

THE HIGH COURT

[2006 No. 147 M.C.A.]

**IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)
AND IN THE MATTER OF AN APPLICATION PURSUANT TO S. 160 OF THE PLANNING AND DEVELOPMENT ACT, 2000
AND IN THE MATTER OF AN APPLICATION BY SLIGO COUNTY COUNCIL**

BETWEEN

SLIGO COUNTY COUNCIL

APPLICANT

**AND
GAVIN MARTIN**

RESPONDENT

Judgment of O'Neill J. delivered the 24th day of May, 2007

1. In these proceedings by its Notice of Motion of the 22nd January, 2007 the applicants seek orders pursuant to s. 160 of the Planning and Development Act, 2000 (hereinafter referred to as the Act), to restrain the respondent from carrying out or continuing to carry out any development or further development at a site owned by the respondent at Kilkillogue, Mullaghmore in the County of Sligo, and directing the respondent to remove forthwith all unauthorised development carried out by him on this site.

2. The unauthorised development complained of by the applicants in this case is a mobile home placed on this site by the respondent.

3. This case is unusual in that the applicants sought similar reliefs against the respondent in respect of another mobile home on this site pursuant to a Notice of Motion dated the 21st February, 2003. On foot of that Notice of Motion his Honour Judge Kennedy in the Circuit Court restrained any further unauthorised development and ordered the dismantling and removal of the unauthorised development from the site. The applicant appealed this order and that appeal was heard by Gilligan J. in the High Court on the 8th March, 2005, who dismissed the appeal and ordered the respondent to remove from the site the entire base of the mobile home together with the existing mobile home and all pipe work associated with it and to render safe all electrical current attached thereto. Subsequent to the order of the High Court as aforesaid the respondent did remove the mobile home and the concrete base and the pipe work attached but replaced it with a smaller mobile home on a gravel base. It is this smaller mobile home with its gravel base that the applicants seek to have removed from the site on the basis that it is an unauthorised development.

4. The background to this matter is as follows.

5. The respondent's father acquired the site in question in or about 1972 and from 1974 onwards kept a mobile home on the site. This mobile home was used by him and his family as a holiday home. It is apparent from the photographs exhibited both in the previous application and in this application that the site upon which this mobile home was located is one of considerable scenic beauty overlooking as it does the bay at Mullaghmore and being quite close to the sea front.

6. Over the years the mobile home placed there in 1974 fell progressively into disrepair. In the meantime the respondent had taken over the mobile home and in the year 2000 he removed the old mobile home and replaced it with a new one. The old mobile home had measured approximately 28 feet by 10 feet (8.5344 metres by 3.048 metres). The new mobile home placed there in March, 2000 was somewhat larger measuring 37 feet by 12 feet.

7. In an affidavit sworn in the earlier application on the 26th day of May, 2003 at paragraph 3 thereof the respondent said the following:

"Thomas Martin purchased the lands in the year 1972 or 1973 from one Maurice McChesney. Thomas Martin placed a mobile home on the lands in 1974. From 1974 the lands were occupied by Thomas Martin and his family and the mobile home on it was sited on a concrete base with electricity and water connected..."

8. In his affidavit sworn on the 1st March, 2007 in these proceedings, at paragraph 4 the respondent says the following:

"In or around 1974, my father placed a mobile home on the lands in question which measured 28 feet by 10 feet (8.5344 metres by 3.048 metres). The said mobile home was placed on a gravel base. The said mobile home was further supported by concrete over the following years. I say that the mobile home remained in situ from 1974 and throughout the years my father, mother, myself and my seven siblings enjoyed many holidays at the said mobile home..."

9. Further on in this affidavit at paragraph 7 the respondent says:

"This new mobile home was larger than the original mobile home, 37 feet by 12 feet, approximately one third of a size larger than the original mobile home. Additionally I placed a wooden fence to enhance the old barbed fences which had deteriorated and built a stone wall to bound the county road. In order to accommodate the larger structure, it was necessary for me at the time to concrete over the gravel base..."

10. At paragraph 10 of this affidavit the respondent says:

"In compliance with the order Mr. Justice Gilligan of the 8th March, 2005, and as set out in correspondence between the respondent's solicitors and the applicants solicitors, the respondent removed on the 26th August, 2005 the new mobile home from the site and removed the concrete base and replaced the original mobile home with an identical mobile home in size and dimension and left the original gravel surface in place..."

11. At paragraph 12 he says:

"The land has now been reinstated to the situation which pertained prior to the placing of the new larger mobile home in 2000. There has been no material change in use in respect of the land since 1974.

13. The County Council is effectively seeking to alter the use of the land having taken no action for decades. The land as now used complies with the status quo as existed prior to the 15th March, 2000 and all bone fide concerns of the Council and any other complainant that arose from a larger caravan being on the site have been addressed..."

12. At paragraphs 15 and 16 the following is said:

"15. I am advised and believe that it is not the practice to obtain planning permission for a particular mobile home/caravan as opposed to permission for the use of lands for that particular purpose and I am advised and believe that where lands are used as a site for a mobile home/caravan it is the invariable practice that a particular mobile home/caravan is replaced from time to time without any requirement that planning permission be obtained. The issue in the previous proceedings turned essentially on the Council's contention that we were not replacing like with like and that the placing of a larger unit constituted development.

16. At no stage have we abandoned the use of the site of land as a site for a mobile home. However the High Court held that we were in error in placing a large unit on the site that error on our part did not constitute an abandonment of long established and continuing user of the site..."

13. The issue which arises for determination on this application is whether as is contended for by the respondent, the replacement on the site in August of 2005 of a mobile home of exactly similar dimensions to the one removed in 2000 was a continuation of the same user of the site as had existed prior to 2000 and secondly, having regard to the fact that no action was taken by the applicants or anybody else for an injunction to restrain unauthorised user pursuant to s. 160 of the Act or its predecessor s. 27 of the Planning and Development Act, 1976, are the applicants now prevented from seeking the relief sought in this application by virtue of s. 160(6)(a)(i) of the Act of 2000 because more than 7 years has elapsed from the date of commencement of the use of the site for this mobile home.

14. It is common case that no planning permission has ever existed in respect of the erection of a mobile home on this site or the use of the site for a mobile home, and that no action was ever taken by the applicants or by anybody else to restrain the use of this site as a site for this mobile home or to have the mobile home dismantled and removed therefrom, except for the application, ultimately determined by Gilligan J.

15. It is not contended by the respondent that the erection of a mobile home on this site or the use of the site for a mobile home is an exempt development.

16. For the applicant it was submitted that the removal of the mobile home in August 2005 pursuant to the order of Gilligan J. and the replacement of it by the mobile home now on site was a new or fresh "development" within the meaning of s. 3(1) of the Act of 2000, and the bringing on to the site in August of 2005 of the mobile home now sought to be removed could not in any circumstances be considered to be the temporary removal for repair and maintenance of the original mobile home. In this regard reliance was placed upon judgment of Morris P. in the case of *Dublin Corporation v. Arnold Lowe and Signway Holdings Ltd* (Unreported, 4th February, 2000). It was further submitted by the applicants again placing reliance upon the judgment of Morris P. in the above case, that the removal of the original mobile home without the intention of replacing it, was to be regarded as an abandonment of any rights which the respondent may have had in relation to the original mobile home.

17. For the respondent it was submitted that a critical issue was what constitutes development in the context of placing a mobile home on a site, and that the dominant consideration was the user of the site, pursuant to s. 3(2)(b) of the Act of 2000. Thus what has to be considered is whether or not there was continuous user of this site since 1974 to the present as a site for a mobile home. It was submitted that the planning permission would not be required every time a mobile home was changed and that a planning permission would not be for any particular type of mobile home. If planning permission was sought it would be for permission to use the site for a mobile home. It was submitted that mobile home such as the one at issue in this case is a chattel and does not form part of the reality. In this regard reliance was placed upon the case of *Leitestone Limited v. Morris* [1997] 1 W.L.R. 687. It was submitted that it was never intended this mobile home would become part of the real estate in the site and could have been removed therefrom without destruction of it. Thus it was submitted that the replacement on the site in August 2005 of a mobile home of similar dimensions to the original one was a continuation of the exact user which had existed uninterrupted from 1974 onwards and which was immune from restraint under s. 160 of the Act of 2000.

18. It was submitted that the objectionable feature of the mobile home replaced in 2000 was its excessive size in comparison to the original. It was submitted that the placing of a mobile home on the site did not constitute "works" and within the meaning of s. 3(1) of the Act of 2000. It was submitted that the fact that the mobile home was that i.e. mobile in nature which could be removed without damage or destruction distinguished this case from that of *Dublin County Council v. Tallaght Block Company Limited* and the case of *Fingal County Council v. Crean* [2001] I.E.H.C. 148 (19th October, 2001), in which O'Caoimh J. held that an advertising structure had been placed by new structure and hence was unauthorised. It was further submitted that there had been no abandonment at any stage of the user of this site as a site for a mobile home.

19. It was further submitted that with regard to the evidence to the effect that this site had been used as a site for a mobile home by the respondent and his family since 1974; that there was no question of profit arising; that the objectionable feature, namely the increased size of the mobile home replaced in 2000 had been addressed pursuant to the order of Gilligan J., and that there was no public interest at stake, that the granting of the injunction sought would be excessively punitive in nature and that this court should exercise its discretion against the granting of the injunctions sought in this application.

20. The relevant provisions of the Act of 2002 are as follows:

S. 3

"3. Development

(1) In this Act "Development" means except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making or any material change in the use of any structures on other land.

(2) For the purposes of sub-s 1 and without prejudice to the generality of that sub-s - ...

(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 purposes of caravanning or camping or habitation or the sale of goods..."

- "(6)(a) An application to the High Court or Circuit Court for an order until this section shall not be made –
(i) In respect of a development where no permission has been granted, after the expiration of a period of seven years from the date of the commencement on the development, or ..."

21. In this case it is clear that since 1974 there has continuously been a mobile home on this site, placed on a concrete base from early in that period until August of 2005, with electricity and water connected.

22. In my view the construction of a concrete base, the placing thereon of a mobile home and the connection to electricity and water supply manifestly amount to the carrying out of "works" within the meaning of s. 3(1) of the Act of 2000 and also its predecessor s. 3(1) of the Local Government (Planning and Development) Act, 1963.

23. Similarly in my view the construction in August of 2005, as the photographs exhibited, clearly demonstrate, of a new gravel base and the placing thereon of a new mobile home regardless of what size it is, constitutes in my opinion "works" within the meaning of s. 3(1) of the Act of 2000, and cannot be regarded as care or maintenance of the original mobile home which was permanently removed from the site in 2000 with the intent that it would be replaced. In this regard I agree with the passage from the judgment of Morris P. in the case of *Dublin Corporation v. Arnold Lowe and Signway Holdings Limited* (Unreported, High Court 4th February, 2000) where the learned President says the following at page 9:

"I believe that there must, in planning terms, be a significant difference between a temporary removal for repair and maintenance with the intention of the original or repaired structure being reinstated after such repair and the removal of such a structure with no intention of its reinstatement by its owner but the replacement of a different albeit (or be it similar) structure by a third party. I am of the view that it is irrelevant that the new structure corresponded in all respects with the original structure. The removal of the original hoarding by David Allen Holdings Limited without the intention of replacing it must be regarded as an abandonment of any rights which might have been acquired up to that time. (See *Dublin County Council v. Tallaght Block Company Limited* [1985] I.L.R.M. 512)"

24. I am satisfied therefore that apart from user of this site as a site for a mobile home the process of establishing the mobile home on the site as described in the evidence necessarily involved the carrying out of works and as such it was a development which required planning permission. I am fortified in this conclusion by the fact that at all times since 1974 the placing of a mobile home on this site by the respondent or his father was intended to be and indeed undoubtedly became the placing of permanent object on this site. There does not appear to have been any question of moving this home and it is plainly obvious it was there as a permanent holiday facility for the respondent and his family. In this context in my view, and having regard to the nature of the work carried out to establish this object on this site, this mobile home is properly to be regarded as a "structure" as defined in s. 2 of the Act of 2000.

25. I am satisfied that when the original mobile home was removed in 2000, this was a permanent change and intended to be so, and 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.

26. 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-s 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 subsections were mutually exclusive in their application.

27. This brings me finally to the submission by the respondent that the court should exercise its discretion not to grant injunctive relief.

28. If the court were to not grant relief that would have the effect of granting planning permission for this structure in circumstances where the various procedures set out in the Act of 2000 for the purposes of protecting the public in regard to development would be ignored with the inevitable defeat of a variety of public interests. Firstly there is the interest of the public in general to participate in the planning process by making objection or observation in relation to any particular proposed development. Secondly the expert supervisory role of the local authority as planning authority would be set at naught as it would be entirely excluded.

29. It was at all times open to the respondent prior to taking the precipitous action of replacing this mobile home in August of 2005 to seek, in the ordinary way, planning permission for this development. He choose not to do so and in my view he cannot now call in aid the discretion of this court, when it is clear that what he has done is a breach of the statutory obligation to obtain planning permission prior to the carrying out of a development.

30. I have come to the conclusion that the replacement by the respondent of this mobile home in August 2005 was an unauthorised development and I am quite satisfied that I should exercise my discretion in favour of granting the relief sought in this application.