THE HIGH COURT

CIRCUIT COURT APPEALS

[2023] IEHC 574

Record No. 2022/773 CA

BETWEEN

JAN VERWEY

APPLICANT

AND

MICHAEL HOGAN, JOHN MCCARTHY and PATRICK O'SULLIVAN

RESPONDENTS

JUDGEMENT of Mr Justice Twomey delivered on the 20th day of October, 2023

INTRODUCTION

1. It is clear from the Supreme Court decision in *Clare County Council v. McDonagh & Anor & Irish Human Rights and Equality Commission* [2022] IESC 2 that when a *local authority* is seeking a planning injunction to remove a person from an unauthorised development, it is necessary to consider whether the injunction is proportionate in light of the prospects of that person getting accommodation elsewhere.

2. The issue in this case, is whether these considerations arise where it is *a private party*, such as a neighbour, seeking a planning injunction or whether the key and usually determinative question, in whether an injunction should be granted to private party, is whether planning and environmental laws have been breached or not.

BACKGROUND

3. This case concerns unauthorised development on lands at Ballymore, Cobh, County Cork (the "**Property**"), which lands are owned by the first respondent ("**Mr. Hogan**"). His neighbour, the applicant ("**Mr. Verwey**"), obtained an injunction from Judge O'Donohoe in the Circuit Court against Mr. Hogan under 160 of the Planning and Development Act, 2000 ("**2000 Act**") to restore the Property to its condition prior to the unauthorised development.

4. Mr. Hogan has appealed that decision. This is a case in which the following points are particularly relevant.

5. Mr. Hogan accepts that he is the legal and beneficial owner of Folio CK155754F, on which most of the unauthorised development has taken place, and that he is the beneficial owner of Folio CK73434F, where some of the unauthorised development has taken place.

6. Mr. Hogan accepts that he is in breach of planning laws in relation to the developments complained of, and for which Mr Verwey seeks an injunction.

7. The breaches are significant in the sense that the Property in question is zoned agricultural, but there has been construction of roadways, foundations, works on a shed, hardstanding *etc* undertaken on the Property.

8. Mr Hogan applied to Cork County Council ("**Council**") for works which he had undertaken on an agricultural shed to be deemed exempted development under s.5 of the 2000 Act but this was refused in 2018. Despite this refusal, no evidence was provided to the Court to show that he has made any attempt to rectify this or any of the other breaches of planning law.

9. Mr. Hogan received a series of warning letters and enforcement notices from the Council from 2019 up to 2021 regarding the unauthorised development, but no evidence was

produced to the Court that he complied with the terms of those letters or otherwise restored the Property to its condition prior to the unauthorised development.

10. Mr Hogan does not dispute that there has been unauthorised development on the Property, but his defence to this planning injunction is that in relation to a small proportion of the unauthorised development (the unauthorised site entrance, the roadway and hardstanding), he says it was undertaken over 7 years ago. Accordingly, he claims that under s160(6)(a)(i) of the 2000 Act, Mr Verwey's application for an injunction is outside the time limit for such applications.

11. In relation to the remainder of the unauthorised development, his defence is that he is living on the Property in a caravan and his son is living in a mobile home, and that he should not be subject to a planning injunction because Article 40.5 of the Constitution states that:

> "*The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law*".

and he places particular reliance on the Supreme Court decision in *McDonagh.*

<u>The unauthorised site entrance</u>

12. As regards the unauthorised site entrance, Mr. Hogan relies on the photomaps provided by Mr. Verwey's engineer over the years since March 2013 to June 2022, and in particular the photomap dated May 2014, to show that this entrance to the Property was in existence on that date. Since May 2014 is over 7 years since these proceedings were issued in June 2022, Mr. Hogan asserts that the Circuit Court was wrong to have required him to close up this unauthorised road entrance. (It is important to note that the parties' positions regarding the ownership of the lands and other aspects of the case does seem to have been clarified since the hearing before O'Donohoe J. in the Circuit Court).

<u>The unauthorised hardstanding and unauthorised roadway</u>

13. As regards the roadway and hardstanding compound that was developed inside that entrance, the photomap of May 2014 does show the existence of roadway and hardstanding compound at that time. However, it is clear from subsequent photo maps dated March 2017 and June 2022 that there was significant intensification of this hardstanding and of the roadway. These photomaps also show that the roadway extended and was further developed from the original site of the mobile home in May 2014 to the different location of the mobile home. In this regard, these photo-maps therefore also show the movement of the mobile home within the last 7 years.

<u>Other unauthorised development</u>

14. More generally, the photomaps dated March 2017 and June 2022 show a very significant intensification of the unauthorised development during this period of time (which is within the 7 year period). In particular, it is to be noted that these photomaps are exhibited by Mr. Verwey's engineer, and none of this evidence was disputed by Mr. Hogan. The June 2022 photomap shows extensive unlawful development of the Property since the 2014 photomap, which is described, *inter alia,* as follows:

> "Unauthorised compound containing steel containers, metal shed, commercial landscaping equipment and landscaping business waste dumping area'.
>
> 'Unauthorised landscaping business waste dumping area'.
>
> 'Unauthorised compound containing mobile home, campervan [i.e., caravan] steel containers, old cars, a shed under construction, ground levels in excess of 1m, horse boxes, scrap metal'.

15. In summary, it seems to this Court that apart from Mr. Hogan's defence (which this Court accepts is valid) that the unauthorised entrance to the Property was developed more than 7 years preceding Mr. Verwey's application, the only defence that Mr. Hogan has to all

the other extensive unauthorised development on his land, is his averment that he resides in the caravan on his Property and that his adult son, who is 40 and suffers from depression, resides in the mobile home on the Property. On this basis, he claims that, as one's dwelling is inviolable under Article 40.5 of the Constitution, the planning injunction should not be granted.

16. In particular, he relies on the Supreme Court judgement in *McDonagh* to claim that, notwithstanding his own breach of planning laws, Mr. Verwey should not be granted the planning injunction. He claims that this Court should be bound by the principle in that case, that a court is obliged to consider the proportionality of granting *a local authority* an injunction, when it will have the effect of removing a person from their home. Mr. Hogan is, in effect, claiming that after considering the proportionality of the injunction in this case, this Court should conclude that such an order would not be proportional in this case. Mr. Hogan makes this argument, even though it is Mr. Verwey who is seeking the injunction, not the local authority.

17. However, it seems to this Court that the principle in the *McDonagh* case is not applicable to this case, since it is clear from the express terms of that judgment that the key issue in that case was that the party which was seeking the planning injunction, to remove people from their home (in that case also a caravan), had a statutory obligation to house those same people. The importance of this fact could not be clearer from the statement of Hogan J. at para [97]:

> *"Second,* ***a critical consideration here is that the present case concerns an application brought by a Council in its role qua landowner and planning authority****. Yet the Council is* ***also a housing authority*** *which has specific statutory duties vis-à-vis the appellants. It has – arguably – failed in its duty qua housing authority to offer suitable accommodation to the appellants, having regard in particular to Ms*

McDonagh's medical needs. If, moreover, a mandatory interlocutory injunction were to be granted, it would mean, in effect, that the appellants would have nowhere to go without necessarily trespassing on the lands of another party". (Emphasis added)

18. Similarly, and even more significantly, Hogan J. referred *obiter* to the position of a private party, such as Mr Verwey, seeking a planning injunction at para. [104] and he stated:

> *"If in this situation the applicant for such relief was purely a private party, then the case for the granting of interlocutory relief would, at least generally speaking, be* ***almost unanswerable.***" (Emphasis added)

19. It seems to this Court that the reason for this very starkly different approach to a private party seeking a planning injunction, on the one hand, and a housing authority with a duty to house respondents, seeking a planning injunction on the other hand, is because of the importance of ensuring compliance with planning regulation and the rule of law. If it were otherwise, then our countryside might be filled with homes built in flagrant breach of planning and environmental protections, with the owners claiming that they cannot be removed from them because of their constitutional right to the inviolability of their dwelling. While housing people in need of a home is a very important issue for the State (and Mr. Hogan avers that his son was previously homeless), a person cannot ignore planning laws on the basis that their housing needs trumps compliance with the rule of law. If this were the case, it might lead to chaos and the integrity of our planning system would be compromised. As noted by McKechnie J in *Murray*, at para. [121], and relied upon in *McDonagh* by Hogan J, at para. [74]:

> *"Earlier in this judgment, I have examined the* ***public interest imperative in upholding and maintaining planning control, planning regulation, orderly and sustainable development and the rule of law.*** *As adapted to suit that branch of public*

concern, the courts have frequently accepted that the integrity of the asylum system, of itself, may be a sufficient justification for refusing entry, the making of a deportation order, or the Minister's refusal to allow individuals to remain on humanitarian grounds. I cannot see why, at the level of principle, if the circumstances are so compelling, a similar approach should not be available for consideration in a planning context." (Emphasis added)

20. Indeed, at para. [75] of the case upon which Mr. Hogan places so much reliance (*McDonagh*,) Hogan J. expressly relied on the comments of McKechnie J at para. [89] in *Murray*, where he noted:

> *"In addition, it must be borne in mind that a breach of planning law will previously have been established and that the defaulter is seeking the indulgence of the court as to what resulting consequences he should face.* ***As such, it must be that the interests of the public will be ever present on the enforcing side.*** *Whilst the importance of that interest and the weight which it must be given, having regard to what is previously stated, will vary on a vertical scale by reference to a number of influencing factors, nonetheless* ***it will always exist and most likely will stand first in the queue for consideration.*** *Such was expressly acknowledged in the passage above quoted from Morris v. Garvey, as is evidenced by the lead-in requirement that any excusing factors must be found within 'exceptional circumstances'."*

21. Despite these clear comments on the difference between a housing authority seeking a planning injunction and a private party, and the importance of ensuring compliance with planning law, Mr. Hogan claims that Mr. Verwey should effectively stand in the shoes of the local authority in seeking this injunction and should be subject to the same considerations by the court, as if he was a local authority.

22. To support this view, he relies on Hogan J.'s reference at para. [104] in *McDonagh* to the fact that, if a planning injunction is sought by an individual, such as Mr Verwey, it is only *'generally speaking'* unanswerable, i.e. it is not *always* unanswerable. Mr. Hogan suggests that the facts of this case are sufficient to distinguish Mr. Verwey's application for an injunction from the '*generally speaking'* cases. On this basis, he claims that Mr Verwey, when seeking the injunction, should be treated in the same way as if he was a housing authority, rather than his neighbour,.

23. In particular, Mr. Hogan relies on the fact that, unlike in the *McDonagh* case, where the respondents were in a caravan on land owned by the county council, Mr. Hogan has an unauthorised development on *his own land*.

24. However, this difference from the *McDonagh* case does not assist him, in this Court's view. This is because it does not get away from a key point in the *McDonagh* case, and the *Murray* case, namely that there is a key public interest in ensuring compliance with the rule of law, and planning and environmental laws in particular, to ensure that persons do not simply flout planning laws, to the alleged detriment of their neighbours and others, and then seek to justify that by relying on the constitutional right to the inviolability of one's dwelling. In this regard, it seems to this Court that it is irrelevant whether ignoring the rule of law is taking place on one's own land or on another's land – the negative effect for the public interest and the environment is the same.

25. Mr. Hogan also relies on the fact that when Mr Verwey was bringing to the attention of the Council the planning breaches in this case, he received replies which stated:

> "A Warning Letter pursuant to Section 152 of the Planning and Development Act, 2000 has issued to the developer. A copy of your representation has been forwarded to the Council's Technical Officer(s) for a report in the matter. You will be advised of any further action by the Council in relation to this matter in due course.

Please note, for your information, that under the provisions of Section 160 of the Planning and Development Act 2000 any person may apply to the Circuit Court/High Court for an injunction where an unauthorised development has been, is being or is likely to be carried out or continued" (Emphasis in original).

26. Mr. Hogan claims that since the Council did not seek a planning injunction, these letters effectively encouraged Mr. Verwey to take the action (as he, unlike the Council, would not, *prima facie* at least, be subject to considerations of the impact of the injunction on the Hogans and their prospects for housing). Mr. Hogan claims these letters effectively place Mr Verwey in the shoes of the Council and so he should be subject to the same tests as if he was a housing authority (i.e., that a court would only grant him an injunction after considering the prospects of the Hogans for obtaining lawful accommodation elsewhere and the proportionality of granting the injunction in those circumstances).

27. It seems to this Court to be a considerable stretch that simply because the local authority pointed out to Mr. Verwey that he had a statutory right to seek a planning injunction, to protect his own property rights as a neighbour, that Mr. Verwey in taking up his rights, was in effect acting as its proxy for the Council, and so a court, in considering his application should treat him, in effect, as if he was a planning authority.

28. This Court rejects this suggestion, since Mr. Verwey has no statutory duties regarding the housing of the Hogans. Simply because he was notified that he has a right to pursue a planning injunction by the Council, and that the Council chose not to pursue one itself, does not impose such obligations upon him.

29. Furthermore, Mr. Verwey has a right to protect his own property interests and his personal rights. His house is in an area which is zoned as agricultural lands, and Mr. Hogan has breached the applicable planning regulations to a significant degree. In addition, Mr.

Verwey claims that Mr. Hogan's son has subjected him to racial slurs and made a threat to his life. In this regard, uncontroverted submissions were made to the Court that Mr. Hogan's prosecution for these alleged offences is due to be heard shortly,

30. For all these reasons, this Court can see no reason therefore for applying the principles which apply in *McDonagh* to this case, when it comes to granting an injunction.

31. Finally, it is clear that this Court has a discretion, as to whether to grant a planning injunction, where there is a *prima facie* breach of planning laws, as in this case. The *Murray* case sets out the factors which are to be taken into account, where there is a breach of planning law, but in determining when a court might exercise its discretion *not* to grant a planning injunction.

32. Mr. Hogan suggested that this Court should not place reliance on the *Murray* decision in this regard, since the injunction in that case, would not have resulted in the Murrays becoming homeless, unlike the Hogans. However, this extract from McKechnie J.'s judgement was relied upon by Hogan J, in *McDonagh*, which case did concern a family becoming homeless. Accordingly, this Court does not agree that it should not rely on the factors in *Murray*, in deciding whether a planning injunction might not be granted if there has been a breach of the planning laws. It is proposed to set out these factors and deal with them in turn. At para. [90], in *Murray*, McKechnie J. stated:

> *"What, then, are the factors which play into the exercise of the Court's discretion? From a consideration of the case law, one can readily identify, inter alia, the following considerations:*
>
> > *(i) The nature of the breach: ranging from minor, technical, and inconsequential up to material, significant and gross;*

[In this case, it seems to this Court that the breach by Mr. Hogan is a significant one, as outlined in Mr. Verwey's engineer's report, which has not been disputed, and also as evidenced by the numerous warning letters and enforcement notices from the Council]

> *(ii) The conduct of the infringer: his attitude to planning control and his engagement or lack thereof with that process:*

[Mr. Hogan's conduct towards the planning authority has been poor. He has ignored warning letters and enforcement notices and has not remedied breaches of planning, despite having his application for an exemption (for the shed) refused]

> *Acting in good faith, whilst important, will not necessarily excuse him from a s. 160 order,*

[Mr. Hogan has, by his failure to engage with the planning authority and by making no attempt to rectify his breaches, not acted in good faith]

> *Acting mala fides may presumptively subject him to such an order;*

[As noted above, there was at a minimum, an absence of *bona fides* on the part of Mr. Hogan. However, it can, at least, be said that Mr. Hogan did not seek to deny the breaches of planning and so his conduct did not amount to *male fides* in this sense]

> *(iii) The reason for the infringement: this may range from general mistake, through to indifference, and up to culpable disregard;*

[Mr. Hogan's actions are at the wrong end of this scale, since they amount to culpable disregard, as there is no evidence of any attempt to rectify the breaches of planning]

> *(iv) The attitude of planning authority: whilst important, this factor will not necessarily be decisive;*

[The planning authority clearly believes that there have been several breaches of planning law, as evidenced by their numerous warning letters and enforcement letters, so this is not in favour of Mr. Hogan]

> *(v) The public interest in upholding the integrity of the planning and development system;*

[This factor strongly favours the grant of the injunction, since not only the planning system but also the rule of law is undermined if flagrant breaches of planning and environmental laws are not subject to strict enforcement, which would be contrary to the public interest.]

> *(vi) public interest, such as:*
>
> *• Employment for those beyond the individual transgressors, or*
>
> *• The importance of the underlying structure/activity, for example, infrastructural facilities or*
>
> *services.*

[This is not a factor in favour of Mr. Hogan as there is no suggestion that this breach of planning provides employment or important materials for the community or other social good]

> *(vii) The conduct and, if appropriate, personal circumstances of the applicant;*

[Mr. Verwey is to be commended for the responsible way in which he acted in bringing the breaches of planning to the notice of the local authority and then only pursuing the matter himself when it seemed that this was the only way to ensure compliance with planning law]

> *(viii) The issue of delay, even within the statutory period, and of acquiescence;*

[The delay has been considered earlier in the context of the unauthorised entrance to the Property and this favours Mr. Hogan. As a result, an injunction cannot be granted regarded this aspect of the development]

> *(ix) The personal circumstances of the respondent; and*

[This factor has been considered, in the context of the unauthorised development constituting Mr. Hogan's dwelling and his son's dwelling. However, for the reasons set out above, this is not a sufficient reason for the refusal of the injunction and for compliance with planning law to be set at nought.]

> *(x) The consequences of any such order, including the hardship and financial impact on the respondent and third parties".*

[While there will be hardship to Mr. Hogan, as noted by Hogan J. in *McDonagh*, when a planning injunction is sought by a party, other than a housing authority, the application is generally unanswerable, notwithstanding any hardship which might result, and so it is unanswerable in this case.]

33. For all the foregoing reason, and subject to hearing from the parties regarding the precise terms of the order, this Court will affirm the order of O'Donohoe J., save in one minor respect, regarding the closing up of all unauthorised entrances.