

**THE HIGH COURT
CIRCUIT APPEAL**

[2015/127 C.A.]

BETWEEN**WICKLOW COUNTY COUNCIL****APPLICANT****AND****LIAM LEE AND JEAN TOMPKINS****RESPONDENTS****JUDGMENT of Mr. Justice Noonan delivered on the 15th day of January, 2019**

1. This appeal is brought by the respondents from an order of the Circuit Court (Her Honour Judge Reynolds) made on the 30th June, 2015 pursuant to s.160 of the Planning and Development Act, 2000, as amended, whereby the respondents were enjoined to cease an unauthorised development on their property at Kilmurry Lower Baltinglass, County Wicklow being the property comprised in Folio 25510F County Wicklow. In the original motion before the Circuit Court, the applicant ("the Council") sought a wide range of reliefs which were granted but the within appeal is concerned only with that part of the order that related to an unauthorised dormer structure/dwelling, to which I will refer as "the shed/workshop", and the construction of an unauthorised wall, referred to as "the screen wall".

2. On the 16th May, 2002, the Council granted planning permission to the first respondent to build a single storey dwelling on the lands (reference 02/6132). On the 24th April, 2003, the Council issued a further permission to the first respondent for a change of house type from single storey to two storey (reference 02/7168). The dwelling house and associated works were duly completed on the land.

3. In or about 2013, it came to the Council's attention that a large two storey dormer structure, independent of the house, had also been constructed on the lands without permission. Further a large brick wall was constructed also without permission. It is not in dispute that both of these structures, the shed/workshop and the screen wall, are unauthorised.

4. The dispute in this case centres on a single issue, namely whether the Council are precluded from bringing the within proceedings by virtue of lapse of time. In that regard the relevant statutory provision is to be found in s.160 subs. (6) of the 2000 Act which provides as follows:

"(6) (a) An application to the High Court or Circuit Court for an order under this section shall not be made—

(i) in respect of a development where no permission has been granted, after the expiration of a period of 7 years from the date of the commencement of the development, or

(ii) in respect of a development for which permission has been granted under Part III, after the expiration of a period of 7 years beginning on the expiration, as respects the permission authorising the development, of the appropriate period (within the meaning of section 40) or, as the case may be, of the appropriate period as extended under section 42 ..."

5. It can be seen therefore that where the development is one for which no permission has been granted, a seven-year limitation period applies but in the case of a development for which permission has been granted, the period is seven years from the expiry of the permission, which itself has a lifespan of five years, giving a total limitation period of twelve years. The affidavits in support of the application were sworn by the Council's assistant planner, Lucy Roche which detail the planning history of the matter. The issues that arise in these proceedings were first brought to Ms. Roche's attention in or about February of 2013 when she reviewed the file and, on the 21st March, 2013, carried out an inspection of the property. Although she could not access the site, she was able to observe that an unauthorised large dormer structure was constructed to the east of the dwelling enclosed by a large brick wall.

6. Arising from Ms. Roche's inspection, a warning letter was sent by the Council to the respondents on the 9th April, 2013. This resulted in the Council being contacted by a Mr. John O'Hanlon on behalf of the respondents who indicated that he had been requested to deal with the matters raised in the warning letter. Nothing further was heard from Mr. O'Hanlon and accordingly a second warning letter was sent on the 10th July, 2013. A second inspection was carried out by Ms. Roche on the 1st October, 2013 which disclosed no change and accordingly on the next day, the 2nd October, 2013 an enforcement notice was served upon the respondents.

7. This again elicited no response and a third inspection was carried out by Ms. Roche on the 21st January, 2014 again disclosing no change. In apparent response to the enforcement notice, on the 15th April, 2014 the first respondent applied for retention permission to the Council in respect of, *inter alia*, the shed/workshop. The Council's solicitors sought an undertaking from the respondents that they would cease the unauthorised development by letter of the 24th April, 2014 to which no response was forthcoming. Accordingly, the within proceedings issued on the 14th May, 2014.

8. A further retention application was made by the first respondent seeking retention of the screen wall on the 9th October, 2014. A fourth inspection was carried out by Ms. Roche on the 15th October, 2014. On the 20th November, 2014, the Council refused permission for the screen wall and by further decision of the 21st January, 2015, refused retention of the shed/workshop.

9. Following the refusal of the two retention applications, the first respondent swore a replying affidavit in these proceedings on the 27th April, 2015, when he raised for the first time the limitation issue on the basis that since more than seven years had elapsed between the commencement of the unauthorised development and the commencement of the proceedings, the Council could not pursue the matter further. Following the making of the order by the Circuit Court in April 2015, the respondents served notice of appeal and on the 30th June, 2015, again applied for retention permission of the existing dwelling house, garage and outbuildings as constructed. On the 3rd July, 2015, the Council granted permission for the dwelling house but refused retention of the garage and outbuildings.

10. In his first replying affidavit, the first respondent accepts that the shed/workshop and screen wall were built without planning permission. He claims however that the development commenced more than seven years prior to the institution of these proceedings. The first respondent's evidence in this regard is that the construction of the shed/workshop commenced on or about the 22nd April,

2004 and the foundations of the screen wall were constructed on the 3rd February, 2005. He refers to certain invoices for concrete he claims was purchased for this purpose. The first respondent's evidence in that regard is supported by an affidavit of Donougha O'Brien, a groundworks contractor who avers that in April 2004, he was engaged to excavate and lay foundations for the shed/workshop and screen wall, *inter alia*.

11. He further says that as a result of consulting his diary, he is satisfied that on the 20th April, 2004, he excavated foundations for the entrance wall and boiler house, neither of which are relevant to these proceedings. He goes on to say that on the 22nd April, 2004, he returned in order to pour the concrete floor of the shed/workshop. He does not appear to make any explicit reference to pouring the foundations for the screen wall.

12. The respondents rely on a further affidavit of Gerry Nolan, a block layer, who avers that he attended in early 2005 at the property to build the screen wall, the foundations of which were already completed. He does not appear to indicate what actual works were carried out by him or to what extent the construction of the screen wall was undertaken. In fact, this is confirmed by the first respondent's second affidavit. In response to an averment by Ms. Roche that an aerial photograph taken in 2005 does not appear to detail the garage or screen wall, the first respondent says the following:

"For the avoidance of any doubt, the respondents have never claimed that these structures were *completed* before 2005. We maintain that these developments were, however, commenced in 2004 and 2005 respectively. I worked on those structures on a piecemeal basis after the development commenced: I purchased materials when I could afford them and I did the work myself. As a result, although the development commenced in 2004 and 2005, the shed (which was the last structure to be finished) was not actually completed until late 2010 or early 2011."

13. A number of Google Earth and Google Street View images are exhibited in the affidavits of Ms. Roche. A street view image from March 2009 clearly shows that while the screen wall is present, the shed/workshop is not, certainly above the level of the wall at any rate. The Google Earth image from 2010 appears to show items such as vehicles and/or containers in the area now occupied by the shed/workshop. Google Earth and Street View images from 2011 clearly however show the presence of the shed/workshop which appears to be fully or substantially completed. This appears to be confirmed by the first respondent in his affidavit above quoted where he says that the shed/workshop was not actually completed until late 2010 or early 2011.

14. It is notable however that there is no evidence before the court as to what precise works were done by the respondents or when they were done, either in terms of the shed/workshop or the screen wall. All that the evidence appears to establish is that the concrete for the workshop floor was poured in April 2004 and foundations for the wall possibly in 2005. It is thus not known when the screen wall that is to be seen in the 2009 photographs was actually constructed to the extent seen in those photographs, nor is there evidence of what degree of construction of the shed/workshop actually occurred before it was substantially or totally completed in 2010/2011.

15. The only persons who can establish these facts are the respondents who have chosen not to do so. In the case of the screen wall for example, the building of such wall, up to a certain height at any rate, may well have constituted exempted development under the planning code. It is only when the permitted height was exceeded, as it was here, that this development became an unauthorised development. There is no evidence before the court as to when this occurred.

16. I am satisfied that the authorities establish that where a time bar defence is relied upon by a developer in answer to an application under s.160, the onus rests upon the developer to prove when the development commenced – see *Wicklow County Council v. Fortune* [2012] IEHC 406. In tandem with that issue lies the question of when a development can be said to have commenced. In that regard, it is important to bear in mind that the evidence in this case, in relation to the shed/workshop at any rate, establishes that while some very preliminary work in the nature of concrete pouring may well have been undertaken in 2004, nothing of substance appears to have happened subsequently for some six years. In *Dublin County Council South v. Balfe Ltd* [1995] WJSC-HC 4391, this court (Costello J.) considered when a development had commenced for the purposes of an application under s.27 of the Local Government (Planning and Development) Act, 1976, the predecessor of s.160. In that case, as here, there had been a substantial lacuna between when the developer claimed was the commencement of the unauthorised user and its resumption. In that regard, the court noted (at p.4408):

"In my opinion when a use has been abandoned and then recommenced nearly four years later an occupant cannot rely on an earlier use to support a claim that the limitation period in the section should run from the earlier date and not from the date of recommencement. If construed in the way urged by the respondents it would be a simple matter to drive a coach-and-four through the section by discontinuing an unauthorised use after a warning notice had been served and then re-commence it again after several years when a limitation period based on the discontinued unauthorised user had expired, and I consider that the section cannot be so construed."

17. Although that case concerned user as distinct from construction, it seems to me that this logic must be equally applicable to the facts of the present case. It would for example clearly be an absurd construction of the section to suggest that because one block is laid and left in situ for ten years before a building is constructed that the development commenced with the laying of the block. In *Kildare County Council v. Goode* [1999] 2 I.R. 495, the Supreme Court had to consider whether quarrying activities carried on by the respondents on their lands required planning permission. They contended that the extraction of sand and gravel was a "works development" as defined by the Local Government (Planning and Development) Act, 1963.

18. Barron J., with whom the other members of the court agreed, found that the expression "works" was intended to refer to activity which was "carried out once and for all and as a means to an end rather than an end in itself. It was intended to apply to temporary activity involving the erection of structures or changes to or removal of existing structures" (at p. 502).

19. In my view, the concept of "commencement of the development" involves a reasonably continuous, but temporary, unitary process leading to a completion of the development in issue. Something which is done sporadically and piecemeal with intervening significant periods of inactivity and abandonment, cannot in my opinion amount to a "commencement of the development" within the meaning of s.160. Seen in that light, it seems probable that the development here which led to the completion or substantial completion of the shed/workshop can only be viewed as having commenced in or around 2010. However, it is not for the Council to prove that.

20. In relation to the shed/workshop, I am therefore satisfied that the respondents have not discharged the onus of establishing that the commencement of the development happened more than seven years prior to the institution of these proceedings.

21. With regard to the screen wall, as I have already indicated there is no evidence before the court as to when this was

constructed, to its present height at any rate. As noted above, the development would only have become unauthorised once a certain height was reached and the respondents have chosen to put no evidence before the court of when this occurred. The pouring of the foundations, without more, cannot therefore amount to the commencement of the development, which of course can only refer to the unauthorised development.

22. For these reasons therefore, the respondents have failed to discharge the onus which rests upon them of establishing that the unauthorised development in issue commenced more than seven years prior to the institution of these proceedings. It is accordingly unnecessary for me to consider whether or not the longer twelve-year time limit would in any event be applicable to this case. I therefore propose to dismiss this appeal and affirm the order of the Circuit Court.