Neutral Citation: [2014] IEHC 267

THE HIGH COURT

[2011 No. 26 CA]

BETWEEN:-

THE COUNTY COUNCIL OF THE COUNTY OF WICKLOW

PLAINTIFF

AND

KATIE (OTHERWISE CATHERINE) FORTUNE (No.4)

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on 6th May, 2014

1. This is now the fourth judgment dealing with aspects of the planning status of certain structures on lands owned by members of the Fortune family at Carrigeenshinnagh, Lough Dan, Roundwood, Co. Wicklow. The first two judgments addressed the issue 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. In the second judgment, *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. In the third judgment, *Wicklow County Council v. Fortune (No.3)* [2013] IEHC 397, I had occasion to re-visit aspects of those earlier judgments in the course of a decision which principally dealt with the planning status of certain caravans and mobile homes which were situate on Ms. Fortune's lands. Concern had nonetheless been expressed by the Council lest my judgment in either *Fortune (No.1)* and *Fortune (No.2)* might be construed as somehow amounting to a tacit of authorisation of the legitimacy of the chalet in question.

3. In my judgment in *Fortune (No.3)* I firmly rejected that argument, saying:

> "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."

4. I continued by saying that in the earlier judgments:

> "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."

5. As it happens, since the delivery of the third judgment, the parties have reached a large measure of agreement regarding certain remaining issues concerning Ms. Fortune's chalet, including conditions relating to the treatment of waste water and effluent. While acknowledging that the court refused to grant an order under s. 160 of the 2000 Act requiring the demolition of the chalet, it is nonetheless appropriate this order should also contain these conditions regarding waste treatment.

6. The only issue which remains is whether a formal declaration should be granted to the effect that the chalet had been illegally constructed. Counsel for Ms. Fortune, Mr. O'Donnell, argued that the court had no jurisdiction in these s. 160 proceedings to grant such a declaration. Counsel for the Council, Mr. Connolly SC, contended on the other hand that it was appropriate that the court should grant such a declaration in order to give fully effect to both the letter and the spirit of the earlier judgments.

7. Section 160(1) of the 2000 Act provides:

> "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;
>
> (c) that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject."

8. It is true that s. 160(1) of the 2000 Act does not expressly vest the court with a jurisdiction to grant a declaration to the effect that a development was unauthorised. Yet here it may be recalled that s. 160 is simply a *lex specialis* which simply gives the court a

wider jurisdiction to grant an injunction in respect of unauthorised development in planning cases than might have been the case under the ordinary law.

9. The statutory power to grant an injunction is found in s. 28(8) of the Supreme Court of Judicature (Ireland) Act 1877 ("the 1877 Act"). Although that sub-section does not expressly empower the court to grant a declaration *in lieu* of granting an injunction, it has never been doubted but that the courts could make such a declaration in such circumstances. After all, both the injunction and the declaration were regarded as independent and, to some degree and in certain circumstances, interchangeable remedies developed by the Court of Chancery in the decades leading up to the creation of one unified High Court by the (English) Supreme Court of Judicature Act 1873 and, in Ireland, by the 1877 Act: see generally, Zamir and Woolf, *The Declaratory Judgment* ((London, 2002) at 12-22. It may be that, in strictness, even if the remedy was developed by the Victorian Chancery judges, a declaratory judgment has its origins in statute and rules of court rather than equity as such, so that "it is not true equitable relief": see *Chapman v. Michaelson* [1909] 1 Ch. 238, 242, *per* Fletcher Moulton L.J.

10. What is clear, however, is that the first general statutory recognition of the power to grant a declaration which was contained in the s. 155 of the Chancery (Ireland) Act 1867 – which stated that no action should be open to the objection that a merely declaratory order was sought thereby – acknowledged this remedy as an independent and free standing judicial power. Although this section was subsequently repealed, the actual language of s. 155 of the 1867 Act is now reflected in the wording of the present O.19, r. 29 of the Rules of the Superior Courts 1986 and the principle is now one which has been firmly embedded in our legal system for well over a century.

11. In any event, the declaration is simply an essential aspect of this Court's general and full original jurisdiction. After all, Article 34.3.1 of the Constitution provides that this Court shall have "a full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal." If this Court not grant a declaration of right in an appropriate case, it is hard to see how this constitutional mandate "to determine all matters and questions" could properly be fulfilled and this is so even when this Court is sitting (as here) in its appellate capacity.

12. Moreover, as I pointed out in *Albion Properties Ltd. v. Moonblast Ltd*. [2011] IEHC 107, [2011] 2 I.R. 563 the express language of Article 40.3.2 of the Constitution requires the courts to furnish an adequate and effective remedy. In that case, I rejected the argument ([2011] 2 I.R. 563, 570-571) that I had no jurisdiction to grant a mandatory interlocutory order requiring a defaulting tenant to yield up possession:

> Any supposed jurisdictional bar which prevented the court from granting injunctive relief in an appropriate case to require a defaulting tenant to yield up possession of a commercial tenancy would be at odds with duty imposed on the courts by Article 40.3.2 of the Constitution to ensure that the property rights of the plaintiff landlord are appropriately vindicated in the case of injustice done. The courts are under a clear constitutional duty to ensure that the remedies available to protect and vindicate these rights are real and effective: see, e.g., the comments of Kingsmill Moore J. in *The State (Vozza) v. O'Floinn* [1957] I.R. 227 at 250; those of Murray C.J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3 and the authorities set out in my own judgment in *S v. Minister for Justice, Equality and Law Reform* [2011] IEHC 31."

13. The granting of a declaration in the present case is perhaps especially apt. Not only should the transgression of the law by the defendant be appropriately marked by judicial order, but in truth such an order simply gives effect more completely to the earlier judgments which I delivered. These judgments stressed that while Ms. Fortune had unlawfully constructed her chalet, the guarantee of the inviolability of the dwelling in Article 40.5 meant that, having regard to the facts of her case, it should not be demolished. It was not therefore enough for the Council to show that the chalet had been unlawfully constructed, since as I put it in *Fortune (No.1):*

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

14. For the reasons then subsequently set out in *Fortune (No.2),* I concluded that those reasons which might otherwise justify the making of the demolition order under s. 160 had not been made by the Council. Yet there was no doubt at all but that the chalet had been illegally constructed and the court order should reflect this. To this one might add that the planning status of the chalet is essentially a matter of public record and, in the absence of a demolition order under s. 160 of the 2000 Act, the court should take steps to ensure that any possible confusion is avoided and uncertainty is dispelled, especially so far as the planning authority, other public bodies and, indeed, private third parties are concerned.

Conclusions

15. For all of these reasons, I take the view that the court has a free standing and independent jurisdiction to grant a declaration which is distinct from the special jurisdiction under s. 160 of the 2000 Act. I will accordingly grant a declaration in the terms sought by the Council, namely, that the timber chalet constructed by Ms. Fortune at Carrigeenshinnagh, Lough Dan, Roundwood, Co. Wicklow is an unauthorised development.