Neutral Citation Number: [2010] IEHC 254

THE HIGH COURT

2007 76 MCA

IN THE MATTER OF SECTION 160 OF THE PLANNING & DEVELOPMENT ACT 2000 AS AMENDED, AND IN THE MATTER OF AN APPLICATION BY:

THE COUNTY COUNCIL FOR THE COUNTY OF MEATH

APPLICANT

-AND-

MICHAEL MURRAY AND ROSE MURRAY

RESPONDENTS

JUDGMENT of Mr Justice John Edwards delivered on the 29th day of June, 2010.

Introduction and Pleadings

1. This is an application for a planning injunction and other relief which came on for hearing before this Honourable Court on the 8th day of March, 2010. The applicant's Notice of Motion is dated the 25th of June 2007 and it claims the following:

> "1. An Order pursuant to the provisions of Section 160 of the Planning & Development Act, 2000 restraining the Respondents and each of them, their respective servants or agents, licensees, or any persons acting in consort with them, and all persons having knowledge of the granting of any Order herein, from carrying out any unauthorized development of land owned and occupied by the Respondents at Faughan Hill, Bohermeen, Navan, in the County of Meath, being part of the lands comprised in Folio 14049 of the Register of Freeholders, County Meath (hereinafter referred to as 'the said lands').
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> 2. An Order restraining the Respondents and each of them, their respective servants or agents, licensees or anyone acting in consort with them and all persons having knowledge of the granting of any Order herein, from continuing with the unauthorised use of the said lands and in particular the use of the said lands for residential purposes.
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> 3. An Order directing the Respondents to remove an unauthorised development from the said lands namely a residential building constructed by or on behalf of the Respondents on the said lands.
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> 4. An Order directing the Respondents to forthwith restore the said lands to a condition suitable for agricultural use being their condition prior to the carrying out of the unauthorized development on the said lands namely the construction of a residential building.
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> 5. Such further or other relief pursuant to Section 160 of the Planning & Development Act, 2000, as amended, as to this Honorable Court shall seem meet."

2. The application is grounded upon the affidavit of Jimmy Young, a Senior Staff Officer in the Planning Department of Meath County Council, sworn on the 29th day of June 2007, and the documents therein exhibited; the affidavit of Wendy Moffat, a Senior Planner in the Planning Department of Meath County Council, sworn on the 29th day of June 2007, and the documents therein exhibited; and the affidavits of Michael Griffin, a Senior Executive Officer in the Planning Department of Meath County Council, sworn on the 24th day of January 2008, and on the 30th day of June 2009, respectively, and the documents exhibited with both of those affidavits.

3. The respondents have filed two affidavits in response to the applicant's application, namely an affidavit of Michael Murray, the first named respondent, sworn on the 11th day of April 2008, and the documents therein exhibited and an affidavit of Rose Murray, the second named respondent, sworn on the 25th day of November, 2009 and the documents therein exhibited.

Facts Not In Dispute

4. The property to which these proceedings relate is a newly constructed dwelling house on a site of approximately 4 acres at Faughan Hill, Bohermeen, Navan. Searches carried out by the applicant in the Land Registry have disclosed that these lands form part of the lands comprised in Folio 14049 of the Register of Freeholders for the County of Meath which lands are registered in the names of Michael Murtagh, John Murtagh and Nora Drain. Further, searches have also revealed the existence of a pending application for the registration of a transfer of part of the lands in the said folio to Rose Murray, the second named respondent herein, under Dealing No. D2007NL02494, which dealing was lodged in the Land Registry on the 24th of April 2007 by Steen O'Reilly and Company Solicitors.

5. The lands the subject matter of these proceedings originally formed part of a larger agricultural holding owned by the Murtagh family. Planning permission was previously granted by Meath County Council for a number of dwelling houses thereon for members of that family. These planning permissions included permissions reference no KAJ40653 granted on the 7th of July 2005 to Orla Murtagh and Karl Brady, and reference no KA40669 granted on the 5th of August 2005 to Aoife Murtagh and David Reilly.

6. Both of these planning permissions were issued subject to conditions. Condition 3 of both permissions was in the following terms:-

> "Prior to commencement of the development the owner of the landholding of which the site forms part as shown outlined in blue on the location map submitted on (in the case of planning permission reference no KA/40653, the 22nd of December 2004 and in the case of planning permission reference no KAJ40669, the 23rd of December 2005) shall have entered into a legal agreement with the planning authority under the provisions of Section 47 of the Local Government (Planning and Development) Act 2000 providing for the sterilisation from any housing or non-agricultural development on the entire remainder of this landholding.

7. The location map showing the landholding out of which the site the subject of the aforesaid planning permissions was being carved and in respect of which the sterilisation conditions were to apply was the same for both planning applications, and the lands outlined in blue on the said map encompass the lands the subject of these proceedings.

8. While a formal sterilisation agreement was not executed in compliance with condition 3 of the aforesaid planning permissions Meath County Council did receive a letter on the 29th of April 2005 from John Murtagh, in respect of planning permission reference no KA/40653, indicating an agreement to sterilise the remainder of the landholding, and a similar letter on the 24th of May 2005 in respect of planning permission reference no KA/40669.

9. Meath County Council duly received Commencement Notices in respect of the developments authorised by planning permissions reference no's KA/40653 and KA/40669, respectively, and it is accepted that the developments authorised by the said permissions have been carried out.

10. On the 8th of May 2006 the applicants received a planning application from the first named respondent to construct a 283 sq metre (3045 sq foot) dormer dwelling on the lands the subject of these proceedings and which constitute part of the lands in respect of which the sterilisation requirement of the earlier planning permissions applied. In this planning application, to which reference no. KA/60180 was allocated; the first named respondent described himself as the freehold owner of the property and indicated that he had acquired same in 2005.

11. On the 29th of June 2006 Meath County Council refused planning permission for the proposed development for the following three reasons:-

> "1. Having regard to the limited size of the original landholding from which the application site is taken, the level of existing and permitted development and its location within an area of high development pressure identified under the Meath County Development Plan, 2001 to permit a further dwelling on these lands would result in an excessive density of development in an unserviced rural area and as such would be contrary to the proper planning and sustainable development of the area.
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> 2. Having regard to the limited size of the original landholding from which the application site is taken, the level of existing and permitted development, the proposed development will result in an excessive concentration of wastewater treatment systems in an unserviced rural area. The proposed development will therefore be prejudicial to public health and be contrary the proper planning and sustainable development of the area.
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> 3. The proposed development would materially contravene condition number 3 of KA/40669 and would be contrary to the proper planning and sustainable development of the area. Condition number 3 of KA/40669 states that "Prior to the commencement of any development the owner of the landholding of which the site forms part, as shown outlined in blue on the location map submitted on 23/12/05, shall have entered into a legal agreement with the Planning Authority under the provisions of Section 47 of the Local Government (Planning and Development) Act 2000 providing for the sterilisation from any housing or non-agricultural development on the entire remainder of this landholding".

12. On the 6th of February 2007 following a complaint from a member of the public Meath County Council became aware that a large house of approximately 588 sq metres (6,229 sq feet) approximately had been constructed on the lands the subject of these proceedings and that the respondents and their family were in residence therein.

13. This dwelling house is approximately double the size of the dwelling for which planning permission had been refused on the 29th of June 2006 and no planning permission was sought for same prior to its construction.

14. On the 2nd of March 2007 Mr Jimmy Young, Senior Staff Officer in the Planning Department of Meath County Council, wrote to the first named respondent drawing his attention to the fact that no planning permission had been obtained for the construction of the dwelling house and advising him that Meath County Council required the immediate demolition of that structure and the return of the site to its original condition prior to the commencement of development. He also indicated that failing receipt within 7 days of a commitment from him in that regard and an outline of his proposals to remove the structure, Meath County Council would institute legal proceedings seeking an order for the removal/demolition of the structure.

15. On the 8th of March 2007 Mr Young received a letter from a Derek Callaghan of "Derek Callaghan Architectural and Engineering Services" on behalf of Mr Murray indicating that he would lodge a planning application before 5pm on Monday the 11th of March 2007, this being the deadline which Mr Young had set for Mr Murray to submit his proposals for the removal of the unauthorised structure.

16. On the 13th of March 2007 Mr Young responded to Mr Callaghan pointing out that Meath County Council had requested the first named respondent to give a commitment that he would remove the structure and to submit his proposals for doing so. He stated that as no such commitment had been given, nor any proposals furnished in that regard, proceedings would be instituted. A copy of this letter was sent to the first named respondent.

17. On the 12th of March 2007 the applicant received a planning application from the first named respondent seeking permission to retain an unauthorised development carried out on the property, namely the development the subject matter of these proceedings. This application was allocated planning reference no KA/70152. The first named respondent described himself in the said application as the owner of the property.

18. On the 3rd day of May 2007 the applicants rendered a decision upon the aforesaid application, reference no KA/70152, for permission to retain an unauthorised development and refused permission for the following reasons:-

> "1. Having regard to the location of the site in an area defined as being under strong urban influence in the 'Sustainable Rural Housing - Guidelines for Planning Authorities' issued by the Department of Environment, Heritage and Local Government in April 2005, and in a rural area under strong urban influence in the Meath County Development Plan 2007-2013, it is considered that the development which is proposed to be retained would result in an excessive density of development in an unserviced rural area, would seriously injure the visual amenities of the area and militate against the preservation of the rural environment. The development which is proposed to be retained would, therefore, be contrary to the proper planning and sustainable development of the area.
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> 2. Having regard to the limited size of the original landholding from which the application site is taken, the level of existing and permitted development, the development which is proposed to be retained will result in an excessive concentration of

wastewater treatment systems in an unserviced rural area. The development will therefore be prejudicial to public health and be contrary the proper planning and sustainable development of the area.

3. The Planning Authority considers that the two-storey dwelling which is proposed to be retained is out of character in terms of its scale, height and design with the existing dwellings adjacent to the application site. The development which is proposed to be retained would represent an unduly prominent and incongruous feature in the local landscape, would be injurious to visual amenity and would establish an undesirable future precedent for development of this kind. The development would therefore be contrary to the proper planning and sustainable development of the area.

4. The proposed development would materially contravene Condition No.3 of KA/40669 and would be contrary to the proper planning and sustainable development of the area. Condition No.3 of KA/40669 states that "Prior to the commencement of any development the owner of the landholding of which the site forms part as shown outlined in blue on the location map submitted on 23/12/05 shall have entered into a legal agreement with the Planning Authority under the provisions of Section 47 of the Local Government (Planning and Development) Act 2000 providing for the sterilisation from any housing or non-agricultural development on the entire remainder of this landholding" and would also materially contravene condition number 3 of KA/40653 which is in similar terms and both of which permissions have been implemented."

19. The first named respondent appealed the applicant's refusal of planning permission to retain an unauthorised development, reference no KA/70152, to An Bord Pleanála, and the appeal was allocated reference no PL 17.231881.

20. On the 5th of June 2009 An Bord Pleanála rendered a decision on the first named respondent's appeal, reference no PL 17.231881, and refused planning permission to retain the unauthorised development in question. It did so for the following reasons and considerations:

"1. Taken in conjunction with existing development in the vicinity, which is an area under strong urban influence, the development proposed to be retained would give rise to an excessive density of development in a rural area lacking certain public services and community facilities, would contravene the policy of the planning authority as expressed in the current Meath County Development Plan to direct residential development to serviced areas, which policy is considered to be reasonable and would establish an undesirable precedent for further development of this type. The development would, therefore, be contrary to the proper planning and sustainable development of the area.

2. It is considered that, taken in conjunction with the existing development in the vicinity, the development proposed to be retained would result in an excessive concentration of development served by wastewater treatment systems in the area.

3. It is considered that the two-storey dwelling which is proposed to be retained is out of character, by reason of its scale, height and design, with existing dwellings in the area notwithstanding the proposed alterations. It represents an unduly prominent and incongruous feature in the local landscape, is seriously injurious to visual amenity and would establish an undesirable precedent for further development of this kind. The development is, therefore, contrary to the proper planning and sustainable development of the area.

4. The development contravenes materially conditions attached to existing permissions for development namely, condition number 3 attached to the permission granted by Meath County Council under planning register reference number KA/40669 and condition number 3 attached to the permission granted by Meath County Council under planning register reference number KA/40653."

The Respondents' Evidence

21. The first named respondent has deposed in his affidavit sworn on the 11th of April 2008 that he became married to the second named respondent on the 14th day of August 1999. He states that he is a native of the parish where the lands and premises in question are situated, and that he was born and reared in the Murray family home which is less than a half a mile away. He went to school in the local school, played football with the local club and is actively involved in the community. He says that he and his wife are very much part of the community.

22. He has explained that in the 1980's he had to emigrate for reasons of work and he moved home to the area because his father had died and his mother was anxious that he take up residence as close as possible to her as that was a difficult time for her and indeed for all of the family. Moreover, he had always wanted to live in the area where he was born and reared.

23. The first named respondent states that initially they applied for planning permission on a site at Ongenstown which is about 2 miles from his family home but that planning permission was refused, notwithstanding their close links to the area, and their history of farming in the area. He says however that a two-storey house is now being built on the same site, approximately a year after they were refused planning permission, and in those circumstances he has become totally frustrated with the whole planning system.

24. The first named respondent states that they then found another site and applied for planning permission for that land. Further information was requested by, and supplied to, the County Council on three separate occasions. Notwithstanding this they were ultimately refused planning permission for these lands as well.

25. The first named respondent states that he and his wife had understood that planning permission would be granted in the case of both of the sites they were interested in and that in anticipation that this would occur they enrolled their children in the local school, i.e., the school that he himself had attended as a child. He states that they were in rented accommodation and at that stage they had two children, were expecting a third child, and the level of tension in the house was unacceptable. He says that it was clear that they could not continue living in the manner in which they were living. At that stage they had spent almost 2 years looking for sites, applying for planning permission, answering endless queries from the Planning Authority, negotiating prices and meeting with architects, drawing up plans, completing drainage tests and waiting for a decision. He says that he found the whole process to be completely frustrating and that this was having a serious effect on his mental wellbeing and on that of his wife and children as well.

26. The first named respondent has deposed that he then became aware that a neighbour was selling 23 acres of land just beside his mother's house. He thought this site would be ideal as it would be close enough to facilitate looking after her, while also being

conveniently proximate to the school that the children were attending. He says that he knew the family who were selling it and they knew him. He says that the vendors sold them the land without the sale going to public auction as a personal favour because they understood the particular difficulties that he and his family were in. Moreover, the vendors of the land were very anxious to sell the land quickly and they felt that they had to conclude the sale quickly. The first named respondent states that while both parties were happy with the price, the lands were purchased without him and his wife getting prior legal and architectural advice due to the pressure that they were under.

27. He states that when they successfully purchased the land they again submitted an application for planning permission. In doing so he believed that having regard to the extent of the land, the fact that he was proposing to farm the lands, the fact that they had a genuine need to live in the area, and the fact that they had traditionally lived in the area that there could be no difficulty with obtaining planning permission, especially as the local people who had known him and his family for generations were very supportive and had no objection to the proposed development.

28. He states that as the proposed structure was set back off the road, would not be visible from the road and have no impact on any of the houses in the vicinity, he could not conceive that there would be any difficulty with obtaining planning permission. In the circumstances he was distressed when the Planning Authority refused permission for the development and he feels that the reasons for their refusal make no sense in the context of the nature of the application lodged.

29. The first named respondent then goes on in his affidavit to address each of the grounds on foot of which planning permission was refused, namely (i) that the proposed development would give rise to an excessive density of development in a rural area proposed; (ii) that the proposed development would give rise to an excessive concentration of development served by wastewater treatment systems in the area; and (iii) that it would contravene a previous permission granted. Although he joins issue with each of these reasons at some length and in great detail it is not necessary for the Court to review his arguments in this regard as these issues are not issues which are justiciable in the context of the present proceedings. The reason for this is that s.50(2) of the Planning and Development Act, 2000 states expressly that:

> *"A person shall not question the validity of—*
>
> *(a) a decision of a planning authority—*
> *(i) on an application for a permission under this Part, or*
>
> (ii) under section 179 ,
>
> *(b) a decision of the Board—*
> *(i) on any appeal or referral,*
>
> *(ii) under section 175 , or*
>
> *(iii) under Part XIV,*
>
> *otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) ("the Order")."*

30. In addition, the first named respondent seeks to make what the Court considers to be the manifestly unfounded case that the 6229 sq ft dwelling house that he and his wife have now constructed without planning permission does not in fact require planning permission on the basis that it is an "agricultural building" and is therefore an exempt development. In brief, he contends that the house forms part of a 23 acre farm that is farmed by the respondents. He states that:

> "…it is simply not possible to farm lands without a place to live and to that extent this is a critical part of the agricultural structures that are necessary for such an undertaking. I say that our farm accounts, all farm documents and indeed all farm implements and machinery including food stuffs are stored within the building. In those circumstances it is a critical part of the existing farm and operation."

31. The applicants have exhibited photographs of the building in question. It is a very large and imposing stone clad two storey dwelling house with a curved drive sweeping up to it and extensive lawns in front of it. It is frankly preposterous to suggest that this is an agricultural structure and the Court rejects the suggestion without hesitation.

32. The Court also has an affidavit from the second named respondent sworn on the 25th of November 2009. In this affidavit she presents what can fairly be described as an articulate and impassioned *plea ad miseriacordiam* to the Court. It is appropriate to quote extensively from it in the circumstances. She states:

> 3. I say that we have now been living in this house since approximately the 23rd of December 2006. I say that when we got married and we were expecting our first child, we had sought to make various applications in respect of various sites and had extensive discussions with the Planning Authority in respect of these sites. I say that as is set out in my husband's Affidavit we were not successful in any of those applications. I say however that on each occasion subsequent to either being told that planning permission would not be forthcoming or having been refused planning permission, these sites were acquired by other persons who had no connection with the area and did not fulfil to the same extent the planning criteria that we had been able to demonstrate, nonetheless they were able to obtain planning permission.
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> 4. I say that on the first occasion that this occurred I was upset but by the time it had occurred on a number of occasions I just felt that there was no prospect of us ever obtaining a planning permission and I say that at that stage we had two children and we had to make decisions in respect of their future and create some kind of a stable environment for them to grow up in.
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> 5. I say that at that stage we had to make decisions as to what school to book them into and to provide even basic facilities because I say that I thought that it was unfair on my children that they must grow up with no stability, with no prospect of being able to identify long terms friends that they might grow up with, a school that they could attend, sporting clubs that they might be able to join and the absence of a permanent place of residence was a matter which was causing great distress to me because I believed that the absence of a secure home where my children could grow up could only be damaging to their health and well being particularly when they were at a young and vulnerable age.

6. I say that when the substantial area of land became available there seemed no reason why planning permission would not be granted in respect of the site. I say that around that time it was necessary to enrol our children in school and we had to be able to identify a specific address in order for them to be allowed to attend. I say that the site itself was almost twenty four acres and therefore there could be no issue in respect of the safe and efficient disposal of septic tank effluent. I say that the site was at the end of a road where there could be no issue of traffic hazard and I say that the area was surrounded by housing and therefore nobody could object on any planning grounds to a house.

7. I say that it was in desperation at having been refused planning permission that we decided to proceed and build a dwelling house which, if we had understood the full implications of what we were engaged in we may not have done so but I say that we were assured that there would be no objection to planning permission on the site and could not see any reasonable planning objection to proceeding.

8. I say that it is very difficult to explain to a Court the total uncertainty that existed at that stage and the desperation that we had in not being able to make any plans for our children's education and watch them grow up without any adequate home in which to bring them up and not being able to make any plans for the things that most people who have a permanent house, take for granted.

9. I say that we had understood from our discussions with the planning officer that there would not be any objection in principle to a house on the site, none of our neighbours, that is those people immediately around the site, had any difficulty and indeed they were delighted to see our house being built and they now have become our friends as well as our neighbours through the period that we have lived there.

10. Insofar as the Council are asserting that there was an agreement that the lands be sterilised, we had never been told that any such agreement had been entered into, we have never been able to obtain any confirmation that this agreement was made and it is a matter that neither myself nor my husband would have had any experience of and it would be unfair to punish us for a matter that was never brought to our notice and an agreement in respect of the lands which we did not know existed at the date on which we bought the lands. Indeed, we have had searches carried out in the planning office and there is no document of public record available, even to this date, which would give an indication that there is a sterilisation order over the land.

11. I say that at all times we had understood that the Council had no objection in principle to a house on the site and we had been told as much, we had no objections from any of our neighbours or indeed any person at all during the course of the construction of the house and indeed for a number of years after the house had been built and the particular house is causing absolutely no harm to anybody either in the immediate vicinity or on any wider scale and I believe that since the proceedings have been taken we have been living with the threat of the Council seeking to demolish the house life has not been very pleasant and we are in effect still living with huge uncertainty although at least we have been able to keep the worse stresses of the case from our children who are entirely unaware of the threat that hangs over their home and the little parts of it that they consider are theirs and which they have moulded to suit their individual needs.

12. I say there is no question also that the Council accept that we are entitled to live in the area and I say that none of the reasons for refusal represent a legitimate or insurmountable obstacle to obtaining planning permission but I say that there appears to be a view that because we have made some bad and stupid decisions in the past that that is going to determine the manner in which all future applications will be considered and I believe that the decisions both of the Council and of the Board reflect no legitimate planning objection but a view that we should be punished to the maximum extent for our past indiscretions and I say that I even understand the approach of the Council and of the Board in this regard.

13. I say that I am fearful that this Court may not be sympathetic to the position that the respondents find themselves in but can only say to the Court that the decisions made arose at a particular time when there had been a history of unsuccessful attempts to obtain a permanent place of residence and that it was for no motive other than one to secure a safe and nice place to bring up our children and try to secure their future as best we could and that there was no other motive involved in the carrying out of the development which was not in any sense for profit or for other gain.

14. I say that since the time that we built the house that we have sought to come to various agreements with the Planning Authority and have spent a vast amount of money seeking to compromise by way of revised applications. Those applications included proposals to demolish substantial parts of the house, reduce the impact of the house, do any works that the Council would require us to do and all that we require at this stage is to be allowed to remain at any level in occupation of the site but to date none of these proposals, which would have put enormous strain on us both financially and emotionally, have found any favour with the Council who appear to be determined to enforce the law to the maximum possible extent.

15. I say that what is being sought in respect of these proceedings is completely disproportionate to the nature of what we have constructed and to its impact on the landscape and other people. I say that I could understand that if we had built some form of commercial development or a development for profit that the Council would take a view that our entire family home should be demolished but this is not the case in this instance. I could equally understand if we were causing some form of environmental pollution or damaging the environment or the landscape in some way but any reasonable analysis of the impact of the house and site could not lead one to form the view that it is causing such irreparable damage that it justifies its demolition.

16. I say that none of the reasons for refusal can be justified and even if they can there are ways of dealing with these issues and we are prepared to do anything that the Council direct us to do and meet any of their requirements in this regard.

17. I say that insofar as the principle of development on this site is concerned the Council do accept that we are entitled in principle to a house and the only issue is the matters of detail that I have referred to earlier in this Affidavit.

18. I say the consequences of an order requiring the demolition of a house would be very serious for myself and for my husband but I say that this is a very small matter in the context of the impact that it would have on our children. I say that our two oldest children the nine year old and the eight year old are at the local national school which is Bohermeen National School having previously attended the pre-school. They are well established in the school and all their friends are at the school. The youngest child is currently in the Bohermeen pre-school and will move on to the national school and

has his own little friends which he looks forward to meeting every day.

19. If the Council are successful in the demolition of our house it will require a movement out of the area and the re-enrolment of our children in a new school which will cause huge disruption. It will also require the removal from the local GM football team and the various activities in which they are enrolled in the Bohermeen Community Centre all of which is predicated on living in the local vicinity and in effect the children's entire life will be turned upside down if they have to move out of the area.

20. I say that I myself am on the Parents' Council of the School and I am very much involved in the local community and because I am involved in the school I know that it would be very difficult to get the same integration for my children in a new school if they have simply to move because of this application and it will be very traumatic for the children and indeed for us also. I beg to refer to a copy letter from the Principal of Bohermeen National School, Mr. Fergal Fitzpatrick, confirming my involvement with the Parent's Association and my children's deep involvement in the activities of the school and the local community upon which and marked with the letters "RM 1 n I have signed my name prior to the swearing hereof.

21. I say that the children themselves have their own rooms and have laid out the rooms to fit their own personalities as all children do. I say that I think frequently about what would occur and how I would explain to my children that their house, which is a source of security to them so far, is to be demolished and they are to move away from their family and friends, is a prospect that I can't even think about without getting upset.

22. I say that I can only comprehend that the effect on my children would be devastating and at a time of their lives could only have serious long term repercussions for their physical and emotional development and while I note that myself and my husband must share a significant portion of the blame there must be other ways that we could be punished for mistakes that were made without affecting innocent parties who don't deserve this level of retribution for mistakes that their parents have made.

23. I say that my husband was involved in the building trade and we saved the money to allow us to build the house.

24. It took all the money we had together with some informal borrowings from family and friends who are aware of our particular circumstances and who are anxious to facilitate us.

25. I say that since the decline in the construction business my husband has not been working full time, finances are very tight and we would obviously be in no position to carry out a development of the type that we have already carried out and indeed would have difficulty even finding the money to rent a house in circumstances where the application by the Council was successful. My husband currently has no work in Ireland and his main source of work is in the heating and plumbing trade in the UK. My husband currently works three days a week in the UK. Of course we would have to find some alternative form of accommodation but our resources in this regard would be extremely limited and as matters stand would have to consider leaving the country to try to obtain work in the United Kingdom in the event that we would have to find accommodation as we would have genuine difficulties in meeting the costs of this new arrangement.

26. I say that in those circumstances any order to demolish the house would not just deprive us of a house but for all practical purposes force us to seek subsidised housing accommodation and cause such an effect on myself, my husband and my family that we believe is disproportionate to any mistakes that we may have made particularly in the light of the efforts that we have gone to and are prepared to go to try to meet any reasonable objection of the Council in respect of this development.

27. I say that nobody in the vicinity has now any difficulty with us living in the area and the person who originally brought to the Council the house that had been constructed is now trying to move away and indeed would no longer be anxious that the Council achieve the order that they are seeking in these proceedings.

28. In all those circumstances therefore I pray that whatever about the planning merits of the Council's case the effect of any such order would be devastating on myself and on my husband but particularly because of what has occurred subsequent to the institution of these proceedings. We could not find alternative accommodation. The disruption to our children's lives would be incalculable and in circumstances where all that has been constructed is a house which we are more than willing to alter and modify I any way to satisfy the Council's requirements I pray this Honourable Court not to make the order sought by the Council to the full extent sought by them."

The Law

33. The relevant parts of s. 160 of the Planning and Development Act 2000 provide:

"(1) 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.

(2) In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature.

(3) (a) An application to the High Court or the Circuit Court for an order under this section shall be by motion and the

Court when considering the matter may make such interim or interlocutory order (if any) as it considers appropriate.

(b) Subject to section 161, the order by which an application under this section is determined may contain such terms and conditions (if any) as to the payment of costs as the Court considers appropriate.

(7) Where an order has been sought under this section, any other enforcement action under this Part may be commenced or continued."

34. The Court has been referred to various authorities by the parties including *Dublin Corporation v McGowan* [1993] I.R. 405; *Stafford and Bates v Roadstone Limited* [1980] I.L.R.M. 1; *Avenue Properties Ltd and McCabe v Farrell Homes Limited* (Unreported, High Court, Barrington J., 27th May 1981); *White v McInerney Construction Ltd* [1995] 1 I.L.R.M. 374; *Dublin Corporation v Mulligan* (Unreported, High Court, Finlay P., 6th May 1980); *Dublin Corporation v Lowe* (Unreported, High Court, 4th February 2000); *Sweetman v Shell E & P Ireland Limited & Ors* [2007] 3 I.R. 13; *Ryan v Roadstone Dublin Limited* [2006] IEHC 53; *Kildare County Council v Goode* [1997] IEHC 95; *Dublin City Council v Matra* (1978) 114 I.L.T.R 102; *Wicklow County Council v Forest Fencing Ltd & Anor* [2007] IEHC 242; *Curley and Rooney v Galway City Council* (Unreported, High Court, Kelly J., 30th March 2001); *Westport UDC v Golden & Ors* [2002] 1 I.L.R.M. 439; *Leen v Aer Rianta Cpt* [2003] 4 I.R. 394; *Dublin Corporation v Garland & Ors* [1982] I.L.R.M. 104 and *Morris v Garvey* [1983] I.R. 319

35. Among the arguments advanced by the respondents was the argument that these proceedings constitute an inappropriate use of s. 160 of the Planning and Development Act 2000. The case made in that regard was that the section is intended as a fire brigade section to deal with an urgent situation requiring immediate action to stop clear breaches of the Act.

36. In that regard the court was referred to the following passage from the judgment of Keane J in *Dublin Corporation v McGowan* [1993] I.R. 405 where the learned judge, speaking of s. 27(2) of the Local Government (Planning and Development) Act, 1963, said:

> "In any event, I would respectfully adopt the approach of Gannon J. in *Dublin County Council v. Browne and Others* (Unreported, High Court, Gannon J., 6th October, 1987) that this section was not intended to enable the planning authority to secure a partial completion of a development. It is intended to ensure that a development is completed in accordance with the planning permission and does not apply to the present situation. Nor, indeed, as Gannon J. pointed out in *Dublin County Council v. Kirby* [1985] I.L.R.M. 325, should this section be operated in the way it often is. It is intended as a "fire brigade" section to deal with an urgent situation requiring immediate action to stop clear breaches of the Act."

37. In the Court's view s.160 of the 2000 Act is much wider in its scope than s.27 of the 1963 Act which it replaced. Whereas s. 27(1) (a) and (b) respectively of the 1963 Act only applied where an unauthorised development "*is being carried out*" or an unauthorised use "*is being made of land*", s. 160 of the 2000 Act applies in cases "*[w]here an unauthorised development has been, is being or is likely to be carried out or continued".* Accordingly s. 160 may be invoked in cases other than fire brigade circumstances or in other words in circumstances other than circumstances of great urgency.

38. Emphasising the discretionary nature of the relief, Counsel for the respondents also relied on the following passage from the judgment of Barrington J in *Avenue Properties Ltd and McCabe v Farrell Homes Limited* (Unreported, High Court, Barrington J., 27th May 1981), where the learned judge stated:

> "It seems to me therefore that the High Court in exercising its discretion under section 27 should be influenced, in some measure, by the factors which would influence a Court of Equity in deciding to grant or withhold an injunction."

39. The respondents have sought to argue that the applicants have not moved as quickly as they might have, and that in effect they should be denied relief on the grounds of laches. In addition to *Dublin Corporation v McGowan*, reliance was also placed in this context on *Dublin Corporation v Mulligan* and *Dublin City Council v Matra*, all cited above. The Court was also referred to the following extensive quotation from the judgment of Smyth J in *Sweetman v Shell E & P Ireland Limited & Ors* [2007] 3 I.R. 13:

> 53 In the course of his judgment in *Dublin Corporation v. McGowan* [1993] 1 I.R. 405, Keane J. at p. 411 stated that the predecessor to s. 160 of the Act of 2000 (s. 27 of the Local Government (Planning and Development) Act 1976) was "intended as a 'fire brigade' section to deal with an urgent situation requiring immediate action to stop clear breaches of the Act". A number of decided cases have emphasised the breadth of discretion that a court enjoys when considering an application for relief under s. 160. Even if there has been non-compliance with a term of a planning permission or unauthorised development has occurred, the court enjoys the discretion which has been traditionally held in relation to issues of injunction. This had already been established as far back as *Avenue Prop. v. Farrell* [1982] I.L.R.M. 21 where Barrington J. stated at p. 26 that:-
>
> > "… it would appear that applicants under s. 27 could range from a crank or busybody with no interest in the matter at one end of the scale to, on the other end of the scale, persons who have suffered real damage through the unauthorised development or who, though they have suffered no damage peculiar to themselves, bring to the attention of the court *outrageous breaches* of the Planning Act which ought to be restrained in the public interest. In these circumstances it appears to me all the more important that the court should have a wide discretion as to when it should and when it should not intervene" (emphasis added.)
>
> That case was concerned with a large commercial development in a highly built up area of Dublin city. In the course of his judgment in the Supreme Court in *White v. McInerney Construction Ltd.* [1995] 1 I.L.R.M. 374, Blayney J. having emphasised the very wide discretion enjoyed by the court observed as follows at pp. 380 and 381:-
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> > "Counsel for the appellant contended that the court was bound to exercise its discretion in a particular way, namely, in order to ensure compliance with the Planning Acts and accordingly an injunction ought to have been granted stopping the development until all the conditions which were to be performed before development commenced had been complied with. Counsel did not, however, refer the court to any authority which supported this restriction on the exercise of the court's discretion and I am satisfied that it would be wholly inconsistent with the wider discretion given to the court under s. 27."
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> 54 *Morris v. Garvey* [1983] I.R. 319, involved a "gross violation" by a developer of terms of a planning permission. Henchy J. considered that there was no inhibition on the granting of an injunction in a situation particularly where there was a

severe impact on the applicant, the neighbour of the offending party.

55 In *Leen v. Aer Rianta c.p.t.* [2003] 4 I.R. 394, McKechnie J. in considering the earlier decisions and in particular that of *Morris v. Garvey* [1983] I.R. 319 observed that it was quite clear in that case that Henchy J. did not intend the excusing circumstances identified as being exhaustive (as every court must decide each case on the individual facts and circumstances surrounding it). Even if I were wrong in the determinations which I have made both as matters of fact and law concerning conditions 1 and 37 as above and the first respondent were considered as having failed to comply with the conditions or had engaged in unauthorised development, I would nonetheless exercise the discretion under s. 160 not to make an order having regard to the following factors:-

> (a) the trivial and/or technical nature of the breaches;
>
> (b) the *bona fides* of the first respondent;
>
> (c) the attitude of the planning authority;
>
> (d) the public interest and hardship to third parties;
>
> (e) the delay on the part of the applicant in particular making it necessary to have an extension of time in which to proceed; and
>
> (f) the failure to respond promptly to the replying affidavits, leaving on the court file a large number of complaints concerning the development which were wholly unwarranted.

56 There have been a number of cases over the last twenty years in which the court could have exercised its discretion not to grant an order under s. 160 when the breach complained of was trivial or technical. These are *Dublin County Council v. Matra* (1978) 114 I.L.T.R. 102, *Grimes v. Punchestown Develop. Co.* [2002] 1 I.L.R.M. 409 and *Mountbrook Homes Ltd. v. Oldcourt Developments Ltd*. [2005] IEHC 171, (Unreported, High Court, Peart J., 22nd April, 2005). Finnegan J., in *O'Connell v. Dungarvan Energy Limited* (Unreported, High Court, Finnegan J., 27th February, 2001) held that an immaterial variation from permitted development would not even constitute unauthorised development. In that case Finnegan J. quoted with approval the following passage from the judgment of Lord Denning in *Lever Finance v. Westminster L.B.C*. [1971] 1 Q.B. 222, at p. 230:-

> "In my opinion a planning permission covers work which is specified in the detailed plans and any *immaterial variation therein* . I do not use the words "*de minimis* " because that would be misleading. It is obvious that, as the developer proceeds with the work, there will necessarily be variations from time to time. Things may arise which were not foreseen. It should not be necessary for the developers to go back to the planning committee for every immaterial variation. The permission covers any variation which is not material."

57 A like approach was adopted by Finnegan J. in *Cork County Council v. Cliftonhall Ltd.* (Unreported, High Court, Finnegan J., 6th April, 2001).

58 While the actions of a developer may be *bona fide* , this does not of necessity excuse him from being the subject of a s. 160 injunction. However, as observed by Keane J. in *Dublin Corporation v. McGowan* [1993] 1 I.R. 405 at p. 412, it would be:-

> "manifestly unjust to have the draconian machinery of the section brought into force against a person who behaved in good faith throughout."

59 O'Sullivan J. *in Altara Developments Ltd. v. Ventola Ltd.* [2005] IEHC 312, (Unreported, High Court, O'Sullivan J., 6th October, 2005) refused to make an order under s. 160 in circumstances where the respondent had received professional advice that what he was doing was in compliance with planning permission before proceeding with a particular phase of the development in question. O'Sullivan J. observed at p. 11:-

> "This is not a case of a developer pushing ahead regardless. On the contrary it has proceeded since November, 2004 with the active support and blessing of the planning authority and in the reasonably held opinion that it was not in breach of the planning permission. In the circumstances I decline to make any order curtailing the respondent's construction works as requested by the applicant."

60 Good faith was also a relevant factor highlighted in both *O'Connell v. Dungarvan Energy Ltd.* (Unreported, High Court, Finnegan J., 27th February, 2001), *Leen v. Aer Rianta c.p.t.* [2003] 4 I.R. 394 and *Grimes v. Punchestown Develop. Co*. [2002] 1 I.L.R.M. 409 at p. 414. While I am satisfied there has been no breach by the first respondent of the terms of the planning permission or exempted development regulations, nonetheless, if I were incorrect in that regard, there has not been any deliberate disregard by the first respondent of the requirements or any attempt to avoid the obligations imposed by same.

The delay in giving necessary follow-up documentation on foot of the agreement is explicable in my judgment in the light of the multifarious pieces of litigation that have surrounded this development. Clearly what was required was that the form and amount would be agreed prior to developments. That has occurred.

61 The attitude of the planning authority to proceedings taken by way of injunction before the courts has been noted as of importance in a number of cases, some of which are reported and others not, *e.g. White v. McInerney Construction Ltd*. [1995] 1 I.L.R.M. 374, *Mahon v. Butler* [1997] 3 I.R. 369 and *Grimes v. Punchestown Develop. Co.* [2002] I.L.R.M. 409 at p. 414 *per* Herbert J.

62 The instant case is stronger than many of the foregoing in that the planning authority in this instance has refrained

not only from enforcement proceedings but confirmed that it is satisfied that the first respondent has complied with the conditions as issued so far as it is concerned. While I accept counsel for the applicant's submission that a planning authority's view is not determinative, if there has been a failure by the planning authority to properly understand the terms of the condition laid down by the Board, I am satisfied in the instant case it has not mistaken its rights, duties or obligations under the condition. It has agreed with the amount and form of the security, that it was entitled to do. It does not require any further documentation prior to the carrying out of the development. It certainly requires to have the back up documentation in place as soon as is possible. The interval of time suggested given the magnitude of the sum and the complexity of the development is not unreasonable.

63 While the public interest and hardship to third parties may not be of immediate concern, in that there has been a stoppage of development on site since mid-2005, nonetheless, I am satisfied that even if there had been the non-compliance that is contended for, I would regard same as technical and have regard to the fact that the first respondent is operating an important facility and has the interest of employees to consider. Furthermore, the longer the development is delayed, the longer the public will be discommoded. Counsel on behalf of the first respondent cited a number of authorities under this heading, *Stafford v. Roadstone* [1980] I.L.R.M. 1, *Dublin County Council v. Sellwood Quarries Ltd*. [1981] I.L.R.M. 23, *Leen v. Aer Rianta c.p.t.* [2003] 4 I.R. 394, *Grimes v. Punchestown Develop. Co.* [2002] 1 I.L.R.M. 409 and of O'Sullivan J. in *Altara Developments Ltd. v. Ventola Ltd*. [2005] IEHC 312, (Unreported, High Court, O'Sullivan J., 6th October, 2005) where he had express regard to the potential hardship to employees of the respondent.

64 While the delay in taking the proceedings from the 10th December, 2004 to March, 2005 by the applicant may not be fatal, it has to be taken in conjunction with the other features of this case. Delay is a matter entitled to be taken into account by the court, *per* Finlay P. in *Dublin Corporation v. Mulligan* (Unreported, High Court, Finlay P., 6th May, 1980) at pp. 8 to 9:-

> "the length of time between the commencement of an unauthorised use or the making of an unlawful development and the time when application is made to the court under s. 27 must always remain one of, but not the only material factor in regard to the exercise by the court of its discretion as to whether to make or not to make an order under s. 27."

65 Likewise in *Dublin Corporation v. Lowe* (Unreported, High Court, Morris P., 4th February, 2000) per Morris P. and Herbert J. in *Grimes v. Punchestown Develop.Co.* [2002] 1 I.L.R.M. 409."

40. The Court does not accept that the applicants delayed unduly. It is clear from the affidavits filed on behalf of the applicants (the affidavits of Mr Young, Ms Moffat and Mr Griffin, respectively) that the applicants were unaware of the unauthorised development until it was brought to their attention by a member of the public on the 6th of February 2007. They immediately wrote to the first named respondent requiring its demolition, and when that did not occur within a reasonable time they commenced the present proceedings. There is no evidence to sustain a case of undue delay or of heel dragging by the applicants.

41. This Court accepts without hesitation the respondents' contention that the relief is of a discretionary nature, that the discretion is very wide and that the Court's discretion must be exercised judicially. Accordingly it is not necessary to specifically review the jurisprudence to which the Court was referred in support of that proposition.

42. In considering how it should exercise its discretion the Court has had regard to all of the matters urged upon it by Counsel for the respondents, as well as the matters deposed to by both respondents in their respective affidavits. The Court has particularly considered the contention that it would be disproportionate and unduly harsh on the respondents to make the orders sought by the applicants in this case.

43. In counter point to the case made by the respondents that the Court should in the exercise of its discretion refuse the relief sought, the applicants have argued that the breach of the planning laws identified in this case was particularly flagrant and was completely unjustified on any basis. They rely in particular on the following passage from the judgment of Henchy J in *Morris v Garvey* [1983] I.R. 319, where the learned judge states (at p.323 et seq):

> "The principal ground of appeal is that, while it allows the High Court to restrain an errant developer from proceeding with a development which is not in compliance with the requirements attached to the development permission, sub-s. 2 of s. 27 does not empower the court to order that the building work done in breach of the condition be pulled down. I cannot agree with that submission.
>
> Section 27, sub-s. 2, is one of the most important and least understood or used provisions of the planning code. The section expressly recognized for the first time that a member of the public (as well as the planning authority), regardless of his not satisfying any of the qualifications based on property or propinquity or the like (which are usually required to justify bringing proceedings), once he discovers that a permitted developer is not complying with, or has not complied with, the conditions of the relevant development permission, may apply in the High Court for an order compelling the developer "to do or not to do, or to cease to do, as the case may be, anything which the Court considers necessary to ensure that the development is carried out in conformity with the permission and specifies in the order." The jurisdiction thus vested in the High Court is extremely wide. It recognizes the fact, which has been stressed in other decisions of this Court, that in all planning matters there are three parties: the developer, the planning authority (or, in the case of an appeal, the Planning Board) and the members of the public. Compliance with the statutory conditions for development is expressly recognized in sub-s. 2 of s. 27 to be the legitimate concern of any member of the public. We are all, as users or enjoyers of the environment in which we live, given a standing to go to court and to seek an order compelling those who have been given a development permission to carry out the development in accordance with the terms of that permission. And the High Court is given a discretion sufficiently wide to make whatever order is necessary to achieve that object.
>
> If sub-s. 2 of s. 27 were to be treated as merely giving the High Court power to interdict a continuance of the development in an unauthorised manner, the new jurisdiction given by the sub-section would be self-defeating and would run contrary to the expressed purpose of the subsection, which is "to ensure that the development is carried out in conformity with the permission . . ." This Court has judicial notice, from what it knows to have happened in other cases, that (for motives which may be put down to expediency, avarice, thoughtlessness or disregard of the rights or amenities of neighbours or of the public generally) developers who have contravened the conditions of a development permission have knowingly proceeded with unauthorised development at such a speed and to such an extent as would (they hoped) enable them to submit successfully that the court's discretion should not be exercised against them under sub-s. 2 of s.

27 because the undoing of the work already done would cause them undue expense or trouble. For my part, I would wish to make it clear that such conduct is not a good reason for not making an order requiring work carried out in such circumstances to be pulled down.

When sub-s. 2 of s. 27 is invoked, the High Court becomes the guardian and supervisor of the carrying out of the permitted development according to its limitations. In carrying out that function, the court must balance the duty and benefit of the developer under the permission, as granted, against the environmental and ecological rights and amenities of the public, present and future, particularly those closely or immediately affected by the contravention of the permission. It would require exceptional circumstances (such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship, or suchlike extenuating or excusing factors) before the court should refrain from making whatever order (including an order of attachment for contempt in default of compliance) as is "necessary to ensure that the development is carried out in conformity with the permission." An order which merely restrains the developer from proceeding with the unpermitted work would not alone fail to achieve that aim but would often make matters worse by producing a partially completed structure which would be offensive to the eye as well as having the effect of devaluing neighbouring property.

In the present case I wholeheartedly support the order of demolition made by Mr. Justice Costello. The demolition expenses which the respondent will incur will be substantial, but they were foreseeable and avoidable; the justice of the case requires that they should fall on the respondent. While I do not impute to the respondent any of the baser motives which may have inspired developers who acted in breach of a development permission in other cases, the fact is that the respondent, having received due notice of his unpermitted building operations, carried on with them despite the threat of legal proceedings. It is true that an official of the planning department of Dublin Corporation stated (no doubt in good faith) that he did not look on the unpermitted work as involving any material deviation from the terms of the permission. Having regard to the uncontroverted evidence as to the extent of that deviation and as to its effect (in particular, on the amenities of the applicant's home), Mr. Justice Costello rightly refused to act on that opinion. If he wished to retain the unpermitted walls, the respondent should have applied for a fresh development permission —thus enabling the applicant, or any member of the public, to raise such objection as might be thought warranted. In such circumstances the opinion of a planning official—no matter how genuinely given—cannot be allowed to defeat the rights of the public and, in particular, those of a next-door neighbour.

Being of opinion that the demolition order was made within jurisdiction and in due exercise of the judge's discretion, I would dismiss this appeal."

Decision

44. With very great regret this Court finds itself in agreement with the applicants in this case. This is not a case of a minor infraction, or of accidental non-compliance, or of non-compliance with some technicality. The unauthorised development carried by the respondents was indeed a flagrant breach of the planning laws and completely unjustified. They have sought to drive a coach and four through the planning laws and that cannot be permitted no matter how frustrated they may have felt on account of earlier refusals. While it will undoubtedly constitute an enormous hardship to the respondents to have to demolish their dwelling house, particularly in circumstances where the first named respondent is now a victim of the general downturn in the construction industry and has little work, nevertheless the law must be upheld. Though it gives me absolutely no pleasure to say it, and it is stating the obvious, they have brought this on themselves.

45. In all the circumstances of the case the Court must accede to the application and grant the relief sought by the applicants. However, the Court is prepared on a humanitarian basis to put a stay on its order of 24 months from today's date in the light of the particularly difficult economic times in which we are living which the Court recognises may make compliance with the Court's order all the more difficult for the respondents. However, the Order must be complied with in full on or before the expiry of the stay.