Neutral Citation Number: [2011] IEHC 81

THE HIGH COURT ON CIRCUIT

2008 253 CA

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

BETWEEN/

THE COUNTY COUNCIL FOR THE COUNTY OF WICKLOW

APPLICANT

AND

SAMUEL JESSUP AND FIONA SMITH

RESPONDENTS

JUDGMENT of Mr Justice John Edwards delivered on the 8th day of March, 2011.

1. Introduction.
1.1 This is the applicants' appeal against the judgment and Order of his Honour Judge Terence O'Sullivan, given at Bray Circuit Court on the 2nd of December 2008 wherein the learned Circuit Court Judge refused to grant an Order pursuant to s. 160 of the Planning and Development Act 2000 to restrain the respondents, and each of them, from carrying on or continuing the development of the lands comprised in Folio No 19832F of the Register of Freeholders for the County of Wicklow

2. Pleadings and Evidence
2.1 The application was commenced by an originating Notice of Motion dated the 7th of September 2007. This claimed:

> "1. An Order pursuant to s. 160(1) of the Planning and Development Act 2000 to restrain the respondents, and each of them, from carrying on or continuing the development of the lands comprised in Folio No 19832F of the Register of Freeholders for the County of Wicklow., and in particular from:
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> (a) the carrying out of substantial structural works on a former ruin in order to create a residential unit therein;
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> (b) the commencement of residential usage of the new structure;
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> (c) the upgrading of an existing roadside entrance by the building of new entrance walls and pillars;
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> (d) the erection of a new roadside boundary wall;
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> (e) the placement of a garden shed on the property;
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> (f) the provision of an effluent treatment system; and
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> (g) associated site development works including extraction, excavation and alteration of a surrounding field.
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> 2. An Order pursuant to s. 160(2) of the Planning and Development Act 2000 directing the respondents, and each of them, to restore the said lands to their condition prior to the commencement of the aforesaid development.
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> 3. Such further and other relief as this Honourable Court may deem appropriate.
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> 4. An Order providing for costs."

(The Court was informed at the commencement of the appeal hearing that the matters complained of in sub- paragraphs 1(c), 1(d) and 1(e) of the Notice of Motion were no longer being relied upon.)

2.2 The application was grounded upon three affidavits of Louise Casey, an Administrative Officer in the Planning Control Section of Wicklow Co Council, and the documents exhibited therein, which affidavits were sworn on the 7th of September, 2007; the 14th of January, 2008 and the 2nd of September 2008, respectively. The application was further grounded upon two affidavits of Tim Walsh, Senior Executive Planner employed by Wicklow Co Council, sworn on the 7th of September, 2007, and on the 18th of November, 2008, respectively, and the documents exhibited therein,.

2.3 The application was, and continues to be, opposed by the respondents who rely upon an affidavit of the first named respondent sworn on the 30th of September 2008, and the documents exhibited therein.

2.4 Ms Casey states in her first affidavit that Wicklow Co Council was notified by third parties of works which were taking place on a ruined structure at Aghfarrell, Brittas, Co Wicklow, on the County Dublin border. The Council was informed, inter-alia, that previously there was a ruin on-site with two walls only standing, together with fencing, but that the entrance had been knocked down, that two further walls had been erected as had roofing, and that services had been installed. Furthermore, the Council was informed that an extensive area had been cleared with the excavated material being dumped in an adjoining field. Ms Casey stated that as a result of the aforesaid complaints she asked Mr. Tim Walsh of Wicklow Co Council to carry out an inspection of the property in question.

2.5 Mr John Gibbons S.C., on behalf of the respondents, objected at an early stage of the case to the Court having any regard to the evidence just described on the grounds that Ms Casey was deposing to hearsay. He relied in particular upon Order 40, Rule 4 of the Rules of the Superior Courts which states:

> "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of any affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall not be allowed."

2.6 The Court was not, and is not, disposed to uphold Mr Gibbons S.C.'s objection. Whether or not a statement proffered in evidence is properly to be regarded as a hearsay statement depends in every case upon the purpose for which it is being adduced, and in particular on whether it is being adduced as testimonial evidence i.e., as proof of the truth of the contents of the statement, or merely as original evidence i.e., as proof of the fact that the statement was made. In this regard see my judgment in *The Leopardstown Club Limited v Templeville Developments Ltd* [2010] I.E.H.C 152. A statement adduced as testimonial evidence may or may not be inadmissible as hearsay (there are many exceptions to the hearsay rule), but a statement adduced as original evidence can never be inadmissible as hearsay. The Court is satisfied that in the present case the statements of complaint described by Ms Casey in paragraph 2 of her affidavit of the 7th of September 2007 were adduced as original evidence and as such they are admissible and they do not fall foul of Order 40, Rule 4. This evidence was adduced merely to establish that a complaint was received and the nature of that complaint. It was not adduced to establish, nor is it relied upon as establishing, the truth of the contents of the complaint received.

2.7 Acting on Ms Casey's instructions, on the 3rd and 4th of April, 2006 the said Mr Tim Walsh visited the property at Aghfarrell, Brittas, Co Wicklow which was the subject matter of the complaint. Mr Walsh stated that when he attended on site on the 3rd of April 2006 he met a man who refused to give his name when requested to do so. The man told Mr Walsh that he was the person in charge of the development, that he was presently residing in the mobile home on the site, and that he intended to move into the refurbished dwelling the following week. Mr Walsh expressed the view to this man that the development was unauthorised but he would not accept that and indicated to Mr Walsh that he considered that the development did not require planning permission. Mr Walsh advised the man that a warning letter would be served upon him. The man stated that he would not be replying to any such letter and that Wicklow Co Council was "backward" in implementing its planning system. Mr Walsh found a man to be aggressive, particularly when Mr Walsh informed him of his intention to take photographs of the property. Mr Walsh further deposed that while he was there on the 3rd of April 2006 he observed the man in question place a dog into the boot of a car that was present on the site which bore the registration number 03 D 40381.

2.8. Mr Walsh has expressed the belief that this man who had refused to give his name was the first named respondent. The affidavit of the first named respondent does not in any way join issue with Mr Walsh's stated belief; and in particular the first named respondent acknowledges in paragraph 8 of the same affidavit that he and his wife purchased the property in February 2006 and that they moved in to the dwelling house on the property in April 2006, while in paragraph 21 he further acknowledges that Mr Walsh did visit the property in April 2006. In the circumstances the Court is satisfied on the balance of probabilities that the man in question was the first named respondent.

2.9 In paragraph 6 of his first affidavit Mr Walsh deposes that *"I subsequently confirmed that the registered owner of the vehicle 03 D 20381 was one Fiona Smith, the second named respondent."* The registration number mentioned here is slightly different from that previously mentioned (03 D 40381). There is manifestly a typographical error in one or other reference, but as far as the Court is concerned this is of no significance. The purpose for which the applicant sought to adduce evidence of the presence of the car, and its ownership, was to establish, in the absence of any admission in that regard at the relevant time, that the applicant had good reason to suspect that the second named respondent was also interested in the property and co-responsible with the first named respondent for the alleged unauthorised works.

2.10 That issue has in fact been overtaken somewhat by events in that an affidavit has been filed on behalf of the respondents, which makes certain admissions concerning the involvement of the second named respondent with the lands in question. Nevertheless, as the admissions made are by no means comprehensive the Court still feels disposed to consider the relevant evidence and make appropriate findings.

2.11 In this Court's view an admissibility issue arises concerning the evidence referred to in paragraph 6 aforesaid, namely whether the Court should disregard it on the grounds that it contains inadmissible hearsay. The Court has considered the position in that regard. The statement may or may not contain hearsay. It may or may not be repetition of a hearsay statement made by another. If Mr Walsh had identified a hearsay source and it was apparent that he was merely repeating what had been said to him by another then the evidence would definitely fall to be excluded as hearsay unless it could be brought within the parameters of some exception. (One such exception, by way of example, would be if the second named respondent had admitted to him that she owned the vehicle. Such an admission would constitute a declaration against interest and would be admissible as such.) However, the evidence does not go that far. Mr Walsh does not say how or by what means he confirmed the matter in question. In the circumstances the Court cannot, without entering the realms of speculation, look behind the bare assertion and it must assess it for what it is. The witness is merely deposing to something that he personally claims to have done, viz that somehow or other he confirmed to his own satisfaction that at the material time the registered owner of the vehicle was the second named respondent. His evidence to that effect does not therefore fall to be excluded as hearsay.

2.12 However, Mr Walsh fails to indicate the means by which he established the matter of which he claims to have obtained confirmation. That being the case the reliability of the asserted confirmation can neither be assessed nor tested. In the circumstances the Court takes the view that it should attach relatively little weight to the assertion as a stand alone piece of evidence, and to regard it as no more than a piece of circumstantial evidence insufficient in itself to establish the larger fact contended for, namely that the second named respondent was in fact the owner of the vehicle in question.

2.13 Notwithstanding that this piece of circumstantial evidence is of little significance on its own, the Court may nonetheless have regard to it in conjunction with other direct and circumstantial evidence in the case, including admissions contained in the first named respondent's affidavit. Having done so, the Court now finds itself in a position to infer several larger facts contended for by the applicants. Accordingly I am duly satisfied on the balance of probabilities that that the second named respondent was in fact the owner of the vehicle in question at the material time, and that it was on the property because she was directly interested in the property. In so concluding the Court has had due regard to ***Thomas v Jones*** [1921] 1 K.B. 22 wherein Atkins L.J. explained the operation of circumstantial evidence as follows:

> "Evidence of independent facts, each of them in itself insufficient to prove the main fact, may yet, either by their cumulative weight or still more by their connection of one with the other as links in a chain, prove the principal fact to be established."

In arriving at my conclusions I have had regard, in addition to Mr Walsh's asserted confirmation, to the fact that the first named

respondent now acknowledges that he is married to the second named respondent; the fact that the first named respondent now acknowledges that he and his wife purchased the property in February 2006; the further acknowledgement that they moved in to the dwelling house on the property in April 2006; the further acknowledgement that Mr Walsh did visit the property in April 2006; the fact that on the 3rd of April 2006 Mr Walsh observed the vehicle in question on the first and second named respondents' property; the fact that on the 3rd of April 2006 Mr Walsh observed that the first named respondent had access to the vehicle in question, and in particular saw the first named respondent putting a dog into the boot of the vehicle; and to the circumstance that the first named respondent in swearing an affidavit on behalf of both respondents does not in any way join issue with Mr Walsh's assertion that his wife, the second named respondent, was the registered owner of the vehicle referred to at the material time. For that matter, neither does it assert that the second named respondent was, or is, unconcerned with the controversial development at issue, nor does it assert that she has been wrongly joined. Moreover, the second-named respondent has chosen not to file any affidavit herself, and has been quite content to rely upon her husband's affidavit.

2.14 Mr Walsh having visited the site on the 3rd of April 2006 compared what he had seen on that occasion with certain photographs of the same property that had been received by Wicklow County Council on the 16th of March 2006. The photographs in question are exhibited with the affidavit of Mr Walsh. He gives no information concerning who took them, or when exactly they were taken, other than stating that they were received by the Council on the 16th of March 2006. However, it is clearly to be inferred that the photographs were understood to have been taken on some date prior to the developments of early 2006 taking place. Having compared what was to be seen on the 3rd of April 2006 with what the photographs in question show, Mr Walsh opines in paragraph 3 of his first affidavit that prior to the developments of early 2006 taking place, a partially restored building was *in situ* on the subject site. He states that hitherto, this former stone building which may or may not have been used as a residential unit had been the subject of a new development involving the construction of a single block wall on the inside of what remained of these stone walls. He states that a wooden roof frame had been placed on these new walls. In Mr Walsh's view such former works had been abandoned for some time. He considered that the partially reconstructed building had, judging by the weathered appearance of the rafters and the beam in the said photographs, remained in a dormant and abandoned condition for a significant period of time, up until February 2006 when the respondents commenced their extensive refurbishment works on it.

2.15 It was submitted to the Court that the Court should disregard Mr Walsh's said opinions as there is no evidence concerning either the provenance or the date of the photographs in question. The Court considers that this submission is not well founded. Mr Walsh has stated that these photographs were received by the Council on the 16th of March 2006 and he exhibits them as real evidence, namely that these are what the council received on that date. The Court has not been asked to rely on the photographs themselves as proving anything in terms of what they show. Rather, the Court is being asked to rely on Mr Walsh's opinions. The Court is satisfied that his opinions are admissible because he is a properly credentialed expert, and the opinions that he has expressed are within the scope of his expertise as a planner. It is true to say that Mr Walsh's opinions are based in part on what he believes these photographs to show, but there is no rule of evidence to the effect that opinion evidence must in turn be based upon the best available evidence or solely upon evidence that is admissible in Court. If they are not based on best evidence, or they are based on legally inadmissible evidence (e.g. hearsay), it is open to a party who disagrees with the opinion to seek to cross-examine the expert as to his opinion with a view to undermining the reliability of the opinion or suggesting that the evidence underpinning it is so infirm that little weight should be attached to it. In this case, there was no application for leave to cross-examine Mr Walsh as to the opinions expressed in his affidavit.

2.16 Mr Walsh further states, at paragraph 4 of his first affidavit, that as a result of development since February 2006, the structure now has four walls, which were all dashed on the date of his inspection on their external elevation, with the exception of the southern elevation which was awaiting such rendering works. He also noted that a completely new roof is in place including its wooden frame and external finish of flat tiles. He states that due to the fact that he was unable to gain access to the interior of the building he was not in a position to ascertain if the single course block walls had been retained in the course of the fresh construction works. He opines that it is likely that they were retained and the remaining stumps of original stone walls removed. He states that the new outer leaf wall would appear to be a mixture of retained sections of the old stone wall and new blockwork, with associated insulation. He further states that as a result of his inspection he formed the view that an unauthorised development was taking place.

2.17 Mr Walsh states that he returned to the site on the following day, i.e. on the 4th of April 2006. On that date he found that digging works on the southern slope of this site adjacent to the public road were taking place for the purpose of enlarging the site for purposes incidental to the enjoyment of the new dwelling unit thereon.. He took photographs himself on this occasion and he has exhibited these. He compared his own photographs with those that had been received by the Council in March 2006 and opines that the property is now markedly different than it was before.

2.18 Mr Walsh goes on at paragraph 5 of his affidavit to indicate that he then made certain enquiries through an estate agency and states that he established certain things as a result of doing so. He has attempted to place before the court a sales brochure advertising the property in question for sale some time ago, which brochure contains certain photographs of the property as of that time, and also a certain description of the property. Once again, counsel for the respondents objects to the admissibility of this material on the grounds of hearsay. On this occasion, the court is satisfied that this objection is properly made out. The material is clearly hearsay and the Court does not intend to have further regard to it.

2.19 Following his site visits on the 3rd and 4th of April 2006 Mr Walsh recommended that a warning letter should be sent to the first named respondent and this was done on the 7th of April 2006. Shortly afterwards he recommended that a similar letter should be sent to the second named respondent and this was done on the 12th of April 2006. Both these letters have been exhibited. These warning letters conveyed to the recipients the Council's view that works carried out by them to date, and such works as they were continuing to carry out, constituted "unauthorised development". The letters also pointed out the penalties for unauthorised development, and pursuant to section 152 (4) of the Planning and Development Act 2000 invited the recipients to make a written submission or written observation concerning the alleged unauthorised development within four weeks from the date of the letter.

2.20 Mr Walsh states in his first affidavit that he again inspected the property on the 3rd of May 2006. He took further photographs on this occasion, which he has exhibited, and these, when compared with his photographs of the 4th of April 2006 show that further work had been done in the interim.

2.21 The respondents replied to the Councils warning letters by a lengthy letter dated the 5th of May 2006. In that letter the respondents contended that the works in question were exempted development within the meaning of s.4(1)(h) of the Planning and Development Act 2000 on the basis that the works did not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures. Further, they sought to dispute the council's contention that the structure does not fall into any definition of habitable house, contending that although it was a dwelling that had lain unoccupied for a considerable number of years with no upkeep, it nonetheless fell into the category of "house" as defined in s. 2 of the Planning and Development Act 2000. The respondents further argued that there had been no change of use

because the building had always been used as a dwelling. Although it had been unoccupied for some time it had never been used for any other purpose. It was further indicated that with respect to the complaint in relation to effluent disposal the respondents intended to make a planning application to regularise the position in relation to that. Finally, in relation to the complaint concerning the associated site development works including extraction, excavation and alteration of a surrounding field, the respondents contended that this was also exempted development on the basis that it was a "land reclamation" permitted under Article 6, and Class 11 (b) concerning "Exempted Development – Rural" of Schedule 2, Part 3 of the Planning & Development Regulations, 2001 (S.I.600/2001); alternatively it was exempted development on the basis that they consisted of "site landscaping works" permitted under Article 6, and Class 6 concerning "Exempted Development – General" of Schedule 2, Part 1 of the Planning & Development Regulations, 2001 (S.I.600/2001).

2.22 The respondent's letter of the 5th of May 2006 was acknowledged by the Council in the first instance, and was later responded to in detail in a letter of the 2nd of June 2006. The response was lengthy and joined issue with the respondents on each of the issues that they had raised in their submission. It is not necessary for the Court to rehearse the detail of the Council's response. However, Court has carefully considered it. It is sufficient to state that the Council was not prepared to accept that either the works on the house, or the associated site works, constituted exempted development, and that the letter of the 2nd of June 2006 sets out in great detail the Council's reasons for not accepting the respondents' contentions. The letter concluded by inviting the respondents to make further submissions in writing on the issues raised within that same letter within 14 days of its date.

2.23 By a faxed letter dated the 15th of June 2006, Gráinne Mallon and Associates, a firm of architects representing the respondents, requested an extension of time within which to reply to the Council's position. The Council replied on the 16th of June 2006 that it was prepared to grant a 14 day extension subject to receipt of an undertaking from the respondents that they would not occupy the built structure. No such undertaking was forthcoming.

2.24 Mr Walsh conducted further inspections of the property on the 13th of June 2006 and again on the 27th of June 2006, respectively. He found the new dwelling unit and the excavated area of land were still in place. There was nobody present on the site although there was a small commercial van parked on the grounds. He states that he subsequently established that this was registered in the name of the first named respondent. (Once again he does not state how he established this. In the circumstances the Court will approach this piece of evidence in the same way as it did the earlier evidence concerning the vehicle 03 D 20381, alternatively 03 D 40381.) Mr Walsh further stated that it was not possible to see into the refurbished building. However, he formed the opinion that the building was being occupied for residential purposes and he sets out his reasons for his opinion at paragraph 9 of his affidavit. These were:

a. There was an electricity supply to the building;

b. An oil tank was now *in situ* with supply pipe leading into the building;

c. A domestic refuse bin was in place along the western elevation of the building;

d. A "cat kennel" was in place close to the entrance door and there was a bowl of fresh pasta positioned next to it;

e. There was a letterbox on the northern side of the entrance gateway.

2.25 Mr Walsh subsequently recommended that an Enforcement Notice should be served on the respondents. This was done on the 3rd of July 2006. The Enforcement Notice, which was issued under s.154 of the Planning and Development Act, 2000, required the respondents to, within 4 weeks of the date of the notice, (*inter alia*) demolish the entirety of the subject building, and remove the demolished material, and also to carry out landscape restoration works.

2.26 By a letter dated the 5th of July 2006, Gráinne Mallon and Associates, to whom the respondents had passed the Enforcement Notice, advised the Council that they had been instructed to make a formal planning application for the retention of the refurbishment of the subject structure and the other works referred to in the Enforcement Notice. They advised that the application would be lodged by the end of that week The Council responded immediately acknowledging the communication and indicating that the timeframe was acceptable to the Council. They stated, however, that "no comfort can be given regarding the outcome of any such application."

2.27 An application for retention planning permission (06/5748) was submitted to the Council by Gráinne Mallon and Associates on behalf of the respondents on the 7th of July 2006. This application was refused by the applicant on the 30th of August 2006. The reasons given for the refusal were as follows:

> "1. The proposed development constitutes sporadic development in an area of outstanding natural beauty Landscape Zone contrary to the provisions of the County Development Plan. These provisions are required to maintain scenic amenities, recreational utility, existing character and to preserve views of special amenity value and special interest and to conserve the attractiveness of the county for the development of tourism and tourist related employment.
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> The council's settlement strategy policy is to encourage further growth of existing settlements and to restrict rural housing development to cases where there is a bone fide necessity to live in the rural area instead of in existing settlements. It is considered that the applicant has not provided sufficient information to show that he comes within the scope of the housing need criteria in the Development Plan. The proliferation of non-essential housing in a rural landscape areas erodes the landscape value of these areas and seriously detracts from the views of special amenity value.
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> 2. No evidence is available that the site is suitable for septic tank effluent percolation and if found to be unsuitable then this development would be prejudicial to public health.
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> 3. It is considered that the proposed development would endanger public safety by reason of traffic hazard because it has not been shown that adequate sightlines are available at junction of the proposed entrance.
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> 4. Inadequate information has been provided with regard to landscaping to enable the planning authority to adequately assess the impacts of the proposed development. The proposed development would therefore be contrary to the proper planning and development of the area."

2.28 There was no appeal against this refusal.

2.29 Mr Walsh inspected the property again on the 29th of September 2006 and found that the dwelling, entrance gate and entrance walls were still in place while the attendant garden/car parking area which had been excavated remained in the same condition that it had been in when he last inspected the site on the 27th of June 2006. He remained of the view that the building was being used for residential purposes. He took further photographs on this occasion including a photograph of the contents of the wheelie bin on the site which he has exhibited. The photograph clearly shows that the wheelie bin contains normal household domestic rubbish. There was also a jeep outside, and the building was again observed to be connected to the Electricity network. In the light of his findings on this date Mr Walsh recommended the commencement of section 160 proceedings.

2.30On the 25th of October 2006 the planning department of the applicant sought, and obtained, approval to institute legal proceedings pursuant to section 160 of the Planning and Development Act 2000 against the respondents from the applicant's Director of Services Planning and Economic Development.

2.31 By letter of the 1st of November 2006 the applicant notified the respondents of its intention to issue proceedings against them pursuant to section 160 of the Planning and Development Act 2000.

2.32 On the 16th of May 2007 the respondents made a further application to the Council for retention planning permission (07/1045). Among the documents submitted by the respondents in support of this application was a document setting out the transactional history of the property in question. This document, which is important in the context of this case, states (*inter alia*):

> "The original date of construction of the dwelling is unknown and we assume that it was built as a labourer's cottage to serve the large formal 'Aghfarrell House'"
>
> (reference to maps)
>
> "Upon Patrick Healy's parent's death, Patrick, his brother Thomas and his sister would have inherited the house. His sister was married and so did not take up residence. His brother Thomas went on to construct his own dwelling 80 m further on up the road. Patrick would have now taken up residence in his parent's dwelling (see signed letters from residents) and continued to work as a part-time farmer and labourer -- re occupation per his death cert.
>
> When Patrick died in 1949 (see death cert) the dwelling was willed to his brother Thomas Healy whose house was located 80 yards further up the road on the same side.
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> When Thomas died he had an estate amounting to approx 12 acres & two dwelling houses (his own and his brother Patrick's). Due to the fact that Thomas had no use for the house willed to him by his brother Patrick he did not maintain it and it slowly began to fall into disrepair.
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> The estate of Thomas (Dodge) Healy was split as follows:
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> 1. His brother's house & 4 acres (now the subject of the application) was left to his nephew Patrick Monaghan (son of his sister)
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> 2. His house & 2 acres was split between his nephew and Michael (Sonny) Murphy.
>
> 3. And the remaining 6 acres to Michael (Sonny) Murphy (located between Brittas River and dwelling house in question).
>
> Now Patrick Monaghan is in possession of the semi derelict cottage & four acres of land. He has no use for this dwelling as he is living in Church Street in Ballymore Eustace. So in 1992 Patrick Monaghan decided to sell the entire 4 acres of land & now semi derelict cottage to Mr Tom Feelin. (sic).
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> Upon Mr Tom Feelin purchasing the dwelling in 1992 he set about renovating the cottage (block work to the gable walls & removing roof etc) but failed to complete these.
>
> He sold it to Samuel Jessup & Fiona Smith in 2005 who upon purchasing the cottage completed the renovations and commenced occupation."

2.33 This planning application (07/1045) was refused on the 10th of July 2007. The reasons given for the refusal of this application were as follows:

> "1. Having regard to the ruinous nature of the original structure on site, which had not been occupied in almost 60 years it is considered that the development does not comply with the criteria for conversions set out in 8.4.1 Chapter 5 (Design and Development) of the County Development Plan. In particular:
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> (a) No evidence has been submitted that the structure was physically capable of undergoing a conversion;
>
> (b) The structure was in a ruinous nature;
>
> (c) The structure has no apparent local, visual or historical interest /value;
>
> (d) The applicant has not shown a specific location will need for the use.
>
> The proposed development would therefore be contrary to the provisions of the County Development Plan 2004 and to the proper planning and development of the area.
>
> 2. The proposed development constitutes sporadic development in an AREA OF OUTSTANDING NATURAL BEAUTY Landscape Zone contrary to the provisions of the County Development Plan. These provisions are required to maintain scenic amenities, recreational utility, existing character and to preserve views of special amenity value and special

interest and to conserve the attractiveness of the county for the development of tourism and tourist related employment.

The council's settlement strategy policy is to encourage further growth of existing settlements and to restrict rural housing development to cases where there is a bone fide necessity to live in the rural area instead of in existing settlements. It is considered that the applicant has not provided sufficient information to show that he comes within the scope of the housing need criteria in the Development Plan. The proliferation of non-essential housing in a rural landscape areas erodes the landscape value of these areas and seriously detracts from the views of special amenity value.

3. The proposed development would be prejudicial to public health because insufficient information has been provided to show that the existing septic tank is suitable to the needs of the dwelling or is compliant with current standards (EPA 2000)."

2.34 Once again, there was no appeal against this refusal, although for what it is worth the Court notes an averment in paragraph 21 of the first named respondent's affidavit to the effect that the respondents were one day late with an intended appeal to An Bord Pleanála.

2.35 Mr Walsh conducted a further inspection of the property on the 4th of September 2007. On that day he found that the reconstructed dwelling and roadside entrance were still in place, and that the area which had been excavated also remained as before. In addition he noticed that further developments of material significance had taken place on the site. These developments consisted of the establishment of an entrance door on the western elevation of the dwelling unit, together with the septic tank connected to this unit and situated to the north of it. He was unable to find evidence that this septic tank is connected to a percolation area as per the requirements of current Department of the Environment approved guidelines for the installation of private effluent treatment systems. He also points out that in any event such an installation would require planning permission and no such permission exists for the development which has taken place. Mr Walsh took further photographs on this occasion and these are exhibited with his affidavit.

2.36 At paragraph 4 of her affidavit Ms Casey opines, based upon her knowledge of, and experience in, planning matters that the addition of two new walls to a ruined structure consisting of two stone walls without a roof, together with the provision of roofing thereon to create a new residence constitutes development for which planning permission is required. She further states that such other works as have taken place on the site, and with which this court is concerned, constitute unauthorised development insofar as they are associated with and ancillary to the reconstruction of the ruined structure on the site. Ms Casey asserts that planning permission has not been obtained by the respondents for any of these items of work.

The affidavit of the first named respondent and the applicant's response

2.37 The first named respondent states at paragraph 3 of his affidavit that he and his wife purchased the property in question in February 2006 from a Mr Thomas Phelan. He states that the property consists of a four acre (approximately) rural site with a small, single story house of approximately 35 m² in area. He states that Mr Phelan had started to renovate the house in 1992 and that they planned to complete the renovation work he had started and to make the house their first marital home together.

2.38 At paragraph 4 of his affidavit the first named respondent says that as they were a young married couple starting off in life without much money they planned to do a simple renovation of the house. They planned to do all the work themselves as they had already taken out a considerable mortgage to buy the property and could not afford to spend further money on employing a building contractor. In addition, the first named respondent is a qualified architectural technician and has experience as a project manager and this meant that he was suitably qualified to undertake a small scale renovation project such as that proposed.

2.39 He states at paragraph 5 that when they bought the property there was a small partially renovated house of approximately 35 m² in area *in situ*. In support of this he purports to exhibit two documents, viz (i) a valuation report prepared for his building society and which valuation report contains a description of the property as it then was, and (ii) a report of a Mr Philip Geoghegan of Icon. However, these reports are clearly hearsay in circumstances where the respondents seek to rely upon the truth of their contents. In the circumstances these documents must be disregarded by the court in the same way that the court has said it must disregard the sales brochure upon which the applicant sought to rely. Of course, it would nonetheless have been open to the respondents to adduce evidence on affidavit from the building society valuer and/or Mr Geoghegan, but that has not been done.

2.40 The first named respondent states at paragraph 6 of his affidavit that the house has been on the site for at least 170 years and probably more and that it was used as a dwelling. He asserts that bringing it back to its former condition re-establishes landscape feature which was probably a historic part of the area. He states that the house has never been used for any purpose other than as a dwelling house and there is no evidence of any attempt to introduce any new use on the property, for example by removing the house or replacing it with some other structure like an agricultural building or applying for permission to use it for some other purpose. He contends that, indeed, the renovation work commenced by Thomas Phelan in 1992 was a clear indication of his intention to continue to use the house as a dwelling. The first named respondent does not state the means of his knowledge of the facts asserted.

2.41 The applicant joins issue with the core assertions contained in paragraph 6 of the first and respondents said affidavit. At paragraph 3 of Mr Walsh's second affidavit he states:

" ….Mr. Jessup avers that 'there was a small partially renovated house of approximately 35 square metres in area *in situ*' on the site when he and the Second Named Respondent purchased it. I beg to differ with Mr. Jessup on this point with regards to the quality of the structure on the site at that time. Based on the photographs exhibited to Mr. Jessup's Affidavit, it is clear for all intents and purposes that this former cottage was in a long-term derelict condition by February 2006, at the time of purchase by the respondents. These photographs of the structure in its pre-development stage were also used in the respondents' original planning application under Planning Register Reference Number 06/5748 which was lodged in response to Warning Letters issued by Wicklow County Council. In this regard, I beg to refer to a further copy of the report from Gràinne Mallon & Associates dated the 7th July 2006 upon which marked with the letter "A" I have endorsed my name prior to the swearing hereof. The condition of the dwelling at the time of purchase can clearly be seen at page 2 thereof.

Furthermore, this report from Gràinne Mallon & Associates accepts the position of Wicklow County Council that the structure was in a derelict condition when the respondents purchased it in early 2006, at page 1 thereof. The report does not accept the contention of the Council that residential use of the structure had been abandoned, however it does go on to accept that there has been a material change to the residence 'in that the character was altered relating to the shape, colour, design and ornamental features.'"

The remainder of paragraph 3 of Mr Walsh's second affidavit is not justiciable as it relies upon evidence that the Court has already ruled as being inadmissible on the grounds that it is hearsay, namely the valuation report previously referred to, the estate agent's brochure also previously referred to, and the report of Philip Geoghegan of Icon also previously referred to.

Then at paragraph 4 of Mr Walsh's second affidavit he states:

> "Wicklow County Council does not dispute the fact that the subject structure was developed and would have been used for a considerable period of time for residential purposes …. . However, the planning authority considers that such a use ceased and was abandoned over 50 years before the respondents actually purchased it. The building would more than likely have deteriorated into a derelict condition during the 1950s due to an absence of maintenance. In this regard, I beg to refer to a history of the site provided by the respondents under their planning application registered number 07/1045 …. . As appears therefrom, no use was made of the property following the death of Patrick Healy in 1949. I still believe that nothing was done at the property until Mr Phelan purchased same in the early 1990s. Any attempts by the previous owner to reinstate the structure for habitable purposes in the early 1990s, which have not been substantiated on affidavit, were not completed and thus fall, or even partial restoration was not achieved. Such works were in themselves non-exempted because the structure would have been in a derelict condition at that stage. As previously referred to, these works had been abandoned. Accordingly, the most recent phase of development vis-a-vis the subject structure constitutes a new development for which planning permission is required."

2.42 The first named respondent confirms at paragraph 8 of his affidavit that renovation works have been carried out since February 2006, and that these were carried out by himself, his wife and his father. He states that by April 2006 they were able to move into the house, and did so. He states at paragraph 9 that all the work done on the house was solely for the maintenance and improvement of the existing structure and he contends that it is exempted development. He states that the overall structure of the house has not changed, the footprint and dimensions of the house have not changed, nothing has been added, and external changes do not materially affect the external appearance of the structure or make it inconsistent with its character or the character of its neighbouring structures. He then describes in detail the works that the respondents have carried out to the house at paragraph 10 of his affidavit.

2.43 Mr Walsh joins issue with the contention that the overall structure of the house has not changed and that external changes do not materially affect the external appearance of the structure. He states at paragraph 6 of his second affidavit that:

> "… the appearance of the overall structure has changed from its predevelopment character and from the appearance it had before it fell into a state of dereliction during the second half of the last century. In all the circumstances, I consider that the external appearance of the structure has been altered to a significant degree and that the current appearance of the structure bears no resemblance to the structure at its pre-development stage."

2.44 The first named respondent contends at paragraph 14 of his affidavit that when the respondents purchased a house there was already an existing "treatment effluent system" which was well-established. He states that by way of maintenance to the existing system he replaced the septic tank but other than that the system is the same.

2.45 Mr Walsh states at paragraph 9 of the second affidavit that the admitted replacement of the former septic tank with a new septic tank is non-exempted development because it involved works (ground excavation) and the installation of a structure that is significant in size and function (i.e. the septic tank). He contends that in the circumstances planning permission was required for same.

2.46 The first named respondent seeks to address the applicant's complaints about the site development works in paragraph 15 of his affidavit. He states that the level of the hill to the rear of the house has not been raised but admits that the gradient of the slope has been altered so as to leave a flat area beside the house which can be used to park vehicles. He states this is not altered the view available at this scenic location and that if anything it has been enhanced by the tidying up the site. He contends that as the level of the ground was not altered by more than 1 m in relation to the adjoining ground but this is exempted development under Class 6(b)(i) of Schedule 2, Part 1 of the Planning and Development Regulations 2001. The first named respondent expressly disputes an assertion contained in paragraph 8 of Mr Walsh's affidavit of the 7th of September 2006 to the effect that the site excavation works interfere with views of Butter mountain, and he exhibits photographs taken by him purporting to show that this is not the case. He also asserts that:

> "I do not believe that this could have any significant impact on the view particularly when you consider that there are two quarries in the immediate area, one across the road operating at approximately 95 track movements a day and the other less than half a mile away from our house. Indeed one of the quarries lies between the house and Butter Mountain."

2.47 In response to this, Mr Walsh states at paragraph 10 of his second affidavit:

> "Wicklow County Council is of the opinion that the extent of the clearance and alteration works carried out by the respondents to the sloped area to the south/rear of their dwelling that forms an integral part of the surrounding small hill, does constitute an interference with the character of this Area of Outstanding Natural Beauty. A key consideration in this instance is that there are really open views to the site and onwards to Butter Mountain as one approaches that from the south on the L-4382-0 County Road. Wicklow County Council is aware of the fact that this route is a popular tourist recreational route to the Wicklow Mountains from the N 81 which links the area to the Dublin metropolitan area"

Specifically addressing the quarries argument Mr Walsh states:

> "… Mr Jessup misses a key point in that this said quarry is likely to have the benefit of being either a pre-1964 quarry or thus an established use or else it has the benefit of planning permissions wherein the conventional development management issues including the issue of 'mitigating negative visual impacts' would have been factored into the relevant planning decisions. Furthermore a key theme in the implementation of the planning regulatory system, is that each case should be taken on its own merits. Thus, in this situation, the existence of alternative land uses in the form of quarries in close proximity to the respondents' site does not in any way mean that site alteration works on the site of the respondents and its associated visual impacts on the character of this area of outstanding natural beauty, should somehow become immune from the need for the planning authorities duties and obligations to regulate same."

2.48 Mr Walsh also continues to dispute that the site development works constitute exempted development under Class 6(b)(i) of Schedule 2, Part 1 of the Planning and Development Regulations 2001, and contends that the works were "significant" and "quite

substantial, involving the removal of a large amount of soil, trees and other matter." Further, and for similar reasons, he also disputes that the alleged landscaping works are exempt under Class 6(a) of Schedule 2, Part 1 of the Planning and Development Regulations 2001, as was contended by the first named respondent at paragraph 16 of his affidavit.

2.49 The first named respondent's affidavit contains certain other averments directly relevant to planning issues but these were directed at complaints that are not now been proceeded with by the applicant, including the complaint relating to the upgrading of the existing road side entrance, the erection of a new roadside boundary wall and the placement of a garden shed at the property. Apart from these matters the remainder of the first named respondent's affidavit (paragraphs 18 to 24 thereof) is devoted to *a plea ad miseriacordiam* on behalf of the respondents, and a description of their personal, financial and family circumstances, of which I have taken due account.

3. The Issues

The Onus of Proof
3.1 The respondents have submitted, and the Court accepts it as being a correct statement of the law, that the onus of proof in s. 160 proceedings is borne by the applicant. Moreover, to the extent that the respondents contend that their development is exempt development, the respondents do not have to prove that their development is exempted development. Rather, authorities such as *Dublin Corporation v Sullivan* (unreported, High Court, Finlay P, 21st December, 1984); *Carroll and Colley v Brushfield Ltd* (unreported, High Court, Lynch J, 9th October, 1992); *Dublin Corporation v McGowan* [1993] IR 405; *Westport UDC v Golden & Ors* [2002] 1 I.L.R.M. 439; *Dublin City Council v Fallowvale* [2005] IEHC 408 and *Fingal County Council v Dowling* [2007] IEHC 258 indicate that it is for the applicant to prove that it is not exempted development.

Alleged unauthorised use
3.2 The applicant does not dispute that the structure in question has been on the site for many, many years. There is no question but that it was developed prior to the coming into force of the Local Government (Planning and Development) Act, 1963 and that it was used for a considerable period of time for residential purposes. However, the applicant contends that such a use had ceased and was abandoned over 50 years before the respondents purchased the property. There is therefore an issue as to whether the respondent's current use of the structure for residential purposes represents the continuation of a use commenced prior to 1 October 1964 and which was not abandoned – in which case the present user would not be unauthorised; or a material change in the use of the structure by the recommencement in recent times of residential use in circumstances where residential user had been abandoned prior to 1 October 1964 – in which case the present user would be unauthorised.

Alleged unauthorised works
3.3 There is an issue as to whether the works on the house are unauthorised development requiring planning permission, or as the respondents contend, exempt development pursuant to s. 4(1)(h) of the Planning and Development Act, 2000.

3.4 There is an issue as to whether the works on the effluent system are unauthorised development requiring planning permission, or as the respondents contend, exempt development pursuant to s. 4(1)(h) of the Planning and Development Act, 2000.

3.5 Finally, there is an issue as to whether the site development works are unauthorised development requiring planning permission, or as the respondents contend, exempt development under Class 6(b)(i) of Schedule 2, Part 1 of the Planning and Development Regulations 2001.

The discretionary nature of the s.160 remedy
3.6 The respondents have submitted that in the event of this court determining either that the current residential use, or the recent works carried out to the structure, are unauthorised, it is nonetheless a case where the Court should exercise its discretion not to grant the orders sought.

4. Relevant Statute Law
4.1 The relevant parts of s. 160 of the Planning and Development Act 2000 provide:

> *"(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:*
>
> > *(a) that the unauthorised development is not carried out orcontinued;*
> >
> > *(b) in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;*
> >
> > *(c) that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject.*
>
> *(2) In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature.*
>
> *(3) (a) An application to the High Court or the Circuit Court for an order under this section shall be by motion and the Court when considering the matter may make such interim or interlocutory order (if any) as it considers appropriate.*
>
> > *(b) Subject to section 161 , the order by which an application under this section is determined may contain such terms and conditions (if any) as to the payment of costs as the Court considers appropriate.*
>
> *(7) Where an order has been sought under this section, any other enforcement action under this Part may be commenced or continued."*

4.2 S.2 of the Planning and Development Act 2000 provides (*inter alia*) that

"'unauthorised use' means, in relation to land, use commenced on or after 1 October 1964, being a use which is a material change in use of any structure or other land and being development other than—

(a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or

(b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34 of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;"

4.3 S.2 of the Planning and Development Act 2000 also provides (*inter alia*) that

"'unauthorised works' means any works on, in, over or under land commenced on or after 1 October 1964, being development other than—

(a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or

(b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34 of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;"

4.4 S.4(1)(h) of the Planning and Development Act 2000 states

"4.—(1) The following shall be exempted developments for the purposes of this Act—

(h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;"

4.5 Article 6(1) of the Planning and Development Regulations 2001 provides:

"6. (1) Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1."

4.6 Article 9 of the Planning and Development Regulations 2001 provides (*inter alia*):

"9. (1) Development to which article 6 relates shall not be exempted development for the purposes of the Act—

(a) if the carrying out of such development would—

(vi) interfere with the character of a landscape, or a view or prospect of special amenity value or special interest, the preservation of which is an objective of a development plan for the area in which the development is proposed or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan,

(viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use,"

4.7 Class 6 concerning "Exempted Development – General" of Schedule 2, Part 1 of the Planning & Development Regulations, 2001 is in the following terms:

"SCHEDULE 2

Part 1

Exempted Development — General

CLASS 6

[Column 1]

(a) The construction of any path, drain or pond or the carrying out of any landscaping works within the curtilage of a house.

(b) Any works within the curtilage of a house for—

(i) the provision to the rear of the house of a hard surface for use for any purpose incidental to the enjoyment of the house as such, or,

(ii) the provision to the front or side of the house of a hard surface for the parking of not more than 2 motor vehicles used for a purpose incidental to the enjoyment of the house as such.

[Column 2]

The level of the ground shall not be altered by more than 1 metre above or below the level of the adjoining ground."

4.8 Class 11(b) concerning "Exempted Development – Rural" of Schedule 2, Part 3 of the Planning & Development Regulations, 2001 is in the following terms:

"SCHEDULE 2

Part 3

Exempted Development — Rural

CLASS 11

[Column 1]

Development consisting of the carrying out, on land which is used only for the purpose of agriculture or forestry, of any of the following works—

(b) land reclamation,

[Column 2]

Blank"

5. Submissions
5.1 The Court has received extensive written and oral submissions from both sides in this matter, for which assistance it is grateful.

6. The Court's Decision

The Abandonment Issue
6.1 The applicant contends, and this Court accepts, that a use of land can be abandoned and that a change of use can occur when an abandoned use is recommenced.

6.2 The Court's attention was drawn to *Dublin County Council -v Tallaght Block Co Limited*, [1985] ILRM 512, in which Hederman J in the Supreme Court stated the doctrine thus:

> "where a previous use of land has been not merely suspended for a temporary and determined period, but has ceased for a considerable time, with no evidenced intention of resuming it at any particular time, the tribunal of fact was entitled to find that the previous use had been abandoned, so the resumption constituted a material change of use".

6.3 In doing so, Hederman J applied the test in *Hartley v Minister for Housing & Local Government* [1970] 1 Q.B. 414, as formulated by Lord Widgery. Moreover, Lord Denning M.R., in his concurring judgment, said this:

> "I think that when a man ceases to use a site for a particular purpose and lets it remain unused for a considerable time, then the proper inference may be that he has abandoned the former use. Once abandoned, he cannot start to use the site again, unless he gets planning permission: and this is so, even though the new use is the same as the previous one.
>
> The material time is when he starts on the new use. You have to ask at that time whether there was then a material change of use-from a non-use into a positive use."

He later added:

> "The question in all such cases is simply this: Has the cessation of use (followed by non-use) been merely temporary, or did it amount to an abandonment? If it was merely temporary, the previous use can be resumed without planning permission being obtained. If it amounted to abandonment, it cannot be resumed unless planning permission is obtained. I said as much in *Webber v. Minister of Housing and Local Government* [1968] 1 W.L.R. 29, 33 and in *Miller (T. A.) Ltd. v. Minister of Housing and Local Government* [1968] 1 W.L.R. 992, 996. Abandonment depends on the circumstances. If the land has remained unused for a considerable time, in such circumstances that a reasonable man might conclude that the previous use had been abandoned, then the tribunal may hold it to have been abandoned."

6.4 The applicant contends that "it is clear that the dwelling house, the subject matter of these proceedings, had been abandoned" The basis for this assertion is the information contained in the document submitted by the respondents with retention planning permission application (07/1045) and quoted at para 2.30 ante. The applicant says that this document sets out the circumstances of such abandonment i.e. the fact that Thomas Healy had no use for the house which had been willed to him by his brother Patrick (who died in 1949) and consequently he did not maintain it and it slowly began to fall into disrepair. This, coupled with the fact that the respondents themselves when applying for retention planning permission referred to the cottage as being "abandoned", appears to be the high water mark of the applicant's claim.

6.5 Every case of alleged abandonment will depend upon its own facts. However, it seems to this Court that in the case of a dwelling house a much longer period of non-use will be required to justify the inference that the owner or owners of it intended to abandon, as opposed to suspend, the former use, than in the case of a business premises. The applicant in this case bears the burden of proving abandonment. The applicant itself has not adduced any admissible evidence concerning the circumstances of the non-user of the cottage at issue in these proceedings for a considerable period of time beyond relying upon the document previously mentioned. That certainly provides evidence of a suspension of residential use for a considerable period, as well as evidence of the fact that Thomas Healy had no personal need to use the property as a residence and of the fact that the property fell into some disrepair. Is all of that enough, however, to justify an inference (as opposed to speculation) that Mr Healy intended that the former use of this property as a residence should be abandoned? In the Court's view it is not enough in the circumstances of this case.

6.6 The fact that Mr Healy did not need to live in the property himself is by no means inconsistent with a possible continuing desire on his part to hold on to the cottage as a residential property with the intention of eventually renting it, or selling it, as a residence; perhaps with a view to refurbishment, or alternatively leaving it to some relative as part of his estate. It might be speculated upon that he had none of those intentions, but it cannot be inferred that he had none of them. However, the Court is being asked to do exactly that.

6.7 The Court notes that it was in fact left to Thomas Healy's nephew, Patrick Monaghan together with four acres of land. This property (both cottage and land) was then sold to Mr Phelan in or about 1992, who commenced refurbishment with a view to the

cottage being used as a dwelling again.

6.8 Moreover, the fact that the cottage had been allowed to fall into some degree of disrepair is not necessarily indicative of abandonment, given the relatively unsophisticated nature of the structure, and the comparative ease with which a property of that nature might be refurbished. Indeed, there is no evidence concerning the exact condition that the cottage was in at the commencement of Mr Phelan's intended refurbishment. While it appears that Mr Phelan started, but did not complete, re-roofing work (*inter alia*) it is not clear whether he removed the pre-existing roof or if the pre-existing roof was already gone. The applicant bears the burden of proof with respect to matters such as this and the evidence as to the exact state of disrepair of the cottage at the time of Mr Phelan's intervention is vague, unsatisfactory and equivocal.

6.9 It is the Court's conclusion that in the particular circumstances of this case the applicant has not succeeded in discharging the burden of proof upon it of showing, on the balance of probabilities, that the respondents' current use of the structure for residential purposes is unauthorised, and that it does not represent the continuation of a use, which was not abandoned, that was commenced prior to 1 October 1964.

The nature of the works carried out: dwelling house
6.10 Both the applicant and the respondents rely upon the decision of Herbert J in *McCabe -v- Iarnrod Eireann* [2007] 2 IR 392 in support of their respective positions on whether the works carried out were exempt by virtue of section 4(1)(h). In that case the applicant in section 160 proceedings claimed that works carried out to a railway bridge was not exempt by virtue of section 4(1)(h). The nature of the works carried out by the respondent was set out in the respondent's affidavit and confirmed by Herbert J., at p.398, as follows:-

> "17. The nature of the works carried out consisted of the brick/stone arch bridge structure being replaced with a flat span pre-cast concrete deck structure. The new deck beams were placed on new pre-cast concrete bed stones which in turn sit on the original stone abutment walls. The new bridge deck was placed at a higher level than the original arch bridge in order to allow the safe passing of high sided vehicles underneath, thus mitigating the risks associated with bridge bashing. Replacing an arch structure with a flat structure also provides benefits in relation to clearance restriction from road level ...
>
> 18. Pre-cast concrete elements were used to enable fast reconstruction of the bridge and thus minimise the closure of the Dublin-Cork line. In order to enhance the appearance of the bridge reconstituted stone facing was used on the new parapet walls and abutment. As much of the existing stone structure as possible was maintained, for example, wing walls and lower section of the abutment walls. More specifically, elements of the existing bridge which were maintained include four stone wing walls to each corner of the bridge ... and section of two abutment walls ...
>
> 19. The concrete bed stones which formed the upper sections of the bridge abutments were faced with stone in order to help it blend in with the original stonework. Further, although the road clearance height of the bridge was increased to a limited extent jor safety reasons, the dimensions of the bridge have not otherwise been significantly altered. A plan area of the bridge bash footprint area which is 23 degrees offset to the public road, was not altered from the original. The removal of the arch and rising of the bridge deck has caused a minor increase in the dimensions of the vertical walls which support the bridge ...
>
> 20. The stability of the railway embankments were also enhanced by extending the parapet walls on each side of the bridge thus preventing ballast falling down onto the road ... "

In considering whether or not those works were exempt pursuant to section 4(l)(h) of the 2000 Act the learned judge went onto find (at p.401 of the report):-

> "23 In my judgment the renewal or reconstruction of a part or of parts of the bridge would be covered by the provisions of s. 4(1)(h) of the Act of 2000, provided that the extent of that renewal or reconstruction was not such as to amount to the total or substantial replacement or rebuilding of the original structure. The question is one of fact and degree whether in the instant case the original railway under bridge has been so changed by the works that one could not reasonably conclude that it remains the same bridge even though with some alterations, improvements or indications of maintenance work.
>
> 24. I find on the affidavit evidence that the replacement of the brick and stone arch and fill material with a new flat span pre-cast concrete deck structure is undoubtedly an improvement of the structure. I find that the other works described at paras. 17 to 20 inclusive of the affidavit sworn by Mr. Ruane on the 16th December, 2005, which I have already quoted, are works of necessary maintenance and also improvements. I find that the original bridge has not been so totally altered that it has become a new bridge even though maintaining some parts of the former bridge. I therefore find that the works carried out by the respondent were works for the maintenance, improvement or other alteration of the bridge and are to that extent within the provisions of s. 4(1) (h) of the Act of 2000."

6.11 The applicant relies upon the evidence of Mr. Walsh and in particular the evidence contained in his second Affidavit sworn on the 18th November 2008 where at paragraphs 3 and 4 (see para 2.39 ante) he sets out the reasons why he does not believe that the external appearance of the renovated dwelling comprises exempted development and why it could not be said that the works carried out have brought the cottage back to its former condition.

6.12 Counsel for the respondent has submitted that the respondents' direct and corroborated evidence in the instant case is that the original four walls and roof structure were intact when they purchased the property and that all the original dimensions and footprint of the house have remained the same. It has been submitted that, on any reasonable assessment, the original house has not been replaced and the extent of the renovation to the house does not amount to the total or substantial replacement or rebuilding of the original structure.

6.13 Counsel for the respondent has further submitted that as regards whether or not the works are inconsistent with the original house or neighboring structures, the Supreme Court held in *Cairnduff v. O'Connell* [1986] IR 73 that the insertion of a window in a side wall of a three storey terrace house, the replacement of a window by a door and the construction of a balcony and staircase for the purpose of converting it into a residence with two flats, had not so materially affected the external appearance of the structure, as to render it inconsistent with the character of the house itself or of adjoining houses. In the course of his judgment, Finlay C.J., at p. 77, held as follows:-

> "Secondly, I am satisfied that the character of the structure provided for in the subsection must relate, having regard to the provisions of the Act in general, to the shape, colour, design, ornamental features and layout of the structure concerned. I do not consider that the character of the structure within the meaning of this sub-section, can depend on its particular use at any time ... "

The respondents contend that the external alterations in the instant case have, if anything, a less significant impact on the appearance of the house when compared to the facts of *Cairnduff v. O'Connell* and do not materially affect the external appearance of the house.

6.14 As previously stated, each case must depend on its own facts and the Court does not consider that it is a valid or helpful exercise to contrast the changes made in the circumstances of this case with the type of changes made in either *McCabe -v- Iarnrod Eireann* or in *Cairnduff v. O'Connell.* The facts of each of those cases were so radically different from the facts of the present case that to do so would be akin to comparing chalk with cheese. That said, it is apparent from the approach taken in previous cases that for external changes to be regarded as "material" they must, in the words of the statute, *"render the appearance inconsistent with the character of the structure or of neighbouring structures".* In the previous cases to which I have been referred the Courts have tended to take a robust view of the materiality requirement and they have approached the issue on the basis that the changes must not be minor, but rather must be of real significance. The *Cairnduff v. O'Connell* decision is helpful to the extent of clarifying that the "character" of the structure must relate to the shape, colour, design, ornamental features and layout of the structure concerned.

6.15 The Court is satisfied that the works complained of were "works for the maintenance, improvement or other alteration of the structure". The Court is therefore concerned with whether those works were works *"which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures."* In this particular case we are talking about an isolated country cottage and there is no evidence concerning the character of neighbouring structures, presumably because there are none. The issue for the Court is whether the works carried out materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure.

6.16 The applicant places much reliance on the fact that report of the respondents' agents, Gràinne Mallon & Associates, dated the 7th July 2006, accepted there had been a material change to the residence "in that the character was altered relating to the shape, colour, design and ornamental features." There is no doubt but that that view was expressed on behalf of the respondents, and that the word "character" was specifically used by a professional who it must be presumed knew the special meaning of that word in terms of the statute, particularly in circumstances where she used it in conjunction with "shape, colour, design and ornamental features", which are the specific badges of character identified by Finlay C.J. in the *Cairnduff* case. A more neutral word such as "appearance", or some other such word, might have been used in the same context but was not used. In the circumstances, the Court cannot lightly disregard this admission, which represents a declaration against the respondents' interest by their duly authorised agent and is, as such, admissible against them. Were it not for this admission the Court would have had some difficulty in resolving the conflict in this matter in favour of the applicant, in circumstances where there was a general paucity of admissible evidence concerning the precise "character" of the structure prior to the carrying out of the works complained of. However, in circumstances where it has been admitted that the character was altered relating to the shape, colour, design and ornamental features of the structure the Court has no option but to find for the applicant on this issue, and to hold that the works in question were not exempt development within the meaning of s. 4 (1) (h) of the Planning and Development Act 2000.

The nature of the works carried out: effluent system
6.17 Notwithstanding the first named respondent's contention that when the respondents purchased the cottage there was already an existing "treatment effluent system" which was well-established; and that by way of maintenance to the existing system he merely replaced the septic tank, the Court is satisfied to accept the evidence of Mr Walsh, and the submissions on behalf of the applicant, that the admitted replacement of the former septic tank with a new septic tank is non-exempted development because it involved works (ground excavation) and the installation of a structure that is significant in size and function (i.e. the septic tank), and that requires to be connected to a percolation area as per the requirements of current Department of the Environment approved guidelines. In this regard, the Court notes that the respondents did not dispute in their letter of the 5th of May 2006, written in response to the applicant's warning letter, that planning permission was required for "on-site effluent disposal". Rather, they evinced an intention to make a planning application to regularise the position in relation to that.

6.18 Accordingly, in the Court's view s. 4 (1) (h) of the Planning and Development Act 2000 does not apply to the works carried out to the effluent system, and those works required planning permission.

The nature of the works carried out: site works
6.19 As the Court has found that the works to the cottage, and its associated effluent system, were unauthorised and non-exempt development for which planning permission was required, it follows in accordance with Article 9 (1) (b) of the Planning and Development Regulations 2001 that all other site works associated with those unauthorised works are also non-exempted development. In the circumstances the respondents reliance upon Article 6 of Planning and Development Regulations 2001 is misconceived, both with respect to Class 6 concerning "Exempted Development – General" of Schedule 2, Part 1 of the Planning & Development Regulations, 2001 and also with respect to Class 11(b) concerning "Exempted Development – Rural" of Schedule 2, Part 3 of the Planning & Development Regulations, 2001.

Whether the Court should exercise its discretion in favour of the respondents
6.20 The respondents have submitted, and the applicant accepts, that the court has a discretion when exercising its power under Section 160. The respondents have referred the Court to *White v McInerney* [1995] 1 ILRM 374 where Blayney J., in the Supreme Court, considering this discretion in relation to s. 27, the statutory predecessor to Section 160, stated, at p. 5:-

> "I am satisfied that both orders made by the learned trial judge were properly made in the exercise of his discretion. The court has a very wide discretion under s. 27. It is admirably expressed by Barrington J in his judgment in *Avenue Properties Ltd v. Farrell Homes Ltd* [1982J ILRM 21 at p. 26:
>
> > 'However, so far as the High Court is concerned the order is discretionary. The term 'injunction' is not used in s. 27 but it is clear that the order contemplated by the section is an order in the nature of an injunction whether restraining or mandatory. The reference to 'interim' and 'interlocutory' orders in s. 27(3) appears to reinforce this interpretation. It seems to me therefore that the High Court in exercising its discretion under s. 27 should be influenced, in some measure, by the factors which would influence a court of equity in deciding to grant or withhold an injunction.'"

6.21 The respondents submit that one of the factors that this honourable Court may consider when exercising this wide discretion was cited McKechnie J. in *Leen v Aer Rianta* [2003] 4 IR 394, at p. 410, *i.e. "the conduct, position and personal circumstances of the respondent". I*n *Dublin City Council v. Sellwood Quarries Ltd*. [1981] LL.R.M. 23 Gannon J. refused to retrain the respondents from carrying out its quarrying actives, i.e. *"the extraction by blasting of rock for commercial purposes*", notwithstanding that he found that they were unauthorised. He set out his reasons for refusing the relief sought at p. 24:-

> "It seems to me that the failure to apply for permission was due to a bona fide belief that such permission would not be required and that no unlawful infringement of the requirements of the Local Government (Planning and Development) Acts would be involved. An order of the nature sought would have very damaging consequences for the respondents and for those in their employment and for those to whom they are bound in contracts."

6.22 It is urged upon the Court that the respondents in the instant case genuinely believed, as they still do, that they could use the house they bought as their home, after it had been refurbished. The former owner of the property had already started renovating the house and the respondents believed that there would be no issue if they completed that work, as long as they confined themselves to maintenance and improvement work, which is what they did. This was the basis of the sale and is reflected in the price of €400,000.00 they paid for the property. Further, it has been submitted that the consequences for the respondents should this honourable Court grant the relief sought would be unduly harsh in all the circumstances. They will be left homeless, with the majority of their mortgage to pay back and with a property that is worth much less than they paid for it. In addition, they will have nothing to show for €30,000.00 of their own money spent on the renovation work and subsequent retention applications. It was submitted that given that the development in question involves a low impact restoration of a small house and the occupation of that house by a small family, granting the orders sought by the applicant would visit a disproportionate hardship on the respondents for a relatively minor and harmless development which was innocently carried out.

6.23 It was further submitted that any reticence on the part of the respondents not accept the Council's allegations that the developments the subject of these proceedings were unauthorised was not due to recalcitrance but rather a genuine belief that they were not based on reasoning. It was urged that that was outlined in detail to the Council from the start, i.e. in the response to the Council's initial warning letter.

6.24 For its part, the applicant urges that the Court's discretion should not be exercised in favor of the respondents in this instance, and it puts forward two reasons why the Court should not do so.

6.25 First, the applicant has expressed concern that if Orders are not made in these proceedings, this might be seen as creating a precedent whereby others would commence the redevelopment of other ruinous dwellings for the purpose of creating a new dwelling in the belief that such developments do not require planning permission.

6.26 Secondly, the applicant points to the reaction of the first named respondent when Mr. Walsh first began to investigate the matter and the clear decision of the Respondents not only to commence residential user of the dwelling house but in fact to carry out further works notwithstanding the involvement of the County Council at that stage. The applicants have submitted that these features of the case show an attitude on the part of the respondents which should preclude any exercise of the Court's discretion in their favor.

6.27 The Court has given careful consideration to the submissions of both parties. It has decided in the exercise of its discretion not to make the Orders sought by the applicant, notwithstanding that the respondents' development is unauthorized. The Court has arrived at its decision for the following reasons.

6.28 The Court has given deep consideration to the conduct, position and personal circumstances of the respondents. While the Court considers the high-handed and dismissive attitude of the first named respondent, in particular, vis-à-vis Mr. Walsh and the other representatives of the Council's planning department to have been regrettable and greatly to be deprecated, particularly in the aspect of blithely continuing to carry out works after a warning letter had been sent, and yet again later on after an Enforcement Notice had issued, it is nonetheless satisfied that Mr. Jessup did genuinely but mistakenly believe that the intended works would be exempt. No doubt his hubris stemmed from the fact that he has some experience as a project manager and architectural technician, but the fact that he had previous experience in that capacity, and the fact that his belief may have been genuine, does not excuse his discourtesy to Mr. Walsh, and the insults tendered by him such as his remark that Wicklow Co Council was "backward" in implementing its planning system.

6.29 Having said all of that, the Court accepts that there was no deliberate attempt in the circumstances of this case to flout the planning laws, and the Court also accepts that if it were to make s.160 Orders in this case the consequences would be devastating for the respondents. If the Court were to make the Orders sought the respondents' cottage would require to be demolished, and there would be significant financial repercussions for them as well as dislocation and disruption of their family unit with all the heartache that that would entail. This Court has made such Orders in the past, e.g., in *Meath Co Council v Murray* [2010] IEHC 254 and would have had no hesitation in doing so if it felt that there had been a deliberate attempt to flout the planning laws. However, in the circumstances of this case the Court considers that s. 160 Orders would represent a disproportionate response to the respondents unlawful actions.

6.30 The Court has been partly influenced in arriving at its view by the fact that the respondents are persons of relatively modest means. Further, although it has no direct evidence of it in the particular circumstances of this case, the Court takes judicial notice of the general downturn in the economy, the hardships that people in all walks of life are facing at this time, and of the fact that times are particularly hard for persons associated with the construction industry. It is presumed that the first named respondent as a project manager and architectural technician is affected in this way.

6.31 The Court wishes to emphasise that in deciding to exercise its discretion in the manner indicated it is not dismissing the concern expressed by the applicant concerning the "precedent" effect of not making s.160 Orders in this case. The Court considers that the concern expressed is legitimate and is a real one. However, it is the Court's view that these concerns are capable of being addressed. First, although the Court will reserve a final decision on costs until after it has heard the submissions of the parties, it is entirely possible that the costs of these proceedings (which are likely to be considerable) would be awarded against the respondents. Secondly, should the fact that the respondents have lost their case on the merits (and, should it arise, have had costs awarded against them) be duly publicised, it is reasonable to anticipate that this may have the desired deterrent effect.

6.32 Accordingly, in all the circumstances of the case, the Court will of its own motion, and pursuant to the claim for further and other relief, simply declare that the respondents and each of them have engaged in unauthorized and non-exempt development on the property comprised in Folio 19832F of the Register of Freeholders for the County of Wicklow, and situate at Aghfarrell, Brittas, Co

Wicklow. The Court, in the exercise of its discretion, is not disposed to make any Order(s) pursuant to s. 160 of the Planning and Development Act, 2000.