. An Bord Pleanála* [2013] IEHC 234 illustrates.

16. There is, likewise, a most general reference to the limitations and conditions contained in Part 3, Class 6 of the 2001 Regulations. Class 6 contains no less than seven separate limitations and conditions. The addressee of the decision is surely entitled to know at a minimum which of these limitations and conditions are engaged in the present case and why. Yet the relevant limitations and conditions are not even specified in the decision, still less is it explained why these limitations and conditions require the application to be refused.

17. In *Grianán an Aileach*, the Supreme Court identified the difficulties caused by the planning authorities through the use of imprecise language in their administrative decisions. Clarity of language and the giving of reasons which are readily understandable is not only central to the planning process, but it is a central feature of any fair system of administrative decision-making: see here the comments of Fennelly J. in *Mallak v. Minister for Justice and Equality* [2012] IESC 59. It is, perhaps, all too easy to be critical of hard-pressed decision makers, but, unfortunately, in the present case the basis for the s. 5 decision to refuse to grant exempted status cannot readily be followed or understood by reason of its resort to vague generalities of language.

18. This, of course, is not to suggest that the Council were wrong to refuse to grant the s. 5 declaration, as I express no view at all on this topic. It is rather to say that it would be quite unfair to shut out Mr. Fortune at this stage on the basis of a decision which on its face plainly fails to meet the requirements of administrative fairness specified in *Mallak* and the basis of which decision cannot easily be ascertained, even if that decision was never challenged at the relevant time by way of judicial review.

19. In these special circumstances I propose to adjourn the making of any order under s. 160 to enable Mr. Fortune to make a fresh application for exemption under s. 5 should be minded to do so. I stress that the making of any such application is entirely a matter for him. When the Council has ruled on the new s.5 application (should one be made), then the finalisation of any possible orders under s. 160 can be reviewed at that point. I will discuss with counsel the timetable (which would have to be measured in weeks) for the making of any such application.

The garden shed
20. Mr. Fortune contends that garden shed was built by his mother at some unspecified date in 2002. In his first affidavit sworn on 29th September 2009, Mr.Brophy averred that the shed had been "fitted out for living accommodation in a rough and ready manner with a kitchenette and a bed."Mr. Fortune maintained that it was used as a garden shed to keep tools and other similar outdoor equipment. While he kept a kettle in the shed as he enjoyed having a cup of tea there, it was otherwise uninhabitable. The windows were broken and the interior is covered with plastic bailing wrap nailed into the walls. In his replying affidavit of 27th October 2010 Mr.Brophy acknowledged that the shed had been substantially emptied of all residential fixtures and fittings and that all that remains is a refrigerator and a table.

21. As the garden shed was not the subject of any s. 5 application, it is clear from *Grianán an Aileach* that this Court is free to determine the exempted development issue *de novo* in the course of these enforcement proceedings.

22. Class 3 of Schedule 2 of the Planning and Development Act Regulations 2001 provides for the prima facie exemption of a garden shed of this nature. This, however, is subject to the following conditions being satisfied:

> "1. No such structure shall be constructed, erected or placed forward of the front wall of a house.
>
> 2. The total area of such structures constructed, erected or placed within the curtilage of a house shall not, taken together with any other such structures previously constructed, erected or placed within the said curtilage, exceed 25 square metres.
>
> 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.
>
> 4. The external finishes of any garage or other structure constructed, erected or placed to the side of a house, and the roof covering where any such structure has a tiled or slated roof, shall conform with those of the house.
>
> 5. The height of any such structure shall not exceed, in the case of a building with a tiled or slated pitched roof, 4 metres or, in any other case, 3 metres.
>
> 6. The structure shall not be used for human habitation or for the keeping of pigs, poultry, pigeons, ponies or horses, or for any other purpose other than a purpose incidental to the enjoyment of the house as such."

23. Neither party supplied me with precise measurements of either height or size. But judged from the photographs, at first blush the garden shed would seem to meet these conditions as to size and height. Moreover, the erection of the shed has left ample private open space, so that condition no. 3 would also appear to be satisfied. Nor, in view of Mr.Brophy's final affidavit, is there any suggestion that the structure is currently being used for human habitation.

24. In these circumstances, I have concluded that the fairest thing to do is to adjourn a final conclusion on this question in order to enable Mr. Fortune to have an affidavit prepared by a planning consultant who would address the question of whether the exemption conditions are satisfied. The Council will, of course, be given an opportunity to reply and make submissions before any final decision is taken.

25. Before leaving this issue, I cannot help thinking as a result of the issues disclosed in this case that the Oireachtas might wish to reflect again on who the appropriate decision-maker in the case of exempted development should be and, specifically, whether much should turn on whether the issue arises in enforcement proceedings or otherwise. Both *Grianán an Aileach* and this case have illustrated the potential for overlap and confusion in the manner of the s. 5 jurisdiction.

26. This case has also illustrated that other considerations also arise in this context. Should, for example, the role of this Court vary depending on the happenstance of whether a s. 5 application has been made? If, moreover, this Court enjoys – as it appears to do – a free standing jurisdiction to rule on questions of exempted development in enforcement proceedings where no s. 5 application has been made, is this consistent with the general philosophy of the planning system where it involves the courts ruling not simply on pure questions of law or mixed questions of law and fact relating to whether there has been a material change of use, but also on what effectively are pure questions of planning policy and appraisal? Even if I had the appropriate evidential basis for such a ruling on the existing affidavits, would it have been appropriate for me to rule in the context of a s. 160 application on some free standing basis whether a particular development satisfied the conditions and the limitations specified in respect of the various classes of developments set out in the Schedule of the 2001 Regulations?

27. But beyond observing that these are issues which the Oireachtas may wish to address in the fullness of time, we may now pass on to deal with the case involving Ms. Fortune alone, 2011 No. 26CA.

PART III: THE PROCEEDINGS INVOLVING

MS. KATE FORTUNE

28. At the resumed hearing, counsel for the Council, Mr. Connolly SC initially expressed concern lest my judgment in both *Fortune (No.1)* and *Fortune (No.2)* be construed as amounting to a development consent. This would, he submitted, have implications under EU law having regard to the State's obligations under the Habitats Directive (Directive 92/43/EEC) given the existence of a special area of conservation in the immediate vicinity of Ms. Fortune's chalet. However, as the argument developed, Mr. Connolly's concerns were, I think, assuaged.

29. For the avoidance of any possible doubt, it should be made clear that I did not accept that Ms. Fortune's actions in constructing the chalet were within the law or that I was somehow authorising this development. As I was at pains to make clear throughout both judgments, the chalet was wholly unauthorised and, indeed, I granted a declaration to this effect. All that the two judgments decided was that having regard to the established fact that Ms. Fortune had been living in the chalet for some time and that it was her only home, the guarantee of the inviolability of the dwelling in Article 40.5 of the dwelling was plainly engaged. As I pointed out in *Fortune (No.1):*

> "At the same time, Article 40.5 affords real protection which the courts must safeguard by word and deed. Insofar as

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

29. I later added that:

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

30. While it is true that, as the above passages seek to illustrate, the guarantee of "inviolability" cannot literally mean what it says, this Court is nonetheless bound to ensure that Article 40.5 operates as a real and meaningful protection for the home-owner or occupier. Applying here – if only by analogy - well established principles of proportionality (*cf*. the judgment of the Supreme Court in *Meadows v. Minister for Justice and Equality* [2010] IESC 3, [2010] 2 I.R. 201), I held that the Council was required to present compelling arguments to demonstrate that in the circumstances of this particular case the demolition of the chalet was the only realistic and proportionate response. On the facts, I held that as the Council had failed to meet this test, it followed that it was not entitled to an order demolishing the chalet. But this is very far from saying that the construction of the chalet was somehow authorised or legitimated by my decision, which it plainly was not.

32. In the course of my judgment in *Fortune (No.2)* I drew attention to the fact that the effluent treatment system which was in operation did not satisfy EPA Guidelines and that the Council was entitled to an order under s. 160 requiring Ms. Fortune to operate the effluent system in a manner compatible with existing EPA guidelines and I invited the parties to address the form of order best appropriate to achieving this objective. As it happens, agreement has been reached regarding the installation of an improved effluent disposals system and the final order will reflect this.

33. There was, however, one issue on which the parties could not agree, namely, whether Ms. Fortune's entitlement to reside in the dwelling ought to be made expressly conditional on the existence of a satisfactory effluent disposal system which met acceptable legal standards. It is, I think, unnecessary to express any view as to whether there would be a jurisdiction to make such an order under s. 160. It suffices perhaps merely to say that there might well be circumstances in respect of which the steadfast refusal of the occupier of an unauthorised dwelling such as Ms. Fortune to have in place a satisfactory effluent disposal system would be a relevant factor in deciding whether to grant an order under s. 160. After all, the habitation of a dwelling without such a satisfactory effluent system might over time pose unacceptable public health or even environmental pollution problems. Certainly, where it was shown in a given case that the habitation of a particular unauthorised dwelling posed significant problems of this nature, then the applicant local authority might well have met the high threshold necessary for Article 40.5 purposes to show that the demolition of the dwelling was objectively justified and that there was no other realistic response.

34. While I have declined to make an order under s. 160 in the present case, as I pointed out at paras. 23-26 of my judgment in *Fortune (No.2),* the Council was entitled to an order requiring the installation of a satisfactory effluent system. I have no doubt but that any order requiring this to be will be fully complied with. In the unlikely event, however, that it were not, I will provide the Council with an additional safeguard whereby, in addition to its standard remedies for non-compliance with any court order, it will also have liberty to apply afresh for a s. 160 order with respect to the habitation of the dwelling without the benefit of such an acceptable effluent system.

The mobile homes and caravans situate on Ms. Fortune's lands

35. We must now consider the question of the remaining structures on Ms. Fortune's lands other than the principal chalet which was the subject of the judgments in *Fortune (No.1)* and *Fortune (No.2),* namely, two mobile homes surrounded by timber decking and two caravans. In affidavits filed before the Circuit Court in October 2010, Ms. Fortune explained that she has two children, one of whom was about to sit her Leaving Certificate in June 2011 and the other was then in his second year in College. Her mother previously lived in the chalet prior to her death in March 2011. One of the mobile homes was used by her son from time to time as his bedroom and the other is used for storage. One of the caravans was removed from the site sometime between 2008 and 2009, and the other is currently also used for storage.

36. It is accepted that there is no planning permission for these developments. There is no doubt at all but that, as has happened in the present case, the placing of the mobile homes and the caravans on the site on a permanent or quasi-permanent basis constitutes "development" within the meaning of s. 3 of the 2000 Act. Section 3(1) provides:

> "In this Act means, '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."

37. Section 3(2) next states that:

> "(2) For the purposes of *subsection (1)* and without prejudice to the generality of that subsection-
>
> (a) where any structure or other land or any tree or other object on land becomes used for the exhibition of advertisements, or
>
> (b) where land becomes used for any of the following purposes-
>
> (i) the placing or keeping of any vans, tents or other objects, whether or not moveable and whether or not collapsible, for the purpose of caravanning or camping or the sale of goods,
>
> (ii) the storage of caravans or tents, or

(iii) the deposit of vehicles whether or not usable for the purpose for which they were constructed or 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."

38. It is perfectly obvious, therefore, from the express language of s. 3(2)(b)(i) and s. 3(2)(b)(ii) that the placing and storage of mobile homes and caravans on land in and of itself constitutes a material change of use. This in turn means that development has taken place for the purposes of s. 3(1), thus triggering the obligation to obtain planning permission. Insofar as there was any possible doubt on this point, the judgment of O'Neill J. in *Sligo Corporation v. Martin* [2007] IEHC 153, makes it absolutely plain that the placing of a mobile home on lands constitutes development for this purpose.

39. A warning letter was first sent by the Council pursuant to s. 152 of the 2000 Act in April 2007. The Council originally allowed Ms. Fortune to apply for retention permission, but no less than three separate retention permissions were refused between 2007 and 2008. The last of the retention applications was refused by An Bord Pleanála in November 2008. These s. 160 proceedings were then commenced in the Circuit Court on 22nd September 2009. On 21st February 2011 the Circuit Court (Her Honour Judge Flanagan) made an order requiring Ms. Fortune and any other member of her family to cease occupation of the two mobile homes and the caravans and to ensure the removal of the mobile homes and the caravans from the site.

40. Given that it is admitted that the structures constitute unauthorised development, one may proceed on the working assumption that the Council would, in principle, at least, be entitled to the s. 160 order which has been sought. What, then, are the possible defences?

The application of Article 40.5 to the mobile home

41. There is no doubt but that, in principle, at least, a mobile home can constitute a dwelling for the purposes of Article 40.5: *The People (Attorney General) v. Hogan* (1972) 1 Frewen 360. But in the present case, the occupation of the mobile home by Ms. Fortune's son appears to have been quite episodic and it is not suggested that he ever lived there. At most, the mobile home seems to have been used from time to time as a sort of out-house to facilitate the son sleeping in separate quarters. It is not even clear that he still uses the mobile home for this purpose. For these reasons, coupled with the fact that no argument has even been advanced that on the facts of the present case the mobile home constitutes a dwelling for the purposes of Article 40.5, I conclude that this constitutional provision has no application to the present case so far as this particular mobile home is concerned.

The lapse of time argument

42. Section 160(6)(a)(i) of the 2000 Act provides that:

". . . an application to the High Court or Circuit Court for an order under this section *shall not be made*:

(i) in respect of a development where no permission has been granted after the expiration of seven years from the date of the commencement of the development." (italics supplied)

43. In my judgment in *Fortune (No.1),* I held following a review of the authorities that that s. 160(6)(a)(i) of the 2000 Act does not impose a jurisdictional bar on the granting of a statutory injunction in the event that the proceedings have been commenced after seven years, the italicised words notwithstanding. I further held because (i) the seven year limitation period is a matter of defence, the onus of proof lies with the party asserting it (in this case, Ms. Fortune) and (ii) by reason of the peculiar knowledge doctrine, the onus in this regard rests in any event with the landowner. I ultimately decided on the limitation issue that as Ms. Fortune had not informed the Court of the date - even in approximate terms - on which the building of the chalet was commenced, she has not established that this application is time-barred by reason of s. 160(6)(a)(i) of the Act of 2000 so far as that structure was concerned. These principles can now be applied to both the mobile homes and the caravan.

44. Before doing it is should be noted that in *Martin* the father of the present home owner had placed a mobile home on a particular site in 1974 and had not sought planning permission to do so. The present owner then replaced the old mobile home by a newer (and slightly bigger) mobile home on the same site in 2000. No action was taken at the time in 1974 by the planning authority and the home owner claimed that he was entitled to the benefit of the seven year immunity as a result.

45. O'Neill J. held, however, that the erection of the new mobile home amounted to a fresh act of development for the purposes of s. 3(1) with the result that any pre-existing immunity was lost:

"…when the original mobile home was removed in 2000, this was a permanent change and intended to be so, hence any rights, or more particularly, immunity from action under s. 160 of the Act of 2000 which had accrued in relation to that structure were abandoned by the respondent [home owner]. I cannot agree with the submission for the respondents to the effect that from a development point of view the placing of this mobile home is to be looked at purely in terms of the user of the land and as governed solely by s. 3(2)(b) of the Act of 2000. This sub-section has of course application but it is in addition to the application of s. 3(1) as discussed above. It could not be said that these two sub-sections were mutually exclusive in their application."

46. It follows, therefore, that in the onus rests on the party alleging that a particular mobile home or caravan enjoys the benefit of the limitation period to show that the mobile home or caravan has rested on the same location for the last seven years immediately proceeding the commencement of these proceeding, save where any movement of the caravan or mobile home was either purely *de minimis* or for the purposes of temporary repair and alteration (*cf*. on this latter point the comments of Morris P. in *Dublin Corporation v. Lowe* [2000] IEHC 161 and those of O'Neill J. in *Martin*). As O'Neill J. demonstrated in *Martin*, it is not enough to show that there was a user of the caravan or mobile home on the homeowner's land for the last seven years. If there were the rule, then it would mean that, for example, an adjoining landowner would be powerless to object to the movement of a mobile home from one part of the site for to another. It would be easy to visualise a case where a neighbour might have no objections to a mobile home located discreetly in one part of a site, but who would strenuously object if it were moved perhaps 200 metres to another part of the site which was in his or her direct line of sight and which hindered his amenities.

47. Can, therefore, Ms. Fortune meet this test? I fear that she cannot. It is true that she avers that her late mother allowed her to place a mobile home on the site sometime after her separation in 1999 when she found herself having to care for two young children with no permanent place of residence. She can also point to the existence of telephone and electricity bills dating from 2001 in respect of the site at Carrigeenshinnagh, but these bills in themselves saying nothing about whether they were in respect of any mobile home or any of the caravans. In any event, as O'Neill J. pointed out in *Martin*, mere *general user of a mobile home or a caravan on a particular site* is not enough: one must also show that *it has remained in the same location on the site in question*.

48. In this context, one may observe that Ms. Fortune does not say – even in approximate terms – when the user of the mobile homes and caravans commenced and nor does she assert that the both the mobile homes and the caravans remained in the same location on the lands for the seven years prior to the commencement of the proceedings in September 2009. She can at most show that a mobile home was placed on the site sometime after 1999. It follows, therefore, that the Council is entitled to the requisite orders requiring Ms. Fortune to remove the remaining mobile homes and caravan from the lands.

Postscript
49. Immediately before the scheduled delivery of my judgment, I was informed by counsel that the mobile homes and the caravans have since been removed in the interval since the date on which the hearing ended. The parties nonetheless requested that I deliver the judgment in the ordinary which I have just done.

PART IV: CONCLUSIONS

50. It remains only to summarise my conclusions in respect of the two cases:

A. This Court has no jurisdiction to grant a free standing declaration in relation to exempted development where (as in the case of Mr. Johnny Fortune) an application for a certificate of exemption under s. 5 of the 2000 Act has been applied for and has been refused.

B. It follows, therefore, that the Council are in principle entitled to orders under s. 160 in respect of the large shed. Given, however, that the reasons proffered by the Council for the refusal of the certificate in 2008 cannot be said to be satisfactory, I will adjourn the making of any order in respect of the large shed to enable Mr. Fortune to make a fresh application for a certificate under s. 5 should he be minded to do so.

C. So far as the garden shed is concerned, this would seem at first blush to satisfy the conditions for exemption specified in Class 3 of Schedule 2 of the Planning and Development Regulations 2001. I will, however, adjourn the making of any order in this respect pending the filing of an affidavit on behalf of Mr. Fortune from a planning consultant dealing with this matter. The Council will, of course, be entitled to be heard prior to the making of any final decision on this point.

D. So far as Ms. Fortune's case is concerned, I reiterate again that there was no question that either the decision in *Fortune (No. 1)* or *Fortune (No.2)* had in some sense legitimated the construction of the chalet. As I made absolutely clear in both judgments, the chalet remains an unauthorised development and no question of any development consent for the purposes of the Habitats Directive could possibly arise. All that I decided in *Fortune (No.2)* was that the Council had not established an overriding public interest on these facts which would justify the Court overriding the Article 40.5 right to the inviolability of the dwelling, again having regard to the particular facts set out in both judgments.

E. It is plain that the placing of a caravan or mobile home on the lands constitutes development requiring planning permission: see s. 3(1) and s. 3(2)(b)(i) and (ii) of the 2000 Act. It is accepted that there is no such permission in existence in respect of either mobile home or the caravan.

F. Having regard in particular to the analysis to be found in the judgment of O'Neill J. in *Martin*, a party wishing to assert that the seven year limitation period found in s. 160(6)(a)(i) has expired in the case of either a mobile home or caravan must demonstrate that the mobile home or caravan has rested on the same location for the last seven years immediately proceeding the commencement of these proceeding, save where any movement of the caravan or mobile home was either purely *de minimis* or for the purposes of temporary repair and alteration.

G. Ms. Fortune cannot satisfy this test in the present case. She can at most show that a mobile home was located on the site some point after 1999. But this in itself is not enough: she would also have to show that mobile home in question was located at the same point on the site for the last seven years prior to the commencement of the proceedings. It follows that the Council are entitled to orders under s. 160 requiring her to remove the mobile homes and the caravan from the site.