Neutral Citation: [2015] IEHC 229

THE HIGH COURT

[2013 No. 338 MCA]

IN THE MATTER OF AN APPLICATION PURSUANT

TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

THE COUNTY COUNCIL OF THE COUNTY OF WICKLOW

APPLICANT

AND

GREGORY KINSELLA AND GILLIAN KINSELLA

RESPONDENTS

JUDGMENT of Kearns P. delivered on the 17th day of April, 2015

In these proceedings the applicants seek an order under s.160(1) of the Planning and Development Act 2000 as amended, restraining the respondents and each of them from continuing with an unauthorised development of lands on folio 8726 in the County of Wicklow where a timber chalet has been erected for residential purposes without planning permission. The applicants also seek an order pursuant to s.160 (2) of the Planning and Development Act 2000 as amended, directing the respondents to remove the said chalet, its concrete base and associated site works.

THE PLANNING AND DEVELOPMENT ACT 2000

The Planning and Development Act 2000 represents a consolidation of the law relating to planning and development which repeals and re-enacts with amendments various provisions of the Local Government (Planning and Development) Acts 1963-1999. The stated purpose of the Act is:-

> *"To provide, in the interests of the common good, for proper planning and sustainable development including the provision of housing …"*

Part VIII of the Act deals with enforcement, the aspect of planning laws with which the Court is concerned in the present case.

Section 151 of the Act provides that a person who carries out unauthorised development is guilty of an offence – a provision which, having regard to the severity of the sentences which may be imposed by virtue of s.156, may be taken as reflecting the importance attached by the Oireachtas to the serious implications of unauthorised development and the need for effective enforcement measures.

Section 152 provides for the issue of a warning letter by a planning authority to a person carrying out an unauthorised development. It permits a planning authority to ignore a development which is of a trivial or minor nature, so that the fact that such a letter does issue is of itself a serious step and may be seen as such.

Section 152 (4) sets out the details of what must be contained in a warning letter in such a way as to fully advise the recipient of the matter which has come to the attention of the planning authority and in respect of which the recipient may make submissions or observations in writing to the planning authority.

Section 153 permits the planning authority to make an appropriate investigation to determine whether or not to issue an enforcement notice. Before issuing an enforcement notice the planning authority must consider any representations made to it under s.152 and any other material considerations.

The service of an enforcement notice is provided for by s.154 and the detailed requirements of such a notice are elaborated at section 154(5).

Section 156 of the Act provides that a person who is guilty of an offence under, *inter alia*, ss. 151 or 154 shall be liable on conviction on indictment to a fine not exceeding £10,000,000 or to imprisonment for a term not exceeding two years or to both and on summary conviction to a fine not exceeding €5,000 or imprisonment for a term not exceeding six months or both.

Section 160 provides for the making of an application to court and in relevant part provides as follows:-

> *"(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 continue;*
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> *(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 subs. (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."

The respondents are brother and sister and are the registered owners of folios 8725 and 8726 County Wicklow. While the second named respondent is joint owner of the property the subject matter of this application she has had no part in the development the subject matter of these proceedings. There is on the property an existing uninhabited cottage which, at some time in the future, the second named respondent intends to refurbish and occupy. The first named respondent now resides in the newly erected wooden chalet with his partner and young son and occupies same as their family home.

In resisting the application the respondents argue that they are entitled to remain *in situ* pursuant to two decisions of the High Court delivered by Hogan J. in the same matter, namely, *Wicklow County Council v. Fortune (No. 1)* [2012] IEHC 406 and *Fortune v. Wicklow County Council (No. 2)* [2013] IEHC 255. Both were cases concerning the unauthorised construction of a dwelling in a scenic location near Lough Dan in Co. Wicklow and both formed different constituent elements of an appeal from the Circuit Court. There were two further *Fortune* rulings which were consequential upon orders and directions made in the earlier cases but do not require consideration in the present case.

That particular matter having been decided in the context of an appeal to the High Court - from which no further appeal was possible - the applicants in the present proceedings invite this Court to hold that the *Fortune* case was erroneously decided insofar as it purported to restrict to the extent it did the powers of a planning authority when dealing with an unauthorised development. There is, of course, a right of appeal from any decision of this Court to the Court of Appeal.

In the course of this judgment the Court will review the jurisprudence which outlines the circumstances and jurisprudence which underpin the deference one judge of the High Court should give to another when deciding a similar or identical point and the circumstances which would justify or even require the making of a different decision.

BACKGROUND FACTS

The respondents bought the holding comprised in folios 8725 and 8726 County Wicklow in 2003 with the assistance of a loan from EBS Building Society, the same being registered as a charge or burden on both folios. The date of registration of ownership of the properties and the charge is the 18th March, 2003. The property fronts on to the N81 national road which, as will appear later herein, is an extremely busy stretch of roadway with an average daily put through of 8,500 vehicles.

At the time of the purchase there was an old cottage on folio 8725 which remains *in situ* and is uninhabited. It is serviced with electricity and has its own water supply.

By planning application 07/285, the respondents, with the assistance of a firm of architects, sought planning permission for a dormer bungalow and other structures additional to the existing house on the land. On making this application, the Council requested further information which was not forthcoming from the respondents and the application was ultimately treated as having been withdrawn. The importance of this early application is to make clear that the respondents were well aware of the requirement to seek and obtain planning permission.

In late 2008, the applicant was advised that the respondents were creating an unauthorised entrance into the site from the N81 national road and issued a warning letter. On further investigation, it emerged that the "unauthorised entrance" was in fact damage caused to the boundary by a car accident. Nothing further turns on that particular incident in these proceedings.

On the 30th August, 2012 a planning official found that a timber chalet had been erected on a concrete plinth on the site some little distance from the existing cottage and was in the course of being fitted out. A warning letter under s.152 of the 2000 Act was sent to the respondents on the 14th September, 2012. By letter dated the 8th October, 2012 the first named respondent asserted that he had acted in the belief that he did not require planning permission as the development in question was the replacement of a previous structure on site. It appears that at some stage in the 1990s there was a mobile home or prefabricated structure on folio 8726, but this was gone at the time when the respondents bought the lands. The first named respondent indicated that he would, however, take the necessary steps to apply for retention.

On the 12th October, 2012 the first named respondent was told that he should lodge a valid application for retention within a period of six to eight weeks. He failed to do so.

A further inspection of the site on the 5th December, 2012 revealed that works had continued on the property which was by now nearing a state when it could be occupied. On the 19th December, 2012 an enforcement notice under s.154 of the Act of 2000 was served. This notice required that the respondent cease the use of the chalet and remove it. By the time of the next inspection which occurred on the 25th April, 2013, the chalet was occupied in the manner already indicated.

Accordingly, the applicants took a decision on the 17th May, 2013 to institute proceedings under s.160 of the 2000 Act seeking a court order for the removal of the unauthorised development. A letter dated the 4th June, 2013 communicated this decision to the respondents who took no steps or any other action by way of compliance and the present proceedings were accordingly commenced in October 2013.

The proceedings were made returnable to the High Court on the 11th November, 2013. An application for retention permission was made on the 8th November, 2013, but this application was refused for the reasons set out in a notification dated the 28th April, 2014. The first named respondent brought an appeal from this decision to An Bord Pleanála which confirmed the decision of the applicant for the reasons set out in a written direction dated the 18th September, 2014. The essential grounds of the decision are danger to public safety by reason of traffic hazard.

REVIEW OF THE AFFIDAVIT EVIDENCE

In this case there has been a substantial amount of affidavit evidence, much of it filed on behalf of the applicants, not least because of their stated apprehension of the damaging implications for the enforcement of planning laws arising from the *Fortune* decision.

The grounding affidavit of Paul Brophy, a technician in the Planning Enforcement Section of Wicklow County Council, sworn on the 16th October, 2013 states that he is familiar with the lands in question and inspected them initially in November 2008 and again in 2009 following a complaint about the opening of a new entrance therefrom onto the N81. However, this alteration to the property was the result of a car crash and is of no particular significance from a planning point of view. However, his inspections of the location in 2008 and 2009 enabled him to depose that there was at that time no structure or building in place where the chalet, the subject matter of these proceedings, is presently located. A local resident made a complaint about the erection of the wooden chalet in July

2012 and he made a further attendance on the 30th August 2012 in this regard. He found that a timber chalet had been constructed on a concrete floor slab on the lands encompassed within folio 8726, together with an open trench running between the side of the chalet and the site boundary to the north east which contained a waste water pipe which was connected to the chalet. The end of the pipe furthest away from the chalet was not connected to anything and lay open on the trench. On the ground to the south of the chalet was a new AJ box which had been covered with a section of plywood, although he saw no evidence that a new septic tank had been installed. Internal works were ongoing when he arrived, although there were no people or work vehicles on site.

Following this inspection, he recommended that a warning letter under s.152 be sent to the respondents and this was duly done on the 14th September, 2012. The first named respondent replied to this letter on the 8th October, 2012 stating that the cabin he had erected as his family home replaced a similar previously existing structure on the same site, a contention which Mr. Brophy firmly rejects. The first respondent indicated he would apply for a retention permission.

A further inspection on the 5th December, 2012 found that works had continued apace since service of the warning letter in September 2012. Furthermore, no application for retention had been lodged by the first named respondent contrary to what he had indicated in his letter of the 8th October, 2012. Following a further inspection on the 25th April, 2013, Mr. Brophy was satisfied that works had been carried out since service of the enforcement notice in December 2012 so that the enforcement notice had not been complied with in any respect. Following this inspection he recommended that s.160 proceedings be commenced. A further inspection on the 27th August, 2013 confirmed that the concrete base and the chalet remained in place and that the chalet was now furnished. It appeared that the chalet was being used for residential occupation and user. A hall light was observed to be on within the old stone cottage on the site also.

Rosemarie Dennison is an Administrative Officer employed in the Planning Enforcement Section of Wicklow County Council. In her lengthy affidavit sworn on the 15th October, 2013 she confirms that the respondents sought planning permission on the lands comprised within folio 8726 in 2007 (ref 07/285) for a 334 sq. metres dormer bungalow, a septic tank and waste water treatment system. She confirms that the County Council sought further information in relation to the application by letter dated the 10th April, 2007 but, even though the respondents had architects acting on their behalf at the time, there was no response to their requests for further information and accordingly the planning application was deemed to be withdrawn.

She says that, apart from the incident involving car damage to the external fence, there were no further developments regarding this site until July 2012. At that time a representation was made by a Blessington resident to the County Council to the effect that they had recently noticed the erection of a residential dwelling in the form of a timber structure. Having referred to the warning letter sent on the recommendation of Mr. Brophy the deponent confirms that in his letter of the 8th October, 2012 the first named respondent had indicated that he would take all necessary steps to apply for retention, but no such steps were implemented. Thereafter the enforcement notice was served. She confirms that the s.160 proceedings were authorised by the duly designated officer of Wicklow County Council on the 17th May, 2013, following which a further letter was sent to the respondents by the solicitors retained for the purpose of these proceedings by the County Council on the 4th June, 2013 advising that s.160 proceedings would be drafted and issued.

She deposes that while affidavits were being finalised with a view to issuing Circuit Court proceedings, the High Court issued its decision in the case of *Wicklow County Council v. Fortune (No. 2)* on the 6th June, 2013. Ms. Dennison states:-

> *"That particular decision appears to have far reaching consequences for the enforcement of the planning laws in this country by way of reference to the constitutional protection afforded a dwelling under Article 40.5 of the Constitution. In that case, Mr. Justice Hogan declined to order the demolition of a house which he had already found to be 'entirely unlawful'."*

She describes the fear and apprehension arising as a result of this decision that a judge of the Circuit Court may now feel precluded from making an order for the demolition of the chalet structure on these lands, given that the first named respondent has already confirmed that the structure is his "family home" and is relying on the aforesaid decision of the High Court in the *Fortune* case. She says the present proceedings were brought in the High Court in the first instance for that reason.

She confirms that planning permission is required for the works which have taken place on the lands comprised within folio 8726. No planning permission has been obtained and accordingly a situation of unauthorised development prevails which the applicants fear will continue unless an order is made by the Court.

Insofar as the first named respondent has maintained that the timber chalet replaced a similar previously existing structure which had been present for a period of approximately ten years, she deposes that planning permission would have been required for such a previous structure and the demolition of same and no such planning permission was applied for or exists. No such structure was evident on the site when it was inspected in the years 2007-2009.

A further affidavit was sworn by Ms. Sorcha Walsh, Acting Senior Planner with the applicant on the 15th October, 2013 in which she states that she carried out an inspection of the site on the 5th April, 2007 for the purpose of the planning permission lodged in that year (ref 07/285). On that occasion the only structure she found on the lands within folio 8726 or the adjoining lands comprised within folio 8725 (which effectively all formed part of the one site), was an old (uninhabited) stone cottage. She did not see any timber chalet or other structure on the site. Had there been such a structure she would have made reference to same and in the County Council's requests for further information on the planning application as it would have been a highly pertinent and relevant matter.

She further confirms the fears and apprehensions felt by the applicants in respect of the High Court decision in the *Fortune* case, that the same has "far reaching consequences and implications for the proper enforcement of the planning laws in this country and in these circumstances, it is appropriate that this Honourable Court hear this particular case as a court of first instance".

She enumerates as relevant to the Court's consideration a number of points as follows:-

> (a) The respondent knew that planning permission was required for the construction of the new dwelling;
>
> (b) No residential user of the timber chalet had commenced at the time the warning letter was sent in September 2012, nor at the time the enforcement notice was sent in December 2012. Instead, work continued in the full knowledge of the County Council's warnings contained in correspondence and the enforcement notice.
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> (c) In reply to the warning letter of the 14th September, 2012, the first named respondent stated he would like to take all necessary steps to apply for retention. At that stage, the dwelling was not occupied, but no application for retention (as

of the time of swearing the affidavit) had been made

(d) In respect of any retention application, it would be necessary to show compliance with the rural policies of the Council, to provide an effluent disposal system and site entrance that meet current standards.

(e) The site is located on the N81, a national secondary road, with limited sight lines at the centre-line of any entrance to the property.

(f) Two dwellings on the site would effectively double the number of traffic movements in and out of the existing entrance.

In the same affidavit Ms. Walsh went on to refer to other difficulties arising by virtue of the fact that the site is located within the Liffey basin river catchment area and overlies the Blessington aquifer. She deposed that the nature of the effluent disposal arrangement serving the new dwelling was not clear. Nor was it clear why there was any need for a new dwelling on the site having regard to the fact there was already a habitable dwelling present.

In concluding her affidavit, Ms. Walsh stated that, if no order for demolition is made, others may take the view that if they perceived planning difficulties of their own, they would simply go ahead and build in the hope that either no proceedings would be taken or if so, no order for demolition would be made. In other words, without legal clarification following the *Fortune* case, the applicants believe there is carte blanche for individuals to build family homes where and how they want with perceived immunity arising from the constitutional protection of the family home. The deponent expresses her serious concern that this would undermine the whole planning, legal and democratic process.

In his first replying affidavit, Gregory Kinsella confirms that he and his sister purchased the site in or around 2003 and that there was a stone cottage present on the site at the time of purchase. He believes there had been in years past a cabin which had been erected by the previous owner Danny Nolan. He states that in May 2012 he commenced the construction of a dwelling on folio 8726 in the same location as the previous cabin. He deposes he had no alternative at that time for housing his family. The mortgage on the property was in arrears and, after a failed attempt to sell the property in 2011, he was left with "no option" but to live on the land with his partner and child. He says he constructed the dwelling in May 2012 and spent subsequent week-ends and evenings after work between May and December installing drainage, electric cables and connecting to the existing septic tank to service same. He moved in to the cabin in December 2012 with his partner Laura and son Christian. He continues to reside there. He deposes that he has a strong family connection to the area and that his parent's property, where he was brought up, is close by.

In relation to the other dwelling, the old stone cottage, he says it is unoccupied and that his understanding with his sister when they purchased the property was that she would reside in it at some future point and that understanding remains in place.

He does not believe that any traffic hazard exists at this location and offered in support a letter from Mr. Jong Kim, a Senior Town Planner. He confirms however that he had submitted an application for retention planning permission in December 2013.

He deposes further that he believes his case is on all fours with that of *Wicklow County Council v. Fortune* insofar as the property sought to be demolished is a dwelling house constructed by an individual who has a real need for housing which is not causing harm or difficulty, and the court should "in line with the precedent in *Fortune* and having regard to Article 40.5 of the Constitution of Ireland refuse to exercise its discretion to grant such an order".

The affidavit of Tom O'Leary, Senior Executive Engineer from the Transportation and Roads Infrastructure Directorate of Wicklow County Council was sworn on the 23rd January, 2014. He disputes any assertion by the respondent that there are good sight lines at the entrance to the property. He states that the N81 at this point is heavily trafficked with free fast flowing traffic unimpeded by traffic flowing in the opposite direction. Speeds of 100km/h are easily achievable. This is a single carriageway rural section of the N81 that has either no hard shoulders, has narrow hard strips or has occasional hard shoulders. The capacity of this road is 8,600 vehicles per day annual average daily traffic as per Table 6/1 of the National Roads Authority's Road Link Design document NRA TD 9/12 of February 2012. He says that the road is running at "pretty close to capacity". The sight lines for vehicles emerging from the entrance create significant safety concern on this high-speed, busy free flowing road. The site entrance is located within a 1.5km section of N81 which is designated as being extremely hazardous by way of gateway signage that has been erected at both ends. The signage provides advanced warning signs of a series of sharp bends and regulation signs for no overtaking. The centre line road markings are generally marked with double white continuous lines with occasional breaks provided for site entrances. He believes any intensification of use of this existing access would create an increased risk to road users in that there is insufficient forward visibility for right turning traffic of vehicles approaching the site entrance from the south and similarly there is insufficient forward visibility for road users travelling north of right turning traffic into the site.

The second affidavit of Paul Brophy was sworn on the 23rd January, 2014. He takes issue with Mr. Kinsella's assertion that there had previously been a cabin on the site in question. He points out that when the respondents applied for planning permission back in 2007, no mention of this previous structure was made in that application. Having made further enquiries, he believes that some form of mobile dwelling existed previously on the site, though more to the front of the site, but historic aerial photographs confirm that no structure was located on the footprint of the current cabin. It appears that this mobile home had been set up above the ground on blocks and had clearly been removed in the 1990s. No other structure had been in place prior to when the first named respondent commenced construction of the current cabin in May 2012, a period of at least twelve years.

In relation to Mr. Kinsella's suggestion that, for all intents and purposes, the property was effectively complete by the time he received the warning letter in September 2012, Mr. Brophy states that this was certainly not the case. There were significant outstanding works as of September 2012 and, by his own admission, the first named respondent did not move into the premises until the 9th December, 2012, over three months after Mr. Brophy's initial inspection and just under three months after receiving the initial warning letter.

He deposes that the site is too small to accommodate two dwellings and deals in some detail with the Council's and the EPA's requirements which are of a minimum nature, and which were known to the respondents since 2007. From his inspections, it has not been possible to ascertain what type of effluent treatment system is on the site and is servicing the dwelling.

He reiterates that the retention permission (ref 13/8842) lodged by Mr. Kinsella resulted in a request for further information sent to him on the 19th December, 2013. The respondent had six months from the date of such request to furnish such information.

In her second affidavit sworn on the 23rd January, 2014, Sorcha Walsh takes issue with the assertion by the respondent that he had

"no other alternative for housing for his family" by reason of his financial circumstances. She deposes that many people throughout the country are in financial hardship but do not engage in illegal development. She deposes that the respondent is simply unable to comply with the various requirements of the County Council outlined in previous affidavits. The respondents had been aware of the position with regard to planning since 2007 and had only recently made an application for retention following the enforcement measures initiated by the County Council. She reiterates that the entrance poses a traffic hazard on a number of levels. To the extent that the respondent seeks to rely on the decision of the High Court in *Wicklow County Council v. Fortune*, she submits that this particular case is far from being "on all fours" with that decision, particularly by reference to the traffic hazard that the entrance to the site poses, together with the public health hazards that presently exist on the site. The detailed analysis conducted by Mr. Brophy had shown that the site is inadequate for two dwellings. These difficulties did not arise in the case of *Wicklow County Council v. Fortune*.

The affidavit continues to repeat the various considerations and reasons why, in the view of the deponent, the relief sought in the notice of motion should be granted. She makes the significant point that, by building this dwelling without applying for planning permission, third parties who might have had a wish to object, have been totally excluded from the process and their rights, both statutory and constitutional, have been rendered null and void.

The second replying affidavit of Gregory Kinsella, sworn on the 4th March, 2014, is somewhat argumentative in nature. He complains of being "avalanched" by the volume of technical material relied upon by the applicants. He repeats that it was his belief that, because there had previously been a chalet on the site for a period of ten years without any objection from the applicant council, that he would not need permission for the development he has carried out.

However, implicitly recognising that planning permission was and remains necessary, the respondent confirms that he did set in train the paper process to apply for retention permission when he was in receipt of the warning letter from the County Council. He does not see any objective consideration of any convincing public reason why the dwelling should be demolished, other than the Council's belief that he should not be permitted to retain the dwelling without having applied for planning permission.

In her third affidavit sworn on the 16th May, 2014, Sorcha Walsh rejects any suggestion that the Council intended to consider the respondent's application for retention other than in an objective way. She stresses that in this instance the authority is wearing its planning enforcement hat. Planning enforcement is a totally separate and distinct department from the remainder of the Council and, in particular, the planning department.

She points out that the first indication of any intention to apply for retention permission was outlined in the respondent's letter of the 8th October, 2012. Thereafter, further correspondence issued to the respondents including enforcement notices and warning letters. The proceedings were issued in October 2013 with a return date of 11th November, 2013. The retention application was lodged three days before the return date on the 8th November, 2013. The deponent states her belief that it took the institution of these proceedings before the retention application was made. She repeats that Mr. Kinsella himself decided to move into the newly constructed dwelling in the full knowledge that the dwelling was unauthorised. She also states that the main reason for the refusal of retention by the Council is the serious traffic hazard posed by the development. She says that given that Mr. Kinsella accepts that the dwelling has been erected without planning permission, the only issue is whether the Court should order the demolition and removal of the dwelling. In the context of refusal of retention by the Council in April 2014, the deponent referred to reports from the planner Edel Bermingham dated the 17th December, 2013 and 25th April, 2014 in which she (Edel Bermingham) concluded that while certain difficulties could be overcome with regard to effluent treatment, the serious traffic hazard issue could not. Her affidavit goes on to again refer to the High Court decision in the *Fortune* case and to reiterate the concerns of the County Council with regard to the implications of same.

The second affidavit of Tom O'Leary was sworn on the 16th May, 2014. In it he confirms he recommended a refusal of the application for retention (ref 13/8842) brought by the respondent. He clarifies that when the application was made, a request for further information was issued by the Council with respect to the application. Arising therefrom, a report was submitted on behalf of the first named respondent by Trafficwise Traffic and Transport Solutions which he was asked to review. He prepared such a report on the 24th March, 2014 which, having had due regard to all points advanced, nonetheless concluded there was a serious traffic hazard at the entrance to the development such that he again recommended a refusal of the application for retention for the reasons set out at p.7 of that report. In this affidavit he points out that the National Roads Authority also opposed the development for policy reasons in their letter dated the 28th November, 2013 addressed to Wicklow County Council Planning Department. Gráinne Leamy of the National Roads Authority wrote as follows in relation to Mr. Kinsella's application for retention:-

> *"The authority has examined the above application and considers that it is at variance with official policy in relation to control of development on/affecting national roads, as outlined in the DoECLG Spatial Planning and National Roads Guidelines for Planning Authorities (2012), as the proposed development by itself, or by the precedent which a grant of permission for it would set, would adversely affect the operation and safety of the national road network for the following reasons:-*
>
> > *'Official policy in relation to development involving access to national roads and development along such roads is set out in the DoECLG Spatial Planning and National Roads Guidelines for Planning Authorities (January, 2012). Section 2.5 of the Guidelines states that the policy of the planning authority will be to avoid the creation of any additional access point from new development or the generation of increased traffic from existing accesses to national roads to which speed limits greater than 60 kph apply. The proposal, if approved, would result in the intensification of an existing direct access to a national road contrary to official policy in relation to control of frontage development on national roads.'*
>
> *Please acknowledge receipt of this submission in accordance with the provisions of the Planning and Development Regulations, 2001-2012."*

A second affidavit of Rosemarie Dennison sworn on the 30th September, 2014 confirms that the refusal of retention permission was appealed by the first named respondent to An Bord Pleanála. She deposes that on the 19th September, 2014 An Bord Pleanála upheld the refusal of planning permission. The reasons stated by the Bord for its decision are elaborated as follows:-

> *"The development proposed for retention is served by an existing access onto the N81, a national secondary route, which is substandard in terms of site lines and forward visibility and where segregated pedestrian facilities are unavailable. The traffic turning movements associated with the retention of this development would conflict with and interfere with the safety and free flow of traffic on the national road network at a point where vehicles travel up to the maximum speed limit. The development proposed for retention would, therefore, endanger public safety by reason of*

traffic hazard and would be contrary to the proper planning and sustainable development of the area."

In the context of the appeal to An Bord Pleanála there was a detailed report prepared by Ms. Jane Dennihy, Senior Planning Inspector, dated the 15th August, 2014. In that report she elaborated the traffic hazard in the following terms:-

> *"I wish to draw attention to the following with regard to the conditions on the N81 in the vicinity of the site: The section of N81 at the site location has heavy volumes of traffic which can achieve speeds well towards the maximum speed of 100 kph. It is part of a 1.5km section of hazardous route at each end of which there are warning signs. The centre line of the carriageway is marked with a continuous white line. A bus stop is opposite the site and it is one of a series of signs that was in the roadside edge along the section of the road. The presence of a bus stop would contribute to pedestrian movement on the road edge where public footpaths and lighting are unavailable and there is a notable amount of vehicular stopping/starting and turning movements associated with the bus service, entrances and intersections with local roads and lanes.*
>
> *I conducted a walkover along the road in both directions up to 300 metres from the site entrance and have driven along the carriageway in both directions a number of times and turned into and exited the existing entrance during the course of my inspections. The route is extremely hazardous for pedestrians who have no designated route or space. The existing access is seriously deficient and any increase in use of an access onto and off the route. The associated waiting and turning movements would contribute to increased potential for interference with the free and safe flow of traffic and risk of endangerment of pedestrian and vehicular safety.*
>
> *I have reviewed the Transportation Engineer's detailed reports on the planning application and further information submissions. Notwithstanding the applicant's willingness to carry out some works to the entrance serving the cottage he has confirmed that it is intended that the entrance serve two dwellings.*
>
> *The Transportation Engineer and Planning Officer's view that permission should be refused is supported in that the proposal should be refused, on grounds of intensification of use of the existing entrance."*

A short affidavit was sworn thereafter by Mr. Jong Kim, Town Planning Consultant retained by the respondent, on the 3rd November, 2014. He confirms he was retained by the respondent in relation to the application for retention permission. He states that, despite the very many objections given by the applicant in its affidavits, the sole reason upon which An Bord Pleanála ultimately refused the permission for retention was the generation of additional traffic. He deposes to his belief that the refusal is based on the fact of two dwelling units occupying the site. The effect of the decision is that traffic generated by a single house is acceptable but not that generated by two.

He says that at the date of these proceedings, the existing cottage is in no fit state for occupation and while the second respondent has reserved her position to carry out renovations and occupy that house, to date she has not done so. From that perspective, he believes that from a planning point of view there is no valid objection to the present development for so long as the other house on the site is not occupied.

In his third affidavit sworn on the 24th February, 2015 Mr. O'Leary strongly disagrees with this view. He deposes that it is clear there is an objection to the unauthorised chalet from a planning perspective. Both Wicklow County Council and An Bord Pleanála on appeal have concluded that the unauthorised development in the form of the chalet and associated works endangers public safety by reason of a traffic hazard and is contrary to proper planning and development. It is incorrect to say that traffic generated by one house on the site is acceptable but not two. He deposes that the entrance creates and presents a serious traffic hazard for both road users and pedestrians. This view is also held by An Bord Pleanála. This is so no matter how many vehicles might use the entrance.

He accepts that if the second named respondent does occupy the existing cottage at some stage in the future, she will be entitled to use the entrance to access the cottage, notwithstanding that it will comprise a serious traffic hazard. Entrances onto national roads that were in existence prior to the 1st October, 1964 are still being used and lawfully so. However, prior to that date, traffic flow was far less, vehicles were of a different construction, they travelled less frequently and at a lower speed. While the use of such entrances may be legitimate to access structures and developments that were in place prior to that time, that certainly does not mean they do not comprise a serious traffic hazard, as in this instance.

Finally, Mr. Kim in an affidavit sworn on the 18th March, 2015, states that he merely wished to point out that the refusal of the retention application by the Board was on the grounds that there was an existing vehicular entrance to the property serving an existing house. No reason had been advanced as to why the respondent's use of the entrance would be any more hazardous than the use permissible for the existing house such that he should be required to demolish his home.

SUBMISSIONS OF THE PARTIES

On behalf of the applicant it is submitted that the buildings and other works referred to in para. (1) of the notice of motion are an unauthorised development within s.160 (1) of the Planning and Development Act 2000 and the use as a domestic dwelling is unauthorised. The Act imposes necessary restrictions on rights and freedoms claimed by property holders "*in the interest of the common good, for proper planning and sustainable development*". The enforcement discretion of the court under s.160 must be exercised with due regard to the objective of the Oireachtas as set out in the 2000 Act within the context of an overall statutory objective of securing planning compliance. Thus the subject of an order "may" be required to take such steps "*as 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."*

The role of the court is to assist effective enforcement and to ensure that only permitted developments are carried out in accordance with permissions granted. The effect and consequences of unauthorised use or illegal development are relevant considerations, as per *Morris v. Garvey* [1983] I.R. 319. The decision of the High Court in *Wicklow County Council v. Fortune (No. 1)* [2012] IEHC 406 held that a test of proportionality should be applied when determining whether relief under s.160 should be granted where the unauthorised structure is being used as a dwelling. Thus an order of the type sought here must identify a necessity "objectively justified…and

convincingly established". It was submitted that the court in the *Fortune* case disregarded the role of the respondent in the planning breach and substituted its own view of proper planning and sustainable development with regard to the reasons for the refusal of retention permission, including the contravention of the development plan. However, the Act of 2000 envisages that there must be good reasons why s.160 relief should not be granted in any case where there is substantial non-compliance with planning obligations. The conduct of the respondent is always a relevant factor, but it was submitted that it was treated as irrelevant in determining the exercise of discretion in the *Fortune* judgments.

In this case full enforcement under s.160 is appropriate and proportionate. The development was unauthorised and deliberate. Traffic hazard is identified as the reason for refusal of permission. There is no realistic prospect that this hazard will abate in the short term. The applicant therefore submits that the Court should not second guess the conclusions of the statutory bodies who concluded that permission of the development should be refused on the grounds of traffic hazard. While a court is entitled to look at the impact of the development in considering whether the remedy sought is proportionate, it ought to act to give practical effect to the enforcement of decisions based on conclusions which are within the exclusive remit of statutory planning bodies.

The applicants asked: Is it a "drastic interference with the inviolability of the dwelling" to prevent a person from using a dwelling which he had no right to establish in the first place? In the present case the dwelling was only established because the respondent "stole a march" on the enforcement process. He built and completed the dwelling and occupied it without any planning permission and in full knowledge that the applicant's viewed the development as unauthorised and illegal. The manner in which the Constitution protects and vindicates rights depends on context. For instance, the Constitution does not give a right to retain possession of a house against the owner where a dwelling has been established in it as a result of trespass. Thus any protection given by Article 40.5 may be modified by law in a proportionate way and may sometimes yield to competing rights and also to duties owed by the citizen. The Act of 2000 modifies property rights and rights which might otherwise be enjoyed to establish dwellings, in the interests of proper planning control by removing the right to establish or alter dwellings except in accordance with planning permission. This planning control is an essential environmental necessity in a properly ordered society. Those who propose to engage in development have access to guidance in the form of Government policy directives and development plans, local authority guidance and guidance from the National Roads Authority. They can engage architects and planners who will advise them. Those who ride rough shod over and ignore these requirements take the risk that they will be unable to regularise their position and that they will have to undo what they have done. Indeed the legislature also deems their actions to be criminal offences under ss.151, 154 and 156 of the Act of 2000.

The courts are not given power to override development plans nor should the Constitution be seen to provide immunities to wrongdoers. Article 40.5 does not confer on any citizen a right to establish a dwelling of his choosing at the place of his choosing. In essence, this is the right which the respondents claim. The provisions of the Act of 2000, an Act which enjoys a presumption of constitutionality, have made the exercise of rights subject to a statutory requirement to obtain and comply with planning permission. The Oireachtas has enacted that decisions on the issue of permissions are made by statutory specialist bodies and that planning policy is not made by the courts.

It is significant that rules 4 and 12 of the rules applicable to assessment of compensation and compulsory purchase exclude value of land increased by unlawful use or buildings, or attributable to unauthorised structures or use. Also excluded is compensation arising from the refusal of a planning permission in many circumstances. This illustrates the point that proportionality is not a principle of universal application which gives a remedy wherever a person is not permitted to do as he pleases with his property. It is not therefore correct to treat the principle of proportionality as being solely concerned with the effect of a given decision on a person or his property.

The application of any proportionality approach should also give due weight to the reasons for the refusal of planning permission. Courts, in the exercise of their functions under s.160, should defer to decisions made by the specialist planning bodies within their sphere of competence.

The approach to the exercise of discretion had been properly outlined in the judgment of Finlay P. in *Dublin Corporation v. Garland* [1982] I.L.R.M. 104 where he stated as follows at p.106:-

> *"The court cannot … entertain, in my view, in regard to applications under s.27 any question challenging the validity or correctness of a decision of a planning authority in regard to the granting or refusing of permission, though it may be concerned within the broader limits of its discretion with the consequences of unauthorised use or illegal development."*

In other words, it is not for the courts to come to a different planning conclusion than that arrived at by the appropriate planning authority.

Finally, in exercising the discretion given under s.160, the Court must bear in mind the consideration that a decision to refuse to make an order under that section in favour of the planning authority may, in effect, reverse a decision to refuse planning permission. Effective planning control depends on public compliance and acceptance of the rules. It also depends on the system of requiring demonstration of planning compliance in land transfer and mortgage transactions and the willingness of the public to respect and comply with their obligations under the 2000 Act. It also depends on the presence of effective measures to secure planning compliance. Jurisdiction conferred by s.160 of the 2000 Act and its statutory predecessors is a special statutory original jurisdiction and not a subsidiary aspect of some equitable jurisdiction to enforce public law. The Court is not precluded in exercising its functions from taking into account a wide range of considerations. These may include hardship, the personal circumstances of the respondents, the impact of the development on others, the prospect of a retention permission being forthcoming, the length of time during which the unauthorised structure has been occupied, the unauthorised structure itself and the other matters listed in the analysis of the authorities set out in pp. 419-424 of Dodd's *The Planning Acts 2000-2007 Annotated and Consolidated* (2008, Roundhall). The bottom line however under the 2000 Act is that s.160 is intended by the Oireachtas to provide an effective tool in planning enforcement. The result and effect of the *Fortune* decision has been to render it ineffective.

On behalf of the first respondent, who places full reliance on the standing and judgment of the High Court in the *Fortune* case, it was submitted that it is not sufficient for a planning authority to show that the development is unauthorised, it must go further and show 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. No such necessity for demolition had been demonstrated in the present case. Accordingly, the Court should not exercise its discretion to order the demolition sought.

While the applicants had invoked many considerations in seeking to demonstrate that there were important public policy objectives requiring the demolition of the respondent's house, these grounds had to a large extent fallen away in the light of the decision of An Bord Pleanála which refused permission for retention on the single ground of traffic hazard.

Furthermore, the Court should be slow to depart from the decision of another judge of the High Court unless there are strong reasons for doing so. There are no such strong reasons in the instant case.

It was submitted that the enforcement of planning legislation is not for the purpose of discipline but for the achievement of the common good. Thus while certain criteria might be appropriate for consideration on the granting or withholding of permission, separate considerations should apply to the enforcement. It was submitted that the issue of traffic generation when considered objectively is not, at least for the time being, a matter of such concern as to warrant the destruction of the respondent's home.

The decision handed down by the High Court in the *Fortune* case represented a further evolution of the law as formulated by the Supreme Court in the *Damache* case (*Damache v. DPP* [2012] 2 I.R. 266) which in turn was a ground-breaking decision in relation to the constitutionality of a section of the Offences Against the State Act, 1939 that had existed for many years. The fact that court decisions can, from time to time, have such effect should not deter the courts from allowing the law to evolve and therefore this Court, it was submitted, should not depart from the views expressed in the *Fortune* case.

STARE DECISIS

While this Court is not strictly bound to follow decisions of other High Court Judges, it is well established that there must be strong reasons to warrant contradiction or departure.

The jurisprudence of the High Court regarding the proper approach of a judge of that court when faced with the previous decision of another judge of that court is consistent. It was well expressed by Parke J. in *Irish Trust Bank Ltd. v. Central Bank of Ireland* [1976] I.L.R.M. 50 when he stated:-

> *" … a court should not depart from a decision of another court of equal jurisdiction unless it is established that the decision was based on insufficient authority or incorrect submissions, or that the judgment had departed in some way from the proper standard to be adopted in judicial determination."*

Similar views were expressed in judgments delivered by the High Court in *Re Worldport Ireland Ltd*. [2005] 2 JIC 1604 and in *Brady v. DPP* [2010] IEHC 231 and in *B.N.J.L. v. Minister for Justice Equality and Law Reform* [2012] IEHC 74.

In *Worldport Ireland*, Clarke J. elaborated on the circumstances where it might be appropriate for a court to come to a different view in the following manner:-

> *"Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is clear error in the judgment, or where the judgment sought to be revisited was delivered [at a] sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all the relevant authorities and which was, as was noted by Kearns J. (in Re Industrial Services Co. (Section 218 application) [2001] 2 I.R. 118), based on forming a judgment between evenly balanced argument. If each time such a point were to arise again, a judge were free to form his or her own view, without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered. In the absence of a definitive ruling from the Supreme Court on this matter I do not, therefore, consider that it is appropriate for me to consider again the issue so recently decided by Kearns J. and I intend, therefore, that I should follow the ratio in Industrial Services and decline to take the view as urged by counsel for the Bank that the case was wrongly decided."*

This view of the doctrine of *stare decisis* was confirmed in the Supreme Court decision in *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27.

That said, there have been a number of instances where circumstances have arisen in which a court may come to a different conclusion, as occurred in *Tanat v. The Medical Council* [2013] IEHC 223, a case in which O'Neill J. found it necessary not to follow the reasoning of a colleague in that particular case. He stated as follows at para. 77:-

> *"I was persuaded to do so by the fact that it appeared to me that the facts in that case, relating to what was the unintended, indeed accidental, eventuality which ensued in the calling in of the guarantee in that case, differed so markedly from the elaborate, carefully arranged series of contractual transactions leading ultimately to a common agreed objective, which was the factual matrix that I had to deal with in this case."*

O'Neill J. also referred to a further consideration of relevance in that case, namely, the fact that two significant highly persuasive authorities had not been opened to his colleague who had come to a different conclusion.

On this aspect of the case, the respondents argue that the decision of Hogan J. in *Fortune* was, and was intended to be, a dramatic reformulation of principles previously thought applicable. That he considered the matter to be that radical may be ascertained from his opening remarks:-

> *"To those unversed to the sometimes haphazard manner by which legal doctrine and jurisprudence can evolve, it may seem remarkable that a Supreme Court decision concerning the power of gardaí to issue search warrants in respect of a private dwelling (Damache v. Director of Public Prosecutions [2012] 2 I.L.R.M. 153) should have potentially far-reaching consequences in areas of civil law far removed from the criminal sphere, such as planning law. Yet perhaps it required a decision of this magnitude to illustrate that which in itself ought to have been obvious over the last 75 years or so, namely that Article 40.5 of the Constitution ensures that the dwelling must be safeguarded in an extensive manner as befits a free and democratic society."*

The Court pauses at this point to note that Hogan J. is perhaps the outstanding constitutional legal expert of this generation and is thus well qualified to express a view of how Article 40.5 might be invoked in the planning process, dramatic and far reaching though the consequences of his decision have been, or are feared to have been, for the efficacy of planning enforcement in this jurisdiction.

This Court must therefore, before embarking upon an analysis of the *Fortune* case, express in the clearest terms its respect both for

the scholarship of the learned trial judge in *Fortune* and the Court's acknowledgment that there are limited circumstances in which a contradictory or dissonant view should be expressed.

THE *FORTUNE* CASE

The first point to note in relation to the case of *Wicklow County Council v. Fortune* is that it was a case initiated in the Circuit Court and determined by Hogan J. in the context of an appeal from the Circuit Court to the High Court. No appeal from that decision was possible. The Court will have some observations to make at the end of this judgment as to whether novel legal principles which have the effect of ushering in severe restrictions on the enforcement of Irish planning law should be determined in the context of a Circuit Court appeal where the High Court is effectively acting as the final stop in the process.

But I turn firstly to the facts of the *Fortune* case and gratefully accept for the purposes of this judgment the outline of facts recited by Hogan J. in *The County Council of the County of Wicklow v. Katie Fortune* [2012] IEHC 406.

The defendant, Ms. Fortune, had at some stage within the previous thirteen years or so (the actual date is not specified) constructed a small timber frame chalet of approximately 70 sq. metres in size in a wooded area of high natural beauty in Lough Dan, Co. Wicklow. Wooden decking in the form of a patio was laid around two sides of the chalet. While the Court found that the chalet had been sensitively constructed and was not immediately visible from the adjoining road, the stark fact remained that this chalet was built without planning permission.

This matter first came to the attention of the planning section of Wicklow County Council sometime in December, 2006. Officials from the Council visited the site on a number of occasions, noting that other parts of the site and immediately adjacent sites were used by other family members for such purposes as the storage of mobile homes and motor vehicles. A warning letter was duly sent pursuant to s.152 of the Act of 2000 on the 18th April, 2007.

The Council decided to postpone making an application to the Circuit Court for a statutory injunction under s.160 pending an application by Ms. Fortune for a retention planning permission. Two separate applications for retention were made on Ms. Fortune's behalf. The process culminated in the decision of An Bord Pleanála to refuse to grant permission by decision of the 18th November, 2008. The reasons given by the Board for the refusal were as follows:-

> "(1) The site of the proposed development is at an elevated location designated in the Wicklow County Development Plan 2004-2010 as an 'area of outstanding beauty'. According to policy ss.9 of the Settlement Strategy it is the policy of the planning authority not to allow development of dwellings within areas so designated, unless it can be satisfactorily demonstrated that the applicant has a permanent note of residence of the immediate vicinity or has resided at the location for a minimum of 10 years. This policy is considered reasonable. It is considered on the basis of the submissions made in accordance with the application of the appeal that it has not been demonstrated that the applicant comes under the scope of the criteria set out under this policy. The proposed development would, therefore, contravene this policy and would be contrary to the proper planning and sustainable development of the area.
>
> (2) The site of the proposed development is located off a lane that is substandard in horizontal and vertical alignment and in poor condition. The Board is not satisfied on the basis of the information provided in connection with the application of the appeal that the lane can be upgraded and maintained to a satisfactory standard to serve the development. The proposed development would, therefore, endanger public safety by reason of traffic hazard and obstruction of road users."

Ms. Fortune's account of events was to the effect that in 1999 she was separated from her husband and had two small children. Not having anywhere else to live, her mother (who apparently owned the site) allowed her to place a mobile home thereon. With the assistance of her family, she was then able to fund the erection of the chalet on the lands. However, as noted by Hogan J. the stark reality of the case was that the chalet was built without planning permission and various applications for retention were refused.

By decision dated the 8th February, 2011, her Honour Judge Flanagan found for the applicant Council and directed that the site be cleared. In particular, the learned Circuit Court Judge directed that the occupation of the chalet should cease as a prelude to its demolition and removal. Thereafter Ms. Fortune brought the appeal the subject matter of the hearing before Hogan J.

In that case, unlike the present case, the respondent contended that the application was time-barred. Having rejected that contention, the learned trial judge proceeded to consider the scope of his discretionary function in the matter of granting an injunction under section 160.

Having reviewed the authorities in relation to the exercise of discretion, Hogan J. concluded as follows (at para. 34):-

> *" … it must be concluded that, objectively speaking, the development was not bona fide. After all, Ms. Fortune elected to build a dwelling in an area of high amenity in circumstances where she must have known that planning permission was required. Were it not for the constitutional argument, I would have been inclined to adopt the same approach as did Edwards J. in Meath County Council v. Murray [2010] IEHC 254, i.e., grant the injunction, albeit subject to a two year stay."*

The learned trial judge then turned to examine the constitutional argument, having noted (at para. 32) that it appeared to be "the first time in which such an argument has been advanced by way of defence in a s.160 application." Noting that the constitutional argument may have been prompted by the fresh emphasis given to Article 40.5 by recent decisions such as *Damache v. Director of Public Prosecutions* [2011] IESC 11 and *The People (Director of Public Prosecutions) v. Cunningham* [2011] IECCA 64, the learned trial judge (at para. 35) indicated his view that there was "no basis at all" for the suggestion that Article 40.5 should be confined in its application to the sphere of criminal law and criminal procedure, noting that the guarantee of "inviolability" of the dwelling in Article 40.5 is a free standing self executing guarantee which applies to both civil and criminal proceedings and to both State and non-State actors alike.

It is important to stress that the learned trial judge acknowledged that the Constitution was not intended to bring about a situation where someone could profit from their own deliberate and conscious wrongful actions by asserting an immunity from legal action and appropriate enforcement by invoking Article 40.5. At para. 41 he stated:-

> *"In the planning context, this does not mean that the courts cannot order the demolition of an unauthorised dwelling because it is 'inviolable'. It rather means that the courts should not exercise the s.160 jurisdiction in such a manner so as to require the demolition of such a dwelling unless the necessity for this step is objectively justified and, adapting the*

language of the European Court of Human Rights (in an admittedly different context) in Goodwin v. United Kingdom [1996] 22 EHRR 123, the case for such a drastic step is convincingly established."

Hogan J. thus felt able to conclude (at para. 42):-

> *"In this regard, it is not simply enough for the applicant Council to show – as, indeed, it already has – that the structure if unauthorised or that the householder has drawn these difficulties upon herself by proceeding to construct the dwelling without planning permission. 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."*

Acknowledging the "novelty" of the point and in particular the fact that the Article 40.5 issue was highlighted only in the wake of the Supreme Court's decision in *Damache*, he adjourned for further consideration the question of whether the particular dwelling should be demolished, stating, however, that the test to be met on such an application would be "whether the necessity for a demolition order pursuant to s.160 (1) has, in fact, been convincingly established."

Hogan J.'s judgment in *Fortune (No. 2)* was delivered on the 6th June, 2013.

In the course of this judgment, the learned trial judge recited the three arguments advanced by Wicklow County Council for the demolition order sought as follows:-

> *"First, it is said that failure to make such an order would undermine the effective protection of the environment provided for under the 2000 Act and, in essence, simultaneously reward Ms. Fortune for having unlawfully constructed this dwelling house. Second, it is said that the very fact that Ms. Fortune could continue to live in this unauthorised dwelling would itself serve as a precedent in terms of future applications for planning permission in the general vicinity, thus undermining the strict planning regime which obtains in this area of great scenic beauty. Third, it is contended that a failure to grant such a relief would compromise the status of the Wicklow Mountains candidate special area of conservation which is immediately adjoining to Ms. Fortune's site. We can now proceed to examine these individual arguments in order whether to examine whether, individually or collectively, they satisfy the standard which I venture to articulate in Fortune (No. 1)."*

In dealing with the first of these arguments, Hogan J., in a short eight line passage, rejected this contention on the basis that, for as long as it remained unauthorised, the property in question was unsaleable and could not be used as security for any lending purposes. "*This in itself*", he concluded, "*should operate as a deterrent to those who would otherwise wish to break the law*".

In relation to the second ground the learned trial judge felt he was concerned solely with the case of Ms. Fortune alone and that he had to consider this case on its own individual merits. He accepted that different considerations might well apply to other developments, depending on their individual circumstances. This portion of the judgment appears to relate to the consideration that the fact that planning permission has been granted in a particular development is a potentially relevant consideration in so far as future planning decisions are concerned. It is however difficult to find anything in this portion of the judgment which addresses the wider concerns of the applicant Council that the decision proposed by Hogan J. would have extremely damaging consequences on a wider basis for the enforcement of planning laws. That is the precedential consideration which is of particular concern to the applicants in the context of the present case.

Having devoted some consideration to the effluent treatment system which was external to the dwelling itself, the learned trial judge held that the Council were entitled to an order requiring Ms. Fortune to operate the effluent system in a manner compatible with existing EPA Guidelines.

The learned trial judge then concluded his judgment by once again posing the question:- "has the case for an order requiring the demolition of the chalet been convincingly established?" He concluded that the "test" he had posed at the conclusion of his judgment in *Fortune (No. 1)* had not been met by the applicants, stating as follows at paras 31 - 32:-

> *"31.…the Council's argument based on moral hazard and rewarding those who take the law into their own hands is diluted by the fact that that I have already declared the structure to be unauthorised. This, in itself, should act as a deterrent to those who might otherwise take the law into their own hands. Nor is the argument based on precedent compelling, since as I have pointed out, the planning authorities could not be obliged to take account of unauthorised structures in assessing whether or not to grant planning permission to third parties seeking to develop in the locality. Nor has any compelling evidence been advanced that the site would compromise the protection of the Natura 2000 site.*
>
> *32. None of this is to suggest that the arguments advanced by the Council are not important and weighty. In other cases, arguments of this kind might well prevail. But in the end I cannot ignore the solemn words of Article 40.5 which this Court is committed to uphold. The making of a s. 160 order on the particular facts of the present case would represent a drastic interference with the inviolability of the dwelling and with Ms. Fortune's property rights. If I may re-echo that which I have already said in Fortune (No.1), such an order could only be justified if compelling evidence requiring such a step had been advanced by the Council. As, for the reasons I have ventured to set out, I am not satisfied that such compelling evidence has been advanced, I will refuse to make an order requiring the demolition of the chalet. I will, however, make an order requiring Ms. Fortune to operate the effluent system which is external to the dwelling in a manner compatible with existing EPA guidelines"*

DISCUSSION

I believe in this case one must commence by considering why we have planning laws and why they must be enforced. In one sense the reason is obvious: without effective planning laws and adequate enforcement procedures to ensure compliance with them, anarchy would rule the roost with regard to all sorts of developments. Dangerous, unsuitable and haphazard developments would be likely, some of which might be constructed or established in locations where a single citizen could inconvenience neighbours, destroy areas of natural beauty, disrupt traffic and even undermine the capacity of the community to engage in normal social function and activities. In short, there would be nothing to stop a 'free for all' development culture from running riot. Take an extreme example:

might an individual create a structure overnight outside the GPO, bring in sleeping and cooking facilities, and claim thereafter that he is immune from removal as his "dwelling" is "inviolable" under Article 40.5 of the Constitution? I offer this example merely to highlight the levels of absurdity that may arise when the property rights of the individual, even when acting unlawfully, are seen in every instance to trump those of a democratic society which can only function when its constituent members are equally bound by rules which regulate matters such as planning and development.

The Planning Acts 1963-2000 provide the law which bind all citizens in this regard. It might be more accurate to say the legislation binds developments, as planning conditions enure for the benefit of the land and society generally, rather than the individual. It is the responsibility of the individual developer to conform, to obtain planning permission when required to do so and to comply with conditions attaching to any permission. In *Kenny v. Dublin City Council* [2009] IESC 19 the essential character of a planning permission was adverted to by Fennelly J. when at para 24 of his judgment he stated:-

> *"The planning permission is a formal and public document. The applicant, the planning authority and the public have participated in a formal statutory procedure, leading to its grant. The permission enures to the benefit of the land on which the permitted development is to be carried out."*

At para 25 of his judgment, Fennelly J. adopted with approval a passage to that effect from Simons on Planning and Development Law (2nd Ed., 2007, paragraphs 5.06 – 5.07).

The Act of 2000 enjoys a presumption of constitutionality and no constitutional challenge to any part of Part VIII of the Act has been made in these, or the *Fortune*, proceedings. That legislation specifically provides enforcement measures for developments which require planning permission and creates serious offences in respect of developments which ignore those requirements. That legislation specifically envisages that, in an appropriate case, a planning authority may apply to court to seek a demolition order under s. 160 as has occurred in this (and the *Fortune*) case.

This Court has no difficulty in acknowledging that any statutory discretionary power bestowed on the courts under s. 160 must be exercised constitutionally (See *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317), which in turn means that the court must act proportionately with regard to the particular transgression in respect of which sanction is being sought. (See *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R.70). Thus a building constructed with a minor departure from a condition contained in a planning permission would not normally attract a demolition order, particularly when the breach is one capable of being easily remedied. In *Dodd's Planning Acts 2000 – 2007 (Annotated and Consolidated)* (at pp. 419 – 424), under the heading "Discretionary Refusal of Relief", a long list of matters and cases relevant to the exercise of discretion are set out. Significantly the author commences his treatment of the topic by referring to the judgment delivered by Henchy J. in *Morris v. Garvey* [1983] I.R. 319 (to which reference was made in submissions) where, in stressing the community's interest in preserving communal environmental rights he stated:-

> *"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.'"*

Summarising the key relevant factors elaborated by Dodd (which are comprehensively referenced to decided cases), they include:-

> (a) The reasonableness of the conduct of both parties;
>
> (b) The bona fides of the respondent in dealing with the planning authority;
>
> (c) Public convenience or interest – *i.e.*, the extent to which the public may be adversely affected;
>
> (d) Delay (if any) in bringing the application;
>
> (e) Error merely technical or minor;
>
> (f) Undue hardship on the respondent (though in *Westport UDC v. Golden* [2002] 1 I.L.R.M. 439 Morris P. took into account the extent to which the respondent contributed to the situation);
>
> (g) Opinion of the planning authority.

However, and having due regard to all of the foregoing, where the breach is a gross one – as in this case – the discretion of the Court is necessarily limited, particularly where a developer has not acted bona fide. Thus in *Wicklow County Council v. Forest Fencing* [2007] IEHC 242, Charleton J. stated:-

> *"This is a major developmnent for which there is no planning permission. It is a material contravention of the County Wicklow Development Plan. It is built entirely to suit the developer and with almost no reference to legal constraints. I am obliged to decide in favour of the injunctive relief sought."*

In *Meath Co. Co. v. Murray* [2010] IEHC 254 Edwards J. directed the demolition of a house which was double the size of the dwelling for which planning permission had been refused, stating:-

> *"This is not a case of a minor infraction, or of accidental non-compliance with some technicality. The unauthorised development carried out by the respondent 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 they 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…nevertheless the law must be upheld."*

These cases – and others – were referred to by Hogan J. in the course of his judgment in *Fortune (No. 1)*, and in fairness to the learned trial judge, he did observe , quite correctly in the view of this Court, that:-

> *"... courts are generally unsympathetic to the hardship which was eminently forseeeable and which results from the culpable behaviour of the developer and landowner in question."*

In *Fortune*, the learned trial judge also found – as does this Court in respect of the case before it – that, objectively speaking, the development was not bona fide. Likewise, the planning history in the case of Mr. Kinsella, with regard to this development, is not open, on the full recitation and analysis of the affidavit evidence, to any other interpretation. But how - in such circumstances - some free standing application of Article 40.5, in the case of an unlawful development, could be applied to vindicate or reward the respondents in this or the *Fortune* case is beyond this Court's comprehension, particularly having regard to the huge public and community interest in protecting the environment and the integrity and efficacy of planning law enforcement.

Even the European Court of Human Rights has pulled up short of any such extreme preference for personal rights over those of the community in this context. The Court was referred to the decision of the ECHR in *Chapman v. United Kingdom* (2001) 33 E.H.R.R. 18, 399, a case in which a gypsy who lived in a caravan on her own land was refused planning permission following which an enforcement notice was issued. Relying on Articles 6, 8 and 14 of the Convention, she complained, *inter alia*, that the refusal of planning permission and the enforcement measures violated her right to respect for private life, family life and home. The Court held that none of the Convention articles invoked had been breached, stating as follows in an important passage at para 102:-

> *"Where a dwelling has been established without the planning permission which is needed under the national law, there is a conflict of interest between the right of the individual under Article 8 of the Convention to respect for his or her home and the right of others in the community to environmental protection. When considering whether a requirement that the individual leave his or her home is proportionate to the legitimate aim pursued, it is highly relevant whether or not the home was established unlawfully. If the home was lawfully established, this factor would self-evidently be something which would weigh against the legitimacy of requiring the individual to move. Conversely, if the establishment of a home in a particular place was unlawful, the position of the individual objecting to an order to move is less strong. The Court will be slow to grant protection to those who, in conscious defiance of the prohibition of the law, establish a home on an environmentally protected site. For the Court to do otherwise would be to encourage illegal action to the detriment of the protection of the environmental rights of other people in the community"*

The adverse consequences for a person who develops land without planning permission knowing full well that planning permission is required could hardly be more clearly stated than in *Chapman*, and this by a court liberally disposed to upholding individual rights at every turn.

Likewise in *Beard v. United Kingdom* (2001) 33 E.H.R.R. 19, 412 at 466, the Court noted (at para 93) that a decision to refuse a retention permission for a caravan used as a dwelling took into account traffic hazard and expressed the view that this was a legitimate aim of "… *protecting the rights of others through preservation of the environment and protection of public health through highway safety*".

Nonetheless, in refusing relief in the Fortune case, Hogan J. relied on Article 40.5 to formulate a new "necessity" test, imposing on an applicant council the obligation to demonstrate that "the necessity for this step (*i.e.*, demolition) is objectively justified" and "convincingly established". It should be noted that in requiring a "necessity test" as a precondition for a demolition order, Hogan J. did not have in mind as the relevant "necessity" the requirement of ensuring compliance with planning laws (in the sense intended by Henchy J. when he utilised the word in *Morris v. Garvey*), but rather the "far-reaching implications for the property rights of the owner of the property" assessed by reference to the policy objectives of legislative compliance and environmental protection (see *Fortune (No. 2)* para 5). The particular provisions of s.160 are, by obvious implication, to be subsumed into this novel legal matrix.

In reaching this view, Hogan J. attached great weight and significance to the decision of the Supreme Court in *Damache v. Director of Public Prosecutions* [2011] IESC and a brief consideration of that case is thus appropriate at this point

THE *DAMACHE* CASE
It must be said at the outset that the *Damache* case had absolutely nothing to do with planning laws or the enforcement of same.

It was a case in which the applicant sought a declaration that section 29(1) of the Offences Against the State Act, 1939 (as inserted by section 5 of the Criminal Law Act, 1976) was repugnant to the Constitution.

That section provided that where a member of the Garda Síochána, not below the rank of superintendent, was satisfied that there was reasonable ground for believing that evidence of or relating to the commission or intended commission of an offence under the Act of 1939 or the Criminal Law Act, 1976, or an offence which is for the time being a scheduled offence for the purposes of Part V of the Act, or evidence relating to the commission or intended commission of treason, is to be found in any building or part of a building, or in any vehicle, vessel, aircraft or hovercraft or in any other place whatsoever, he (*i.e.* the member of the Garda Síochána) may issue to a member of the Garda Síochána not below the rank of sergeant a search warrant under this section in relation to such place.

The kernel of that case was the finding of the Supreme Court that there should be independent and impartial supervision of the issuing of a warrant.

The place for which the search warrant was issued in the *Damache* case was the home of the appellant. No planning issues of any sort arose, nor was there any question but that Mr Damache was entitled to the occupation and enjoyment of his dwelling under his lawful tenure of same. To the extent that the case is at all relevant to the present case, the following passages from the Chief Justice contain some general references to the status of the dwelling under our Constitution:-

> *"39. … The dwelling is regarded as a place of importance which is protected under the Constitution. Thus, at the core of this case is to be found the principle of the constitutional protection of the home.*
>
> *40. Article 40.5 of the Constitution of Ireland states:-*
>
> *'The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.'*
>
> *Thus, the Constitution protects the inviolability of the dwelling.*
>
> *41. There has been a long history of protection of the home under common law. In 1604, Sir Edward Coke in Semayne's Case 77 ER 194, stated:-*
>
> *'That the house of everyone is to him as his (a castle and fortress, as well for his defence against injury and violence, as for his repose.'*

The principle was referred to by Sir William Blackstone in his Commentaries on the Laws of England (1768), where he stated:-

'For every man's house is looked upon by the law to be his castle of defence and asylum, wherein he should suffer no violence.'

42. In Ireland the dwelling house is protected under the Constitution. The Constitution vindicates and protects fundamental rights. In The People (Attorney General) v. O'Brien [1965] I.R. 142, Walsh J. pointed out that:-

'The vindication and the protection of constitutional rights is a fundamental matter for all courts established under the Constitution. That duty cannot yield place to any other competing interest. In Article 40 of the Constitution, the State has undertaken to defend and vindicate the inviolability of the dwelling of every citizen.'

43. In The People (Attorney General) v. Michael Hogan (1972) 1 Frewen 360 at 362, Kenny J. stated:-

'Article 40.5 of the Constitution which is in that part of it which has the heading 'Fundamental Rights' and the sub-heading 'Personal Rights' reads: The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law. The guarantee is not against forcible entry only. The meaning of the Article is that the dwelling of every citizen is inviolable except to the extent that entry is permitted by law which may permit forcible entry.'

44. In The Director of Public Prosecutions v. Dunne [1994] 2 I.R. 537 at p. 540 Carney J. stated:

> *'The constitutional protection given in Article 40, s. 5 of the Constitution in relation to the inviolability of the dwelling house is one of the most important, clear and unqualified protections given by the Constitution to the citizen'.*

The Court would apply these statements, recognising the importance of the inviolability of the dwelling."

The remainder of the judgment goes on to emphasise that, for the process in obtaining a search warrant to be meaningful, it is necessary for the person authorising the search to be able to assess the conflicting interests of the State and the individual in an impartial manner. The Court thus concluded that such person should be independent of the issue and act judicially.

The Court did, of course, recognise that the status of inviolability conferred by Article 40.5 on a dwelling is qualified in the sense that a dwelling may not be forcibly entered save in accordance with law which (as was stated at para. 55) means "*without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution. Entry into a home is at the core of potential State interference with the inviolability of the dwelling*".

The processes elaborated in Part VIII of the Act are as far removed from any notion of "forcible entry" as could be imagined. Part VIII specifically provides the law under which and in accordance with which planning authorities must act. Nor is a planning authority "stooping to methods which ignore the fundamental norms of the legal order" when seeking proper enforcement of planning laws. On the contrary, it is its duty and responsibility to ensure that those laws are complied with. Numerous opportunities are provided by the mechanisms contained in Part VIII whereby a person who lacks planning permission can regularise his situation. Even in circumstances where a development has taken place without permission, it is open to an applicant to apply for a retention permission, and if that is refused to bring an appeal from such decision to An Bord Pleanála.

The *Damache* decision did not purport to address enforcement issues arising under provisions of Part VIII of the Act of 2000. Nor did it purport to address the extent of property rights a developer may have in a house or dwelling built without planning permission or, as in this case, in flagrant breach of the planning laws. I see no basis at all for adapting or transposing observations made in the context of *Damache* into the completely different legal and factual matrix of unauthorised planning developments. Still less do I see any basis for introducing a new test, based on some 'free-standing' obligation under Article 40.5, to effectively set aside the considerable body of jurisprudence which already exists in relation to the discretionary application by the courts of enforcement procedures under Part VIII of the Act.

The manner in which the Constitution protects and vindicates rights depends on context. For instance, the Constitution does not give a right to retain possession of a house against the owner where a dwelling has been established in it as a result of trespass. Nor can the Constitution be construed as providing immunities to wrongdoers, a category to which the respondent in this case most certainly belongs.

Nor does Article 40.5 confer on any citizen a right to establish a dwelling of his choosing at the place of his choosing. In essence, this is the right which the respondents claim. To the extent that the respondents enjoy rights to private property under Articles 40 and 43 of the Constitution, the provisions of the Act of 2000 have made the exercise of such rights subject to a statutory requirement to obtain and comply with planning permission. The Oireachtas has enacted that decisions on the issue of permissions are made by statutory specialist bodies and that planning policy is not made by the courts.

There is thus, in the view of this Court, absolutely no justification for the kind of crossover approach into a planning context of principles enunciated in the quite different context of the issuance and execution of a search warrant into a dwelling lawfully held and lawfully occupied.

To the extent that the judgment of Hogan J. in *Fortune (No. 1)* may be seen as holding or implying that the conduct of the respondent is a matter of little importance in determining the exercise of discretion, this Court would demur from any such view because it flies in the face of all the historic jurisprudence which holds that the conduct of a respondent is one of the most compelling factors in the list of discretionary factors. The judge's own statement that the lack of planning permission might, down the road, cause a difficulty for the developer in terms of a resale can only be seen as relegating unlawful conduct to the outer periphery of relevant considerations.

Further, the requirement that there be 'objective justification' for the planning authority's decision to bring enforcement procedures, which demands that a case be 'convincingly established' to the extent that it meets a 'necessity test' effectively rewrites and amends Part VIII of the Act in a manner impermissible under our Constitutional framework of separation of powers. Nor can the Court take over the role of the planning authority in this arena. The portions of *Fortune (No. 2)* cited above demonstrate that portion of the decision of Hogan J may be seen as performing the function of the planning authority, something out ruled by Finlay P. in *Dublin*

Corporation v. Garland [1982] I.L.R.M. 104 where (at p 106) in a passage already cited he stated:-

> *"There can, in my view, be no function in the court on the making of an application under this section in any way to review, alter or set aside a decision of the Planning Authority with regard to the granting or withholding of permission. The entire scheme of the Planning Acts is that, subject to the limited exceptions for the determination by the High Court of questions of law specifically referred to it, decisions as to the proper planning and development of any area are peculiarly the function of the Planning Authority in the first instance and of An Bord Pleanala on appeal from them."*

DECISION

In this case the Court is satisfied that full enforcement under s.160 is both appropriate and proportionate. The development consisting of the construction of this chalet was unauthorised and undertaken with full knowledge that planning permission was required. Even after the service of warning letters and enforcement notices, development continued in what can only be described as flagrant disregard for planning laws. That a serious traffic hazard has thereby been created has been identified as the ultimate reason for refusal of retention permission. There is no realistic prospect that this hazard will abate in the foreseeable future.

The Court is satisfied that it should not second-guess the conclusions of statutory bodies who have concluded that permission of the development should be refused on the grounds of traffic hazard. While the Court is entitled to look at the impact of the development in considering whether the remedy sought is proportionate, the Court is satisfied that it ought to act to give practical effect to enforcement of decisions based on conclusions which are within the exclusive remit of the relevant planning authorities in this case.

The respondents in this case elected not to utilise an existing established residence on the premises. They moved with speed to build another house. The prospect of refusal of permission on the grounds of traffic hazard ought to have been anticipated by them. Ensuring that development does not impinge on road safety is a very important planning objective.

This Court has a further difficulty with the decision arrived in the *Fortune* case, because it appears to adopt an approach which is at odds with previous authority in that it involves a review of the planning assessment forming the reasoning for the decision of the statutory planning authority acting within its sphere of competence which, as was stated by Finlay P. in *Dublin Corporation v. Garland* cited above, is not within the court's remit.

Thus while the assessment of the degree of environmental damage caused by a planning infringement is relevant to the exercise of discretion under s.160 in general, this assessment should be confined to issues not related to planning policy or judgment. The Court must have due regard and pay due deference to the expertise of a planning authority which has qualifications which the courts, of necessity, lack in this regard. Thus the Court must give due weight to any planning reasons embodied in the reasons for a decision to refuse planning permission. It is not the function of the Court to reverse the decisions of a planning authority nor does the legislation envisage a role for the courts in setting planning policy.

The jurisdiction conferred by s.160 of the Act of 2000 (and its statutory predecessors) is a special statutory original jurisdiction and not a subsidiary aspect of some equitable jurisdiction to enforce public law. The jurisdiction is thus firmly based on what the Court is required by statute to address in the event that it makes an order. The jurisdiction under s.160 is conferred on both the High Court and the Circuit Court. It says nothing about declarations. The Circuit Court does not enjoy any free-standing jurisdiction to grant declaratory relief in public law matters and the jurisdiction of the High Court on appeal from the Circuit Court is confined to jurisdiction which the Circuit Court may itself exercise.

This does not, of course, mean that the Court is precluded from taking into account a wide range of considerations, including hardship, the personal circumstances of the respondents, the impact of the development on others, the prospect of a retention permission being forthcoming, the length of time during which the unauthorised structure has been occupied, the unauthorised structure itself and the other matters to which reference has already been made in the summary of considerations elaborated in Dodds *Planning Acts*.

This Court is satisfied that the relatively small significance accorded by Hogan J. to the damaging precedential effects of his suggested approach is misplaced. The fact that, in the absence of permission, difficulties in making good title in the event of a sale of property many years later may not have anything like the deterrent effect which he postulated. On the contrary, the "message" which may emanate from the *Fortune* decision, perhaps unfairly from the Court's point of view, was that a whole new level of uncertainty has been introduced into the efficacy of enforcement measures under Part VIII of the Act of 2000. This Court apprehends that many developers, including those who have no short term need to sell property on which the unlawful development is located, may, as a result of the *Fortune* decision, regard flouting the planning laws as a risk worth taking. That would be incredibly destructive of planning law and planning law enforcement in this jurisdiction were it to occur.

CONCLUSION

For all the reasons elaborated above, I am satisfied the applicants are entitled to the relief sought in this case, including an order for the demolition of the chalet, built on the site without either planning permission or retention permission and in full knowledge that neither permission existed. I appreciate that the removal of this chalet, modest enough as it is, will cause a degree of hardship to the respondent and the Court will thus hear some brief further submissions with regard to a timescale for the necessary works of demolition.

Finally, I would hope, without in any way wishing to cause offence to the learned Hogan J., to assert my own belief that a Circuit Court appeal, because it admits of no further appeal, is not an appropriate forum in which to introduce or lay down novel legal principles which may have far reaching effects and consequences such as occurred in the *Fortune* case.