Neutral Citation [2012] IEHC 406

THE HIGH COURT

IN THE MATTER OF AN APPLICATION UNDER SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000

[2011 No. 26 CA]

BETWEEN/

THE COUNTY COUNCIL OF THE COUNTY OF WICKLOW

PLAINTIFF

AND

KATIE (OTHERWISE CATHERINE) FORTUNE

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered the 4th day of October, 2012

1. This appeal from a decision of the Circuit Court raises difficult and, in some respects, novel issues concerning the application of the Planning and Development Act 2000 ("the Act of 2000"). The first issue concerns the nature of the seven year limitation period provided for in s. 160(6)(a)(i) of the Act of 2000. Does this section represent a jurisdictional bar to proceedings commenced after the seven year period or is it in the nature of a defence available to a respondent? Moreover, on whom does the burden of proof lie? The second issue relates to the nature of the "inviolability" of the dwelling as provided for in Article 40.5 of the Constitution (and for that matter the "respect" for the family home provided for in Article 8(1) ECHR). To what extent, if at all, can this constitutional provision be invoked by the home owner by way of defence to an application for an injunction which would seek to compel him or her to remove the dwelling for want of planning permission?

2. These important issues arise in the following circumstances. The defendant, Ms. Fortune, has at some stage within the last thirteen years or so constructed a small timber framed chalet approximately 70 sq. m. in size in a wooded area of high natural beauty in Lough Dan, Co. Wicklow. Wooden decking in the form of a patio has been laid around two sides of the chalet. While it seems clear from the photographs supplied to the Court that the chalet has been sensitively constructed and is not immediately visible from the adjoining road, the stark fact remains that this chalet was built without planning permission.

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

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

> "1. The site of the proposed development is at an elevated location designated in the Wicklow County Development Plan 2004-2010 as an "area of outstanding beauty". According to Policy SS9 of the Settlement Strategy is the policy of the planning authority not to allow development of dwellings within areas so designated, unless it can be satisfactorily demonstrated that the applicant has a permanent note of residence of the immediate vicinity or has resided at the location for a minimum often years. This policy is considered reasonable. It is considered on the basis of the submissions made in accordance with the application of the appeal that it has not been demonstrated that the applicant comes under the scope of the criteria set out under this policy. The proposed development would, therefore, contravene this policy and would be contrary to the proper planning and sustainable development of the area.
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> 2. The site of the proposed development is located off a lane that is substandard in horizontal and vertical alignment and in poor condition. The Board is not satisfied on the basis of the information provided in connection with the application of the appeal that the lane can be upgraded and maintained to a satisfactory standard to serve the development. The proposed development would, therefore, endanger public safety by reason of traffic hazard and obstruction of road users."

Ms. Fortune herself has explained the circumstances in which the chalet was constructed. She has explained that in 1999 she found herself separated with two young children, then aged seven and nine. She had nowhere to live because she had previously lived with her husband in accommodation which was associated with his work. In those circumstances she was effectively destitute and her mother (who is sadly deceased since the date of the Circuit Court hearing) allowed her to place a mobile home on this site. She goes on to explain that with the assistance of her family:-

> "I was able to fund the erection of a wooden chalet on the lands to provide a home for my children and I. The alternative was for me to seek social housing and I felt that I would be able to provide a better home for my children amongst their extended family than relying on the assistance of the State and living far removed from them. The chalet is small and has been designed in a manner as sensitive to its surrounding as possible. It is located in a discrete and isolated situation and is not visible from its surrounds."

5. Other members of her extended family live in or use similar sites in the immediate vicinity.

6. By decision dated 8th February, 2011, Her Honour Judge Flanagan found for the applicant Council. In effect, the Circuit Court

ordered that the site should be cleared and in particular that the occupation of the chalet should cease as a prelude to its demolition and removal. Ms. Fortune now appeals to this Court against the making of these orders.

Section 160(6)(a)(i) of the Act of 2000 and the seven year limitation period

7. It is against this general background that we can turn to consider the first issue, namely, that of the onus of proof in relation to the seven year limitation period. Ms. Fortune contends that the application in statute-barred because the Council have not shown that these proceedings were commenced within the seven year time limit. Section 160(6)(a) provides in relevant part that:-

"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 seven years from the date of the commencement of the development." (italics supplied)

8. The first thing to note is that s. 160(6)(a)(i) does not impose a jurisdictional bar on the granting of a statutory injunction in the event that the proceedings have been commenced after seven years, the italicised words notwithstanding. The words "shall not be made" have been hallowed by statutory usage in the field of limitations law as creating simply a defence and not a jurisdictional bar. Given that the Supreme Court has stressed that the similar wording of s. 11 of the Statute of Limitations 1957 creates a full defence available (if applicable) to the defendant who elects to plead it (*cf* the comments of Henchy J. in *O Domhnaill v. Merrick* [1984] I.R. 151, 158), the same must be taken to be true by analogy in the case of an application for a statutory injunction given that the same formula has also been used ins. 160(6). The seven year time limit is, therefore, a matter of defence and is not one which goes to not jurisdiction.

9. Second, it is true that as Mr. Bradley S.C. pointed out, s. 156(6) of the Act of2000 expressly provides that:-

> "In a prosecution for an offence under sections 151 and 154 it shall not be necessary for the prosecution to show, and it shall be assumed unless the contrary is shown by the defendant, that the subject matter of the prosecution was development and was not exempted development."

10. Likewise, s. 162(1) provides that in any proceedings for an offence under this Act, the onus of proving "the existence of any permission granted under Part III shall be on the defendant". But I cannot for several reasons regard these provisions as requiring the application of the *expression unius* maxim of statutory interpretation in the context of s. 160(6). The fact that the Oireachtas elected to lay down a special rule governing *criminal* prosecutions in respect ofunauthorised development offences (s.151) or offences relating to warning notices (s. 154) or more generally (s. 162(1)) cannot determine the onus of proof in relation to an aspect of the limitation period applicable to *civil* enforcement. No wider inference can therefore be drawn in relation to the *lex specialis* provided for in s. 156(6) or, for that matter, s. 162(1). Indeed, McKechnie J. already said as much on this very point in his seminal judgment in *South Dublin City Council v. Fallowvale Ltd*. [2005] IEHC 408 and I respectfully agree with his analysis.

11. Third, it is true in all the s. 160 cases to date (including the cases dealing with its statutory predecessor, s. 27 of the Local Government (Planning and Development) Act 1976) this Court has stressed that the *general onus of proof* in such cases rests with the applicant: see, e.g., *Westport UDC v. Golden Ltd*. [2002] 1 I.L.R.M. 439 per Morris P., *Fingal County Council v. Dowling* [2007] IEHC 258 per de Valera J. and *Wicklow County Council v. Jessup* [2011] IEHC 81 per Edwards J. This case-law can be traced back to the statement of Finlay P. in *Dublin Corporation v. Sullivan,* High Court 21st December, 1984, where he stated that:-

> "I am satisfied since the applicants come seeking relief which would affect the ordinary property rights of the defendant and which potentially could cause him loss that in the absence of some express provision to the contrary which does not exist either ins. 27 of the 1976 Act or otherwise in the planning code that the general proposition must be that it is upon the applicants that the general proposition must be that it is upon the applicants there rests the onus of proof of proving the case which they are making...."

12. While fully accepting these comments so far as the general onus of proof in such cases is concerned, it may be recalled that prior to 1992 the old s. 27 procedure did not provide for a time limit along the lines of s. 160(6)(a) so that in *Sullivan* Finlay P. was obviously not addressing the question of on whom the burden of proof with regard to the time period actually rested. Nor do I read the comments of de Valera J. in *Dowling* as establishing any general proposition regarding the location of the burden of proof with regard to the time limits to s. 160(6)(a), as those comments were rather made following a consideration of the evidence of both the applicant and the respondent and it was in that context that the judge found against the applicant.

13. It is also true that in *Fallowvale* McKechnie J. rejected the argument that s. 160 created any reverse-onus types provisions:-

> "To overcome this difficulty it has been suggested by the planning authority that this court shall read into s. 160 a provision which would have the effect of placing the onus of proof on a respondent in circumstances, *inter alia*, where that party wished to claim an exemption under the planning code either through its statutory provisions or by virtue of the exempted provisions of the Regulations or indeed if the defence should rely upon a pre-1964 user. In my opinion, there is no known rule of interpretation which would permit this court to so construe the provisions of s. 160 of the Act. On the contrary, it seems to me that given the express omission of any such provision or of any similar or comparable presumption to that contained in other sections of the Act, it would be entirely inappropriate for this court to construe the section in the manner suggested. Accordingly, I do not believe that by any acceptable method of construction can a like provision or rule with similar effect be read into the section in question."

14. Yet at the same time McKechnie J.'s exceptionally thorough review of the applicable case-law- a review upon which I could not hope to improve- reveals that in some instances and in some circumstances the legal burden may be taken to have rested with the respondents with regard to at least some aspects of the s. 160 application procedure:-

"The onus of proof issue, which was keenly contested in this case, arises by virtue of the respondents' reliance on s. 4(1)(h) of the Act of 2000 and on Class 32 and Class 39 of the Regulations. It is no part of their argument on the facts of this case that any of the development in question has the benefit of a pre-1964 user. Therefore, the views which I express on this point are confined to the statutory provisions as identified and do not purport to cover circumstances, which by virtue of their existence prior to the 1st October, 1964, are in effect excluded in their entirety from the provisions of the Act of 2000

In *Lambert v. Lewis* (Unreported, High Court, Gannon J., 24th November, 1984) the issue before the court required in the judge's opinion "no more than an interpretation of the exemption regulations in S.I. No. 65 of 1977 ...."These regulations can be considered as predecessors to the 2001 Regulations and on the point at issue are indistinguishable from them. In that case, it was submitted to the

court that the activities complained of fell within the class of "light industrial use" and that the premises in question had a history of such use prior to 1st October, 1964, or alternatively prior to 15th March, 1977, the date upon which these regulations came into force. Having found that the defendant's premises did not have the benefit of any such use on either of the dates mentioned and having concluded that the use complained of constituted a material change of use, the learned judge, at pp. 10-11 of the judgment continued:-

> 'Because there is no existing permission granted under the Planning Acts to use the subject premises other than as an amenity contiguous or adjacent to the curtilage of a private residence in an area zoned for primarily residential use and because the occupier Mr. Lewis has made applications for permission for retention of use the onus lies on him to establish the facts from which the court could reasonably infer that there has been no such material change of use. This he has failed to do.
>
> From a further consideration of the judgment as to the manner in which the hearing proceeded, it is clear that the defendant assumed the responsibility of bringing the use of his premises within the exempted Regulations. Furthermore, in addition to the passage above quoted the learned trial judge at p. 14 of the judgment reaffirmed his opinion by saying "In my view any change of use from use for such purposes is an unauthorised use unless coming within the provisions for exempted development in either the 1963 Act or the Regulations of Statutory Instrument 65 of 1977. The onus of establishing exemption falls on the Respondents.'"

15. McKechnie J. then continued thus:-

"The decision of Finlay P., as he then was, in *Dublin Corporation v. Sullivan*, supports in my view, the limited proposition which can be deduced from *Lambert v. Lewis*. In *Sullivan's* case it was admitted that a change of use from a single dwelling unit to a multiple dwelling unit had occurred after the material date. Both parties contended that the other party had the responsibility of establishing that this change of use had occurred after 1st October, 1964. Having expressly agreed with the views of Gannon J. in *Lambert v. Lewis*, the then President distinguished *Sullivan* from that case by saying at p. 3 that "... the unauthorised development relied upon by the applicants is an unauthorised change of use and the issue which arises is as to whether it is a prohibited unauthorised change of use not as to whether being a prohibited unauthorised change of use it is the subject matter of the statutory exemption". In those particular circumstances he was satisfied that the onus rested upon the applicants to prove that the suggested material change of use had occurred after 1st October, 1964. It is therefore clear that *Dublin Corporation v. Sullivan* was not dealing with an exemption claimed on foot of a statutory provision or on the basis of exempted developments under the Regulations, but rather was concerned solely with the date upon which the admitted change of use had occurred. I therefore do not feel that this decision is on the point at issue in this case, but in any event by the express wording of his judgment, Finlay P., as he then was, agreed with *Lambert v. Lewis*. See also the decision of O'Caoimh J. in *Fingal County Council v. Crean*, (Unreported, High Court, 19 October, 2001) in which the learned judge concluded that the onus of proof rested upon the respondents to satisfy the court that the exemption relied upon, being that contained ins. 4(1)(g) of the Act of 1963 applied to the circumstances of that case.

Further support for this position is to be found in the decision of the Supreme Court in *Philip Dillon v. Irish Cement Limited*, (Unreported, Supreme Court, 26 November, 1986: see para. 2.654 in O'Sullivan and Shepherd, Irish Planning Law and Practice) In that case the net issue was whether the activities of the respondent were exempted under the 1977 Regulations and in particular under Class 34 thereof. Finlay C.J. speaking for the court said:-

> 'I am not satisfied that this case comes within Class 34 as an exemption. I am satisfied that in construing the provisions of the Exemption regulations the appropriate approach for a Court is to look upon them as being Regulations which put certain users or proposed development of land into a special and in a sense privileged category. They permit the person who has that in mind to do so without being in the same position as everyone else who seeks to develop land, namely, subject to the opposition or views or interests of adjoining owners or persons concerned with the amenity and general development of the countryside. To that extent I am satisfied that these Regulations should by a court be strictly construed in the sense that for a developer to put himself within them he must be clearly and unambiguously within them in regard to what he proposes to do.'

Whilst it might be suggested that this passage deals more with the method of interpretation rather than with on whom the onus rests, nevertheless I feel, that read as a whole and also by reason of the particular reference to the developer putting himself within the Regulations, the judgment is endorsing the principle stated in *Lambert v. Lewis*. In addition the court also explains at least in part, the justification for placing this obligation on a respondent when the Regulations are being invoked.

Westport UDC v. Golden [2002] 1 I.L.R.M. 439 is the case most heavily relied upon by the respondents and in their submission is the preferred line of authority on the point at issue. [The relevant passage from the judgment of Morris P. reads] as follows:-

> 'I approached this case on the basis that the onus is upon the applicant to establish to the courts satisfaction that one of the matters referred to in s. 27(1) of the 1976 Act has been or is occurring, that is to say that the onus is on the applicants to show that development of land, being development for which a permission is required under Part IV of the Principal Act, has been carried out or is being carried out without such permission or that an unauthorised use is being made of the land.
>
> I do not accept that *Dillon v. Irish Cement Ltd*. is authority for the proposition that where the respondent seeks to establish an immunity on the grounds that a development is an exempted development under s. 4 of the 1963 Act that he must bring himself within the exemption. *Dillon v. Irish Cement* was a case in which Finlay C.J. considered that in the particular circumstances of that case and by reason of the unique exemption claimed there was such an onus on the respondent. However in the present case none of these considerations apply.'

The same judge also gave judgment in the earlier case *Lennon v. Kingdom Plant Hire Ltd*. (Unreported, High Court, Morris P., 13th December, 1991) where one of the issues was whether or not the works in question could be correctly categorised as land reclamation and thus exempt under the then exempting regulations. It would appear that the case proceeded on the basis that the onus of establishing the applicability of the exemption rested upon the respondents and accordingly on that ground can be clearly distinguished from *Westport UDC. v. Golden*. As a result of this concession there was, of course, no contrary submissions or debate on this point. It can, I think therefore, be accepted that the more concluded view of Morris P. is that as he outlined in the *Westport UDC v. Golden* decision."

16. McKechnie J. then summed up thus:-

> "In my opinion the stage presently reached is that there is clear preponderance of authority in favour of the proposition that when the development complained of is sought to be excused under cover of either s. 4 of the Act of 2000 or under the exempted developments provisions in the Regulations then the onus of establishing this point is upon he who asserts. In this context I cannot see any difference between the section and the Regulations. I also cannot accept that *Lambert v. Lewis* can be explained away as being a decision on its own facts and neither can the decision of the Supreme Court in *Dillon v. Irish Cement*. In reaching this conclusion, however, I am not in anyway suggesting that the onus of proof is not otherwise on the moving party. Such party must therefore satisfy the court by probable evidence of all the other proofs which may be essential to a successful application under s. 160 of the Act of 2000."

17. It may also be observed that in *Pierson v. Keegan Quarries Ltd*. [2010] IEHC 404 Irvine J. noted the parties had agreed that "the onus of proof lies upon the party who seeks to rely on a statutory time limit to defeat a claim to prove that assertion".

18. In the present case the respondent contends that the application is time-barred. It is specifically contended that the Council cannot show that the application was commenced within seven years of the commencement of the development. The present proceedings were commenced on 22nd September, 2009, and the Council can simply show that on diverse dates from 2006 onwards the chalet had been constructed and that mobile homes were on the site. The Council freely admits that it is simply not in a position to prove affirmatively the date on which the development commenced.

19. Here it may be recalled that the seven year time limit is, as we have already seen, simply a matter of defence, not jurisdiction. This means that the application will be regarded as statute-barred only if the respondent elects to raise this defence. In my view, in the light of *Fallowvale* the onus in this regard rests with her who asserts that this is so, namely, Ms. Fortune. This, however, she has signally failed to do. In particular, she has failed to tell the Court even the approximate dates on which the development commenced, even though this is a matter which of necessity is peculiarly within her own knowledge.

20. Indeed, it could be said that a more general principle of the law of evidence bearing on peculiar knowledge really underlies and explains decisions such as *Lambert v. Lewis*, *Dillon v. Irish Cement* and *Fallowvale*. This is perhaps especially true of matters such as the date of commencement of a particular development as distinct, for example, from the question of whether the development was unauthorised. The latter question lends itself to objective determination by reference to a public register to which the public have access. It is, therefore, not considered unfair or unreasonable that the onus of proof in this regard should - at least in general - rest with the applicant.

21. It is otherwise in the case of the date of commencement of a development. Take, for example, the present case where the chalet was constructed in a wooded area which was not readily visible from a public road or path. How could a planning authority (or, for that matter, a member of the public who sought s. 160 relief) be expected to prove the date on which the development was commenced so that the seven year period might be nicely calculated for the purposes of a limitation period? The chalet might well have been constructed for months or even years before its planning status came into question or matters came to the attention of a body such as the Council. An applicant seeking a s. 160 order would, for example, have no right *in advance* of the proceedings to demand details of matters such as architects' drawings or invoices from builders so that the date of completion of the works might perhaps be objectively ascertained, even though, of course, such material might be obtained on discovery.

22. The fact remains, however, that it would be unreal and unduly burdensome on an applicant for relief under s. 160 if he or she were to be expected to carry this burden. This, after all, is the rationale for the peculiar knowledge rule. It represents a practical recognition of life's realities that certain matters lie almost beyond the beyond the effective capacity of an outsider to prove where they relate to events which are largely personal and private to the other party. An old example is supplied here by the decision of the House of Lords in *General Accident Fire and Life Assurance v. Robertson* [1909] A.C. 404. Here the question was when a particular application form for life insurance had been received and registered by an insurance company. This date assumed importance because the insurance company had repudiated liability on the ground that the insured had not died within the twelve months of the registration of the policy and the policy had provided for such a limitation clause. Lord Lorebum L.C. held ([1909] A.C. 404, 413) that as the specific date on which the company had received and registered "was peculiarly and solely within their knowledge", the burden of proof lay with them.

23. The precise date on which the development "commenced" is of necessity one such example. "Development" is defined by s. 3 of the Act of 2000 as the "carrying out of any works" on or over land or the "making of any material change in the use of the any structures or other land." Who but the landowner could be expected to know or prove these facts? A landowner may endeavour to conceal the fact that unauthorised development has taken place or that there has been a change of use on the lands. Is it be said that an applicant for s. 160 relief is effectively to be denied the right to come to court because he or she cannot establish *ex ante* the precise date on which such a development commenced?

Conclusions on the seven year limitation period issue

24. Put in this fashion these questions effectively answer themselves. I would therefore conclude that because (i) the seven year limitation period is a matter of defence, the onus of proof lies with the party asserting it (in this case, Ms. Fortune) and (ii) by reason of the peculiar knowledge doctrine, the onus in this regard rests in any event with the landowner.

25. It follows, accordingly, that as Ms. Fortune has not informed the Court of the date even in approximate terms - on which the building was commenced, she has not established that this application is time-barred by reason of s. 160(6)(a)(i) of the Act of 2000.

The grant of a s. 160 injunction, discretionary factors and Article 40.5

26. There is no real dispute but that the construction of the chalet was unauthorised and that the necessary planning permission for this structure is not in existence. The real question, however, is whether I should exercise my discretion to grant an injunction under s.160. The existence of such a discretion is not really in dispute. It is true that as Barrington J. noted in *Stafford v. Roadstone Ltd*. [1980] I.L.R.M. 1 the nature of the discretion available to the Court under s. 27(1) of the Local Government (Planning and Development) Act 1976 (the statutory precursor to s. 160) was analogous to that available to a court of equity in an injunction application. There are, of course, some potential differences, since the statutory injunction is really a form of public law enforcement and to that extent the public interest may loom larger here than in the case of its private law cousin.

27. This was recognised by Henchy J. in *Morris v. Garvey* [1983] I.R. 319,324 where stressing the community's interests in preserving communal environmental and ecological rights, he went on to observe that:-

> "It would require exceptional circumstances (such as genuine mistake, acquiescence over a long period, the triviality of mere technicality of the infraction, gross or disproportionate hardship or suchlike extenuating or excusing factors) before the Court should refrain from making whatever order....as is 'necessary to ensure that the development is carried out in

conformity with the permission.'"

28. In recent times this Court has stressed that the discretion is limited in those cases where the infraction is gross and the developer has not acted bona fide. Thus, for example, in *Wicklow County Council v. Forest Fencing Ltd*. [2007] IEHC 242 Charleton J. observed that the unauthorised development in question was large and substantial:-

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

30. In *Lanigan v. Barry* [2008] IEHC 29 Charleton J. also noted that in that case he was required to act:-

> "to restrain major breaches of the planning code which have flaunted the legal rights of the community in favour of an unrestrained action that has seriously impacted on the character of a quiet area and the reasonable use by neighbours of their farms and dwelling."

31. Likewise, in *Meath County Council v. Murray* [2010] IEHC 254 Edwards J. granted an injunction pursuant to s. 160 requiring the respondents to demolish an enormous dwelling house which was approximately "double the size of the dwelling for which planning permission had [already] been refused ... and no planning permission was sought for same prior to its construction." Having reviewed the case-law, Edwards J. concluded:-

> "This is not a case of a minor infraction, or of accidental non-compliance, or of non compliance with some technicality. The unauthorised development carried by the respondents was indeed a flagrant breach of the planning laws and completely unjustified. They have sought to drive a coach and four through the planning laws and that cannot be permitted no matter how frustrated they may have felt on account of earlier refusals. While it will undoubtedly constitute an enormous hardship to the respondents to have to demolish their dwelling house, particularly in circumstances where the first named respondent is now a victim of the general downturn in the construction industry and has little work, nevertheless the law must be upheld. Though it gives me absolutely no pleasure to say it, and it is stating the obvious, they have brought this on themselves.
>
> In all the circumstances of the case the Court must accede to the application and grant the relief sought by the applicants. However, the Court is prepared on a humanitarian basis to put a stay on its order of24 months from today's date in the light of the particularly difficult economic times in which we are living which the Court recognises may make compliance with the Court's order all the more difficult for the respondents. However, the order must be complied with in full on or before the expiry of the stay."

32. It may be observed in passing that no argument based on Article 40.5 of the Constitution was advanced in that case. By contrast, this question is central to the present case and this appears to be the first time in which such an argument has been advanced by way of defence in a s. 160 application. I will address the Article 40.5 argument separately.

33. Other factors which might affect the exercise of discretion was whether the developer had relied in good faith on professional advisers (see, *e.g.*, *Pierson v. Keegan Quarries Ltd.*, *Altara Developments Ltd. v. Ventola Ltd*. [2005] IEHC 312); whether demolition might involve hardship to third parties (*Pierson v. Keegan Quarries*) or, indeed, hardship to the developer himself or herself. Normally, however, as the decisions of Henchy J. in *Morris*, Irvine J. in *Pierson* and that of Edwards J. in *Murray* all illustrate, courts are generally unsympathetic to the hardship which was eminently foreseeable and which results from the culpable behaviour of the developer and landowner in question.

34. If one applied the existing case-law to the present case, however, it may be observed that unlike the circumstances disclosed in cases such as *Forest Fencing, Lanigan and Murray*, Ms. Fortune has not engaged in a large scale construction project which manifestly violated proper planning and development considerations. Nor does the dwelling impact on the rights and amenities of her neighbours, unlike the situation disclosed in cases such as *Lanigan and Pierson*. At the same time, while it is true that there were extenuating circumstances- after all Ms. Fortune found herself with young children (and few resources) who she considered might best be raised in an extended family environment in a rural setting - it must be concluded that, objectively speaking, the development was not bona fide. After all, Ms. Fortune elected to build a dwelling in an area of high amenity in circumstances where she must have known that planning permission was required. Were it not for the constitutional argument, I would have been inclined to adopt the same approach as did Edwards J. in *Murray, i.e.*, grant the injunction, albeit subject to a two year stay.

35. We may now turn to examine the constitutional argument. A key feature of Mr. Bradley's argument was that no injunction could or should be granted as this would infringe the guarantee of inviolability attaching to the dwelling as provided for in Article 40.5 of the Constitution. While this argument may well have been prompted by the fresh emphasis given to Article 40.5 by recent decisions such as *Damache v. Director of Public Prosecution* [2011] IESC 11 and *The People (Director of Public Prosecutions) v. Cunningham* [2011] IECCA 64, there is nevertheless no basis at all for the suggestion that Article 40.5 should be confined in its application to the sphere of criminal law and criminal procedure. As is highlighted by the judgment which I am also giving today in the quite separate and different case of *Sullivan v. Boylan*, the guarantee of "inviolability" of the dwelling in Article 40.5 is a free standing, self-executing guarantee which applies to both civil and criminal proceedings and to both State and non-State actors alike.

36. It is also true that, as counsel for the planning authority, Mr. Sheridan readily acknowledged, in this respect Article 40.5 goes further than the parallel guarantee in Article 8(1) ECHR (which provides that everyone has the right "to respect for. ...his home and correspondence..."). It follows that some weight must be accorded to the more emphatic language used by the constitutional provision. As I observed in *EA v. Minister for Justice and Equality* [2012] IEHC371 when contrasting the language of Article 41 on the one hand with Article 8 ECHR on the other:-

> "Moreover, it must be recalled that while Article 8 ECHR simply guarantees the right "to respect" for family life, some weight must be given to the even more emphatic description of family rights contained in Article 41 -"inalienable and imprescriptible"- even if those rights are not, of course, to be regarded as absolute."

37. It seems to me that the passage also applies by analogy to the issue in the present case. It may be recalled in passing, however, that the European Court of Human Rights has stressed that the demolition of or removal of a dwelling by a public authority engages the respect for the private house provided for in Article 8(1)ECHR. The decision making process here must be fair "and afford due respect to the interests safeguarded to the individual by Article 8": see, *e.g., Chapman v. United Kingdom* [2011] ECHR 43, *Horie v. United Kingdom* [2011] ECHR 289.

38. It is also true that there are some legal contexts in which the word "inviolable" might bear the interpretation which Mr. Bradley S.C. has urged upon me. Thus, for example, Article 22(1) of the Vienna Convention on Diplomatic Relations (which is given the force of law by s. 5(1) of the Diplomatic Relations and Immunities Act 1967) provides that:-

> "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission."

39. The use of the word "inviolable" in that special and particular context might suggest something close to an absolute level of protection, although it might be a nice legal question as to whether a planning authority would be entitled to obtain a s. 160 injunction in circumstances where, for example, it transpired that a diplomatic mission had built an embassy premises without the requisite planning permission.

40. Yet the Constitution cannot be interpreted in such a desiccated fashion, divorced entirely from the context and object of the constitutional provision in question. If Mr. Bradley S.C.'s argument were correct, it would effectively mean that residential planning control would be virtually meaningless. It would mean, for example, that a residence which was unlawfully erected in defiance of the planning authorities was immune (or, at least, virtually immune) from the s. 160 procedure, even though, for example, the dwelling might constitute a fire hazard or pose a danger to road users or that it might occupy a prominent position in a region of great natural beauty to the detriment of that beauty spot. If, moreover, this construction of Article 40.5 were to be admitted, what would there be to stop the deliberate and unlawful construction of a dwelling on another's land? Is it to be said that in such circumstances the rightful landowner could not secure an injunction compelling the removal of the dwelling on the ground that it was "inviolable"? The Constitution was not intended to bring about a situation where someone could profit from their own deliberate and conscious wrongful actions by asserting an immunity from legal action and appropriate enforcement by invoking Article 40.5.

41. At the same time, Article 40.5 affords a real protection which the courts must safeguard by word and deed. Insofar as the Article 40.5 speaks of "inviolability", the drafters must be taken to have intended to convey through the use of rhetorical and philosophically inspired language drawn (as Hardiman J. pointed out in *Cunningham*) from the European constitutional tradition so that the dwelling should enjoy the highest possible level of legal protection which might realistically be afforded in a modem society. In the planning context, this does not mean that the courts cannot order the demolition of an unauthorised dwelling because it is "inviolable". It rather means that the courts should not exercise the s. 160 jurisdiction in such a manner so as to require the demolition of such a dwelling unless the necessity for this step is objectively justified and, adapting the language of the European Court of Human Rights (in an admittedly different context) in *Goodwin v. United Kingdom* (1996) 22 EHRR 123, the case for such a drastic step is convincingly established.

Conclusions on the s. 160 and Article 40.5 issues

42. In this regard, it is not simply enough for the applicant Council to show - as, indeed, it already has - that the structure is unauthorised or that the householder has drawn these difficulties upon herself by proceeding to construct the dwelling without planning permission. It would be necessary to go further and show, for example, that the continued occupation and retention of the dwelling would be so manifestly at odds with important public policy objectives that demolition was the only fair, realistic and proportionate response. This might be especially so if, for example, the dwelling jeopardised or threatened the rights or amenities of others or visibly detracted from an area of high natural beauty or presented a real and immediate traffic or fire hazard or the structure in question so manifestly violated the appropriate development plan that the homeowner had no realistic prospect of ever securing permission in respect of the dwelling.

43. Given the novelty of the point and, in particular, the fact that the critical Article 40.5 issue was highlighted only in the wake of the Supreme Court's decision in *Damache* (which decision long post-dated the commencement of these proceedings), I propose to adjourn the question of whether this particular unauthorised dwelling should be demolished for further argument in the light of this judgment. I will, if necessary, allow both sides to adduce further evidence on the question of whether the necessity for a demolition order pursuant to s. 160(1) has, in fact, been convincingly established.