

THE HIGH COURT

[2016 No. 339 MCA]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

ELAINE MORGAN

FIRST NAMED APPLICANT

AND (BY ORDER)

CARLOW COUNTY COUNCIL

SECOND NAMED APPLICANT

AND

SLANEYGIO LIMITED AND JOSEPH GERMAINE

RESPONDENTS

JUDGMENT of Ms. Justice Baker delivered on the 4th day of May, 2017.

1. This application arises from the demolition by the respondents of a building situate at and known as 25 Dublin Street, Carlow, Co. Carlow, a terraced building between and connected to Nos. 24 and 26 Dublin Street, Carlow.
 2. Number 26 Dublin Street, Carlow is a protected structure and the applicant and her two siblings are the owners. The applicant brings the application on her own behalf and on behalf of, and with the authority of, the other two co-owners.
 3. The first respondent is a limited liability company of which the second respondent is the principal shareholder, and is the owner of the premises at No. 25 Dublin Street, Carlow, which adjoins No. 26 on the northern boundary thereof.
 4. For convenience, I will refer to No. 25, the now demolished building, as "the Premises". The Premises is situate within an architectural conservation area, but is not a protected structure.
 5. A particular feature of the Premises is that it has a gated arch on the ground floor through which access may be gained to the yard at the rear.
 6. This judgment is given in an application for an order pursuant to s. 160 of the Planning and Development Act 2000, as amended, ("the PDA") for the reinstatement of the Premises to its prior condition, and for ancillary orders relating to the degree of detailed directions and scrutiny to be engaged by the court regarding such works.
 7. On 1st November, 2016, Noonan J. made an order *ex parte* restraining the carrying out of further works by the respondents to the Premises and the preservation of all structural materials at, or taken from, the site. On 10th October, 2016 an order was made by me joining Carlow County Council as co-applicant in the proceedings on its motion, and continuing the order made *ex parte* by Noonan J. By that order the applicant was permitted to carry out temporary works of buttressing and support subject to conditions, and the conservation architect employed by the applicant was permitted to enter upon and inspect the Premises.
 8. An unusual feature of the application is that the respondents have indicated a willingness to reinstate the building, and argue that in those circumstances the making of a court order is unnecessary and oppressive. The respondents have made this concession notwithstanding their assertion that the works carried out at the Premises were exempted works of demolition executed for the purposes of improving and making safe the existing structure. As the making of an order under s. 160 is conditional upon the court accepting that the works of demolition were unauthorised, and therefore amenable to a planning injunction under the section, the respondents deny that the court has jurisdiction to grant an order under s. 160.
 9. Carlow County Council supports the application and rejects the assertion that the works of demolition were exempted development.
- Relevant facts**
10. In December, 2015 Slaneygio purchased the Premises. On 24th June, 2016, Mr. Germaine attended a pre-planning meeting with Carlow County Council at which he indicated his intention, or that of the company, to seek planning permission to develop the Premises and erect a hostel. A second pre-planning meeting was held on 2nd August, 2016, and the planning officials advised Mr. Germaine that, as the building was situate in an architectural conservation area, and because it abutted a protected structure, the demolition of the building would not be in accordance with best architectural practice or the planning guidelines.
 11. In late September, 2016, Mr. Germaine visited one of the co-owners, Ms. Morgan's brother, David Morgan, asking him to consent to demolition of the Premises in return for a car park space in the proposed development. David Morgan in his affidavit of 14th November, 2016, avers that he refused consent and that he pointed out to Mr Germaine that the demolition or redevelopment of the Premises would be a matter for the planning authorities.
 12. Mr. Germaine in his first affidavit of 9th November, 2016, says that at some point in mid-October, 2016, he instructed workmen to enter upon the Premises and carry out certain internal works, as a consequence of which on 20th October, 2016 a wall or part of a wall to the rear of the Premises collapsed. At some time between 20th and 27th October, 2016, Bill Forristal, B.E. inspected the Premises on behalf of the respondents and produced a written report dated 27th October, 2016, sent by email at midday on Saturday, 29th October. Mr. Germaine asserts that as a result of concerns regarding the safety of the building expressed in that report that he carried out the demolition works on 29th October, 2016. The work commenced early on that morning, a Saturday morning of a bank holiday weekend, and continued over the weekend.
 13. The interim injunction was granted on Tuesday morning, 1st November, 2016.
 14. No planning permission exists for the demolition of the building, and it is accepted for the purposes of this application that, as the

demolition was not a spontaneous event, the demolition may be characterised as “works” comprising development within the meaning of the PDA.

The issues

15. The respondents argue that, as Mr. Germaine has stated on his own behalf and on behalf of the company that he will reinstate the Premises, and as counsel has confirmed this in open court prior to the commencement of the hearing, an injunction is not necessary. However, the matter for determination first by me is whether the court has jurisdiction to grant an injunction under s. 160 and that engages the question of whether the works of demolition were exempt within the planning code. Certain factual differences arise from the affidavit evidence, and I will in this judgment also consider whether those factual differences require to be resolved by the cross-examination of Mr. Germaine on his affidavits. I will deal also with the argument, that because the demolition of the building is said by the respondents to have been necessitated by health and safety considerations, the court should exercise its discretion to refuse injunctive relief.

Are the works exempt?

16. It is common case that the Premises has been empty for a number of years, and the respondents assert that it has been semi-derelict for a long period of time. Mr. Germaine’s evidence is that he engaged contractors for the purpose of cleaning out the interior of the building, and taking down plaster work and decaying and rotting materials, with the intention of “bringing the structure back to its core” before any repair or decorative works “of a more substantial nature” could be carried out. The Premises is not a protected structure and the works of internal refurbishment were exempt from the requirement of planning permission.

17. Mr. Germaine says that following on works carried out on 20th October, 2016, “a catastrophic” collapse occurred to the rear of the building and he exhibits a photograph which shows a large gaping hole in the wall and a considerable amount of rubble in the form of timber and mortar scattered around.

18. Mr. Germaine says that it became apparent that the building had no foundations and that there was “immediate concern as to the stability of the remainder of the building given the relatively minor works that caused the rear wall to collapse”. He says that the collapsed wall supported part of the roof, and that the lack of support for the roof which in turn tied the building together had the combined effect that the building became unstable and unsafe. He says the roof timbers were in very poor condition and damaged by rot, as were the floors.

19. Mr. Germaine obtained a report from PDS BFP Consulting Engineers and Bill Forristal B.E. of that firm inspected the Premises prior to providing his report dated 27th October, 2016, and gave a considered view that the structure remaining was in a “dangerous state and presents a significant hazard both within the site, to the adjoining properties and to the general public on the adjoining street”, and recommended that “action should be taken as soon as practicable to make safe the site”.

20. Mr. Forristal in a previous paragraph in his report noted that the “root cause” of the recent collapse of the rear wall “is not immediately apparent” but noted that the structural configuration combined with poor condition of flooring and roofing timbers resulted in an unstable structure prone to collapse from vibrations or from accidental impact.

21. Mr. Forristal recommended that access to the site be restricted, that consultation be had immediately with Carlow County Council, that temporary safety measures and “long-term proposals” and measures be taken, and that the damaged roof and damaged and dangerous masonry walls be reduced to a safe height. It was noted as important that agreement be reached with neighbouring owners on temporary and long-term weathering and structural support. Prompt action was advised.

22. Mr. Forristal expressly noted the “broader” scope relating to the planning and building control situation on site.

23. The evidence of Mr. Germaine was that the building was demolished in reliance on this report and for reasons of health and safety. His evidence is that his motivation in carrying out the works of demolition was to ensure the safety of nearby buildings and members of the public, and that he was anxious to do so before what he describes as the “festivities” expected over the October bank holiday weekend “reached the building”.

24. The respondents rely on this sequence of events as the factual basis on which it is argued that the works carried out were exempted development.

25. Mr. Germaine avers that it was always his intention to refurbish the building in the manner which is now intended and that “the intention in respect of the building” is to reconstruct it “in the same style and in terms of its appearance facing the street” and the new building will be “identical or certainly not materially different from, the building that was there originally”. He asserts that the works now proposed to reinstate the building will have the effect that the new building on the site will be of the “same appearance of the original building, albeit in a structure that will be stable and appropriate”.

The statutory provisions

26. Section 2 of the PDA as amended provides the definition of “works” as follows:

“works’ includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.”

27. The legislation identifies a class of development including the carrying out of works as exempt, and the relevant exempting provision on which the respondents rely is s. 4(1)(h) of the PDA:

“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;”

28. The leading case on the interpretation of the exempting provisions is the judgment of Ryan J. in *Michael Cronin Readymix v. An Bord Pleanála* [2009] 4 I.R. 736. The works in question involved the extension of quarry works to incorporate a plant to manufacture cement blocks. An Bord Pleanála determined, pursuant to its statutory power in s. 5 of the PDA, that the construction of the extension for block-making was not exempted development, as it did not constitute works carried out for the “maintenance, improvement or other alteration” of the existing structure. The judgment of Ryan J. was given in the challenge by the applicant to the

decision of An Bord Pleanála.

29. Ryan J. considered the meaning of the word "alteration" in s. 4(1)(h) and identified a number of different meanings in the phraseology used in the subsection. Of particular relevance to the present application is that Ryan J. noted that when the effect of works of improvement, maintenance or alteration was to render the appearance inconsistent with the structure, the works were not capable of being characterised as exempt. An alteration envisages of its nature "some material impact", but an alteration that is inconsistent with the character of the building is not exempt.

30. Ryan J. considered that An Bord Pleanála had been wrong in its interpretation of s. 4(1)(h), and as he put it:

"an extension is not excluded as a matter of definition. An extension can be an improvement or an alteration. Maintenance and improvement (and other alteration) are the *purposes* for which the work is done in exempted development." (para. 25)

31. Ryan J. summarised the matter as follows:

"It is clear when the paragraph is analysed in this way that work that is exempted development can materially affect the external appearance of the structure provided it does not make it inconsistent with its own character or that of neighbouring structures. This is precisely the point that was decided in *Cairnduff v. O'Connell* [1986] I.R. 73, where the Supreme Court was satisfied (although Griffin J. had some reservation on the point) that the works did materially affect the external appearance of the defendant's house. The court held that the work was not inconsistent with the character of the house itself or adjoining houses and was therefore exempted development. The balcony and staircase at the back of the defendant's house could well be described as an extension, as well as an alteration or an improvement." (para. 26)

32. Ryan J. gave a number of illustrations of works that might be considered exempted and others which would not. The building of a modest extension to a domestic dwelling, and the carrying out of painting or other works of decoration or maintenance might in some cases change the character of a building but in other cases not do so. As he said, the definitions are not "intended to express legally watertight and hermetically sealed concepts and have to be given their reasonable meanings in the particular contexts in which they are used." (para. 27)

33. In reliance on that judgment, the respondents argue that the works carried out by them, while they are properly to be characterised as "works" within the meaning of the PDA, are exempted works of development as the works were carried out with the intention of reconstructing the building, i.e. for the purpose of improvement or alteration of the building, and that, as it is the intention of the respondents that the building would be restored in the same style as the building that was there originally, the works are exempt.

34. The proposition is grounded in an assertion that works may be exempted if the subjective intention or purpose of the person carrying out those works is to maintain or improve an existing structure, and that an accidental or unintended consequence of the carrying out of works remains exempt even if the consequence of those works would not taken alone be exempt. I do not consider this proposition to be legally sound for a number of reasons.

35. The suggestion that the exemption contained in s. 4(1)(h) requires a planning authority or the court to engage in an analysis of the intention of a person would make a decision on a planning matter one to be determined on the basis of a finding of subject motive or intention, would involve the planning authority or the court in an analysis of subjective, and difficult to ascertain, intention, and could make a consideration of whether works were exempt a matter of conjecture. Whether works or a development are exempt is a matter to be determined objectively by reference to the definition in s. 4(1)(h), and by reference to the character of the building and adjoining buildings, not by reference to whether the works were deliberate, accidental or, as presented by Mr. Germaine, merely an unfortunate and unintended consequence of the carrying out of improvements.

36. The question whether particular work is exempt is a question of law to be determined in the light of the facts and the definition contained in the PDA. Just as the question whether the impact of works materially affects the external appearance of the structure is a question of the application of legal principles to the facts, so too is the question whether works are exempt. The planning authority determines the matter by reference to the nature of the works and the nature of the building to which alterations are made. The task is the assessment of whether the carrying out of the works, be they characterised as improvement or maintenance, has or is likely to have the effect that the building has lost its material or essential elements. These matters are to be objectively assessed.

37. The concrete application of the provisions relating to exemption readily admit of different classes of work of different degrees of intensity lying in different places along a spectrum between works which can readily be characterised as improvement, and works which have the effect of changing the original identity of a building, such as the external appearance or the character of the building is inconsistent with or materially different from the old building.

38. To take an example, the carrying out of works to extend the ground floor of an existing dwelling house might involve the demolition of some of the rear wall of the building. The purpose of demolishing the wall is to facilitate or enable the construction of the extension, which could be characterised as an improvement or alteration of the existing structure. The excavation and demolition of the rear wall is carried out in order to facilitate the works of improvement or extension. In the words of the statute, the carrying out of the work of demolition is *for* that improvement.

39. The entire demolition of the house on the other hand will inevitably affect the external appearance of the structure, and it is difficult to imagine a more extreme example of the alteration of a structure than the alteration by demolition of an entire building as a result of which what is left is an empty site or a hole in the ground.

40. The mere fact that the motive or purpose of demolishing the building is to build a new building with modern materials, with an appearance identical, or materially similar, to the previous building cannot of itself render demolition exempt. Put simply, the new building is not the same structure as the old building, and while this might be particularly obvious or stark in the case of a historic building, it is an observation that may be made in regard to any building, even a building of no particular architectural or conservation interest.

41. The matter can also be dealt with by reference to the identity or essence of a building, and any work of demolition or excavation which means that the original building has entirely lost its identity as a building, could not in my view be exempt development as it could not be said that the works did not materially affect the external appearance of the structure. The demolition of a building does not merely affect the external character of the structure, but destroys the structure.

42. There is some judicial authority on how a court might determine how a building has lost its original identity in planning terms. Herbert J. in *McCabe v. Córas Iompair Éireann & Anor.* [2007] 2 I.R. 392, considered precisely this question in regard to works carried out by the respondents to a railway bridge which it claimed had been necessitated by damage caused to the bridge by being repeatedly struck by heavy good vehicles. In the course of the works, the respondents eliminated an arch in the bridge and replaced it with a flat deck. Planning permission had not been obtained for the works. Herbert J. held that the works were exempted development, being works for the maintenance, improvement or alteration of the bridge. Herbert J. considered that the matter came down to the extent or degree of the works or reconstruction:

"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." (para. 23)

43. Herbert J. found that the replacement of the brick and stone arch with a new flat span pre-concrete deck structure was "undoubtedly an improvement of the structure", and that the original bridge "has not been so totally altered that it becomes a new bridge even though it maintains some part of the former bridge".

44. Herbert J. considered various indices or elements of the new bridge structure as relevant to his consideration. The overall dimensions of the bridge remained the same, the essential and immediate visual impact was preserved as the original sections of the original limestone abutments remained. The new arches were faced with reconstituted stone blocks. The visible replacement stone work "was designed to blend, and does effectively blend the new single span flat deck" with the existing stone structure. Herbert J. also referred to the colour or design of the materials used and noted that these did not "contrast discordantly" with the other masonry.

45. The Supreme Court considered the question in *Cairnduff v. O'Connell*, which dealt with s. 4(1)(g) of the then relevant Act of 1963. Finlay C.J. held that the insertion of a window in the side wall of the three storey terraced house, the replacement of a window by a door in the construction of a balcony, and the installation of a staircase for the purpose of converting it into a residence of two flats, did not so materially affect the external building of the structure as to render it inconsistent with the character of the house itself or adjoining house:

"Secondly, I am satisfied that the character of the structure provided for in the sub-section 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 ..." (p. 77)

Application to the facts of the present case

46. The case law, including the judgment of Herbert J. in *McCabe v. Córas Iompair Éireann & Anor.* and the Supreme Court in *Cairnduff v. O'Connell*, relates to works of development which altered existing structures, and by which the court was considering whether the structures that lost their original identity. The entire destruction of a building, which leaves nothing more than a hole in the ground, must of its very nature be an alteration to which the process identified in s. 4(1)(h) could not be applicable, namely that works be carried out for a purpose with a particular effect on an existing structure and consistent with the essence or identity of that structure.

47. The entire character of the Premises as a building has been destroyed, and therefore, in my view, as a matter of law and objectively speaking, it is not possible to argue that the works did not so materially affect the external appearance of the structure so as to render its appearance or character inconsistent with its previous structure or surrounding buildings.

48. The matter is not one of motive, and the destruction of a building even for purposes of putting in its place a building which is more structurally sound, cannot render the works exempt.

49. It follows, therefore, that I consider that the respondents have failed to convince me that the development carried out on the premises is exempted development. This has the effect that s. 160 of the PDA is engaged and the application under that section is properly brought.

The section 160 application: discretion

50. The respondents concede that works to reinstate the building are required to be done, and have in open court and on affidavit expressed a willingness to carry out the necessary works to replace the demolished building with a new building of similar character and type. In those circumstances, the respondents say that it is unnecessary and wrong that an order be made under s. 160, and that even I were to determine that the works carried out by the second respondent constituted unauthorised development, that I should refuse to grant injunctive relief having regard to what they say were *bona fide* intentions, and the fact that the building was demolished for reasons of health and safety and not with any motive inconsistent with the planning code, or with an intention of deliberately ignoring the architectural and period features of the building.

51. The leading judgment on the power of the court to grant a planning injunction under s. 160 remains the case of *Morris v. Garvey* [1982] I.L.R.M. 177 which has been considered in a number of subsequent cases including the judgment of Clarke J. in *Cork County Council v. Slattery Pre-cast Concrete Limited & Ors.* [2008] IEHC 291, where he noted that while the court retained a discretion as to whether it might grant an order under s. 160 where it is established that there has been unauthorised development, that discretion is to "sparingly exercised" (para. 12.1):

"At the same time the starting point has to involve a recognition that unauthorised development is unlawful and that a court should be slow to tacitly accept the unauthorised nature of a development by giving any undue leeway to the party who has been guilty of the unauthorised development in the first place."

52. Undoubtedly, the actions of the parties have a bearing on the exercise of the court's discretion, but so too do other factors.

53. Kearns P. in *Wicklow County Council v. Kinsella* [2015] IEHC 229, at p. 56 of the judgment identified a number of relevant factors:

"(a) The reasonableness of the conduct of both parties;

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

54. In the present case, the planning authority is of the opinion that the demolition works were not exempt and has sought an order for the reinstatement of the building in its totality "in like dimensions and fabric, and in consultation with the Council and further with the consultation of a conservation architect in the Department of Arts". There was no delay and the breach of the planning code is not trivial or technical.

55. The one factor which might influence me in determining whether to grant an injunction is the reasonableness of the conduct of the respondents, and whether the demolition of the building was an unintended consequence of other clearly exempt works. This does require that I determine an issue of fact.

56. Mr. Germaine asserts that his purpose in carrying out the works of total demolition arose from advice that the building was unsafe, and that the sequence of events had the effect that, notwithstanding his prior intention, the only reasonable and safe thing to do was to demolish the building in its entirety.

57. The applicants point to a number of factors which would suggest that the evidence of Mr. Germaine is not credible. In particular, they point to the fact that the timber, clay brick, timber rafters and timber floor, found in the demolition yard were not in very bad condition, or were in good condition, notwithstanding what is asserted by Mr. Germaine. They point also to the fact that Mr. Germaine, before he received the report from Mr. Forristal, at 12:15 on Saturday 29th October, 2016, had some hours earlier begun the demolition works. None of the recommendations made by Mr. Forristal were followed, including the recommendation that the respondents seek "planning permission for demolition or have the written authorisation/direction from the County Council". The planning authority was not consulted nor was an agreement reached with neighbours. Mr. Forristal in a letter of 30th October, 2016, sent to Mr. Germaine confirms that he had advised Mr. Germaine before the works of demolition were carried out verbally and by text that "you could not proceed without getting the necessary approvals". Mr. Forristal says the works carried were "unauthorised works" and done "against my advice".

58. The applicants argued that the weight of evidence, including that of independent experts including Mr. Forristal, the affidavit of Karl Pedersen, Architect sworn on 28th November, 2016, and the affidavit and exhibited memoranda of Paula Murphy, Executive Planner of Carlow County Council, sworn on 14th November, 2016, which shows advice given to Mr. Germaine on Thursday, 27th October, 2016, to, *inter alia*, take down the damaged roof safely and to consult with Carlow County Council on matters of temporary safety and long term proposals, points to a deliberate or careless approach to the works by the respondents.

59. Nonetheless, the matter remains one where there is a conflict on affidavit, and notwithstanding that s. 160 provides that the application is to be heard by affidavit, a material fact asserted on affidavit by Mr. Germaine that the demolition works were done wholly for safety reasons, is one that cannot be resolved by affidavit. Certain objective and independent pointers exist to point to a more complex series of motives, but nonetheless it seems to me that in order to resolve the matter fully and in order to fully adjudicate on whether the discretionary factors identified on behalf of the respondents should preclude me from granting an injunction, it is appropriate that I now require the attendance of Mr. Germaine for cross-examination. I consider that the conflict of evidence may not be readily resolved without the cross-examination of Mr. Germaine on his two affidavits.

60. A notice of motion issued on 7th March, 2017, pursuant to O. 40, r. 1, requiring the attendance of Mr. Germaine for cross-examination and for reasons relating to the listing of the case, this application came to be listed at the hearing of the application under s. 160 on 24th March, 2017. Mr. Germaine did not attend and, therefore, the matter proceeded in his absence by the opening of the affidavit evidence and legal argument. Both counsel accepted that a final decision on the application may have to await the result of cross-examination and I agree.

61. In summary, I conclude:-

- (a) I am satisfied as a matter of law that the works of demolition carried out by the respondents are not exempted development for the purposes of s. 4(1)(h) of the PDA.
- (b) Whether I should exercise my discretion and refuse to make an order in the light of the assertion that the demolition occurred as a matter of mistake or as an unintended consequence of a lawful action will await the cross-examination of Mr. Germaine.

62. The suggestion that an injunction is not necessary having regard to the concession made by the respondents is linked to the question of the discretionary nature of the remedy, albeit I note for present purposes that the degree to which the reinstatement must respect the fabric of the historic building is one which may require ongoing supervision by an expert. I am persuaded by the argument of the County Council that the works must be of a type and quality which respects that character, and that ongoing scrutiny and supervision may be necessary in the circumstances.