THE COURT OF APPEAL

CIVIL

Court of Appeal Record No. 2020/145

High Court Record No. 2018/246/MCA

Ní Raifeartaigh J.

Pilkington J.

Neutral Citation Number [2022] IECA 6

Humphreys J.

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

BETWEEN

GERARD DOORLY

APPLICANT/APPELLANT

AND

CIARA CORRIGAN AND PADRAIG CORRIGAN

RESPONDENTS

JUDGMENT of Ní Raifeartaigh J. delivered on the 21st day of January, 2022

1. I wish to express my concurrence with the judgment of Humphreys J.

2. First, I agree that as a matter of law, it was for the respondents to prove to the court that they fell within the relevant planning exemption concerning tree-felling. As regards the

particular situation arising from the combination of ss.4 and 172 of the PDA 2000 as amended, together with Schedule 5, part 2, 1(d)(iii) and 15 of the PD Regulations 2001 (concerning whether the tree-felling involved conversion to another land use which had a significant effect on the environment) the onus remained on the respondents to show that they fell within the tree-felling exemption; this meant that the onus was on the respondents to negative that they fell within the relevant exception(s) to the exemption. I agree that the onus of proof in this regard emerges clearly from the decisions in *Fallowvale* [2005] IEHC 408, *Fortune* [2012] IEHC 406 and, in particular, *Daly v. Kilronan Farms* [2017] IEHC 308. I gratefully adopt the reasoning in those decisions as well as the analysis of Humphreys J. in the present case on the onus of proof in a s.160 application where the question is whether the respondent falls within an exemption from the requirement to obtain planning permission (and specifically where the question of an exception to an exemption falls to be considered by the Court).

3. Secondly, I agree that the trial judge fell into error in her application of the burden of the proof to the evidence in this particular case. While she stated the burden of proof correctly as a matter of general principle, I agree that when she came to deal with certain aspects of the evidence, she appears not to have applied the burden of proof in accordance with the principle and that at crucial points in her judgment, she in effect indicated that the appellant (not the respondent) had fallen short of meeting the relevant onus of proof.

4. Thirdly, as regards ss.4 and 172 of the PDA 2000 as amended, together with Schedule 5, part 2, 1(d)(iii) of the PD Regulations 2001, in circumstances where the appellant had established that there had been tree-felling which was not covered by permission, the respondents were required to show on the balance of probabilities that they had not engaged in tree-felling for the purpose of conversion to another land use which would have a significant

effect on the environment. In my view, the evidence proffered by the respondents was extremely thin and had significant gaps. This included gaps as to the precise nature and extent of the tree-felling operation which had been carried out, who exactly had decided that it should carried it out, the reasons for it, and the future intentions of those who had carried out. Such evidence as there was raised many questions which were left unanswered, and the explanations shifted over time, as can be seen from a perusal of the affidavits.

5. I also consider that the fact that the respondents relied exclusively upon hearsay evidence of their future intentions regarding replanting as a matter of significance. It would have been an easy matter for one of the respondents to make a direct sworn averment as to their future intentions as to replanting, but this was not done. This was representative of the general manner in which they approached the case, in which important pieces of information peculiarly within their knowledge were not disclosed to the court. These included matters such as the connection between the respondents (against whom the application had been brought) and Mr. Garry (the person who appears to have authorised and been closely connected with the tree-felling); the circumstances and precise reasons for the felling operation which had taken place, setting out precisely why the actions that had been taken were justified as necessary and proportionate to achieve the stated objectives of the exercise; and various matters concerning the licence application (as described in further detail in the judgment of Humphreys J.). Having regard to the totality of evidence that was put forward by the respondents, I am of the view that it fell short of establishing on the balance of probabilities that they fell within the exemption.

6. Fourthly, having regard to the definitions of "protected structure" and "attendant grounds" in s.1 of the PDA 2000, and having regard to the terms of the Record of Protected Structures insofar as it deals with Claremont House and specifically references the woodlands,

I agree with the conclusion of Humphreys J. that the woodlands of Claremont House constituted a special feature within the attendant grounds of a protected structure and therefore fell within s.57; that therefore the onus fell upon the respondents to establish on the balance of probabilities that the tree-felling which had occurred did not materially affect the character of the protected structure; and further, that they that they failed to do discharge this onus of proof having regard to the evidence in the case.

7. Finally, I agree that it is appropriate for the Court to order remediation in this case having regard to the above conclusions and the circumstances of the case, together with, inter alia, the fact that the evidence of replanting was purely of a hearsay nature It seems to me that remediation in the terms proposed by Humphreys J. would be appropriate and for the reasons set out by him.

8. As noted above, I have had the advantage of reading in draft, and agree with, the judgment of Humphreys J. in which he expresses his agreement with this judgment. As the judgment is being delivered electronically, Pilkington J. authorises me to say that she also agrees with this judgment.