

THE HIGH COURT
IN THE MATTER OF AN APPLICATION UNDER SECTION 160 OF THE PLANNING AND
DEVELOPMENT ACT, 2000 (AS AMENDED)

[2021] IEHC 618

RECORD NUMBER: 2019 493 CA

BETWEEN

FINGAL COUNTY COUNCIL

PLAINTIFF/RESPONDENT

AND

JAMES NUGENT

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Niamh Hyland delivered 1 October 2021

Background

1. This is an appeal by Mr Nugent ("the appellant") against the Order of Linnane J. of 28 November 2019 directing him to take various steps pursuant to s. 160 of the Planning and Development Act 2000 (as amended) (the "2000 Act").
2. The first part of the appeal concerns an electronic gate (also referred to as the "inner gate") on the appellant's lands measuring 2m by 7m wide, located approximately 23m from the public road (R108) and from an outer gate along the public road. The respondent's concern was that (a) the use of this electronic gate amounts to a breach of a condition of the planning permission for the outer gate; and (b) constitutes a potential traffic hazard. Linnane J. found the gate was unauthorised development and ordered its removal.
3. Second, the appellant is appealing that part of the Order relating to a waste trailer located on the appellant's lands that was ordered to be removed by Linnane J. The appellant accepts that the trailer requires planning permission, and that no planning permission exists for it, but argues that the waste trailer is immune from enforcement due to the limitation period under s. 160 of the 2000 Act.
4. The land the subject of these proceedings is situated in Belinstown, Ballyboughal, County Dublin with folio number DN19779. The outer gate of the property, along the public road R108, was built in December 2008 to secure the appellant's lands against trespass, theft, and vandalism. Retention planning permission was granted on 4 August 2009.
5. Following a site inspection of the lands on 16 May 2017, an enforcement notice was issued on 3 July 2017 giving a two-month period to the appellant to, *inter alia*, remove the new electronic inner gate on the property and remove the trailer being used to store food waste. The appellant sought retention permission (reference number F18A/0417), which was refused by the respondent on 10 September 2018. The appellant appealed this decision to An Bord Pleanála (reference ABP-302716-18). This was refused on 12 February 2019.
6. The land in question is known as Site A. Site B, which is situated close to it, is also owned by the appellant. The Site B lands were used for reception, storage, processing and distribution of farm produce, including produce grown on the lands and produce grown

elsewhere. In the Circuit Court, there was a significant dispute between the parties as to the use of the lands at Site A but ultimately Linnane J. held that the appellant was using it as part of commercial activity and for the purpose of carrying on his food processing business located at Site B. She held, *inter alia*, that the principal use of three sheds that had been erected was to provide a storage facility for the food processing business and not for agricultural use. That part of her Order has not been appealed.

Proceedings

7. The original proceedings in this case commenced by way of Notice of Motion dated 12 February 2019 and came on before Linnane J. on 21 and 22 November 2019. By Order dated 28 November 2019 Linnane J. required the appellant to remove certain structures on his lands and cease certain uses occurring on those lands.
8. A Notice of Appeal dated 5 December 2019 was served on 6 December 2019, in which the appellant appealed against the entirety of the Order. However, counsel for the appellant has explained that the appeal is now limited to paragraphs 1 and 4 of that Order, following correspondence by the appellant's solicitor on 21 October 2020.
9. The Order of Linnane J. reads in material part:
 - "1. *The Defendant, his servants or agents to remove the new electronic inner gate measuring approximately 2 metres high by 7 metres wide, the subject of the proceedings herein, and situated on the Site and identified with the label "Electronic gate" on the aerial photograph attached hereto within four weeks of the date hereof.*
 - ...
 4. *The Defendant, his servants or agents to remove the trailer, the subject of the proceedings herein, situated on the Site and used in connection with business outside of the Site and identified with the label "Waste trailer" on the aerial photograph attached hereto within four weeks of the date hereof."*
10. Due to the appellant's non-compliance with this Order, Fingal County Council ("the respondent") brought contempt proceedings and on 6 February 2020 the appellant was found to be in contempt. In response to those proceedings the appellant undertook to comply with the terms of the Order and I am informed that the electronic gate and waste trailer have been removed. Should this appeal be successful I am told that the appellant intends to resume use of the trailer and gate.

Arguments of the parties

Appellant's arguments

Electronic Gate

11. In his affidavit of 30 April 2019, the appellant avers that he built the inner gate 23m back from the road at the request of a neighbour to ensure that vehicles would not be left waiting on the public road as the outer gate opened, causing a build-up of traffic

(paragraph 22). The appellant says that he understood that such a development would be an exempted development.

12. The appellant submits that the electronic gate is an exempted development under Article 6(1) of the Planning and Development Regulations 2001 (S.I. 600/2001) and that no basis was given by the respondent for restricting that exemption. Article 6(1) reads as follows:

Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.

Class 9 of Part 1 of the Second Schedule provides:

The construction, erection, renewal or replacement, other than within or bounding the curtilage of a house, of any gate or gateway.

The height of any such structure shall not exceed 2 metres.

13. The appellant argues therefore that the electronic gate is *prima facie* an exempted development although he concedes that this is subject to Article 9 of the Planning Regulations. Two separate provisions of Article 9 are potentially relevant.
14. Article 9 (1)(a)(i) provides that a development will not be exempted should it contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act. Separately, under Article 9 (1)(a)(iii), a development will not be exempted should it endanger public safety by reason of traffic hazard or obstruction of road users.
15. The appellant argues that Condition 4 of the planning permission for the outer gate F09A/0234 could not be read in such a way as to prevent any works for the electronic gate.

Condition 4 provides that "4. *The entrance hereby approved shall be used solely as an agricultural entrance and shall not facilitate access to commercial or other development without a prior grant of planning permission*".

16. The appellant argues that such a condition does not in fact prohibit the erection of the electronic gate, citing *Camiveo Ltd v. Dunnes Stores* [2019] IECA 138 for the proposition that the ordinary meaning of the condition would be understood by the public to concern use and not works. The appellant submits therefore Article 9 (1)(a)(i) is not engaged.
17. The appellant further disputes the respondent's argument that the electronic gate could constitute a traffic hazard or danger, as the electronic gate is set back a substantial

distance (approximately 23m) from the side of the public road, R108. The appellant argues that the electronic gate would neither cause nor contribute to traffic, and in fact the very purpose of the electronic gate was to avoid vehicular traffic queuing on the public road. The appellant therefore argues that Article 9 (1)(a)(iii) is not engaged.

18. The appellant summarises his position by stating that, as Article 9 is not engaged, the electronic gate should be classified as an exempted development and that Linnane J. erred in making an order requiring the removal of the electronic gate.

Waste Trailer

19. The appellant points to the limitation period in s. 160(6)(a)(i) of the 2000 Act, to the effect that no order shall be made for a development after a period of 7 years from the commencement of that development.

20. Section 160(6)(a)(i) provides that:

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

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

21. The appellant submits that per *Wicklow County Council v. O'Reilly* [2015] IEHC 667 the practical effect of s. 160 is that once a period of 7 years and 63 days has elapsed, works commenced before that time are immune from enforcement proceedings.
22. The appellant avers at paragraph 44 of his affidavit of 30 April 2019 that the trailer on the lands is used to store animal product and has been used for this purpose for a period amounting to more than 7 years, 63 days (since 2008). He argues that the limitation period contained in s. 160(6)(a)(i) of the 2000 Act prohibits an Order in relation to any development commenced before a certain period (in this case 11 December 2011).
23. The appellant submits that this trailer was in use before the December 2011 date and exhibited, *inter alia*, aerial images of the lands concerned which show the waste trailer in use. He exhibits documents to that effect and points to Google Street View satellite imagery. These exhibits include a letter by Mr Paul O'Neill, Chartered Insurer, dated 27 November 2017, stating that at an inspection on February 2008 the trailer was parked on the lands. A further letter from Mr John McDermott, farmer, dated 28 November 2017 is included, confirming he transported surplus food for animal feed since 2008 and included an authorisation granted to Mr McDermott by the Minister for Agriculture on 23 November 2007 which permits him to carry out certain activities including, *inter alia*, hauling feed.
24. New evidence (exhibited to a letter from the appellant's solicitor dated 26 June 2020) was sought to be introduced by the appellant. This new evidence consisted of a further declaration by Mr O'Neill which includes a picture of the lands from Google Street View dated April 2009 in which he declares the waste trailer is visible, and a further affidavit

sworn by Mr McDermott in which he elaborated on his previous evidence and averred that since 2008 the appellant has stored surplus animal feed in the waste trailer. The appellant admits that there has been some movement of the mobile trailer over the relevant time period.

Respondent's arguments

Preliminary Objection

25. Insofar as there is an attempt to introduce new evidence in relation to the trailer, the respondent argues that the appellant cannot now rely on further evidence which was neither before the Circuit Court, nor the subject of an application to admit fresh evidence. This evidence includes the aerial photography from Google Street View, the affidavit of Mr McDermott and the declaration of Mr O'Neill. The respondent points to the fact that the images were available at the time of the Circuit Court hearing, and that the appellant had adduced evidence from Mr McDermott and Mr O'Neill at the hearing, so there is no persuasive reason why this so-called "new" evidence could not have been adduced at the hearing before the Circuit Court.

Electronic Gate

26. The respondent argues that the appellant did not rely on the argument that the electronic gate was an exempted development in his affidavit and is therefore precluded from relying on such a defence (per *South Dublin County Council v. Balfe* (Unreported, High Court, Costello J., [1995] WJSC-HC 439.). Without prejudice to that argument, the respondent argues that the electronic gate was used for a commercial and non-agricultural purpose – i.e. carrying traffic from business outside the site. The respondent argues that this amounts to a breach of Condition 4 of the planning permission which requires that the entrance approved be used solely as an agricultural entrance.
27. The respondent observes that the appellant's argument that Condition 4 regulates use and not works is misguided as this assumes a legal appreciation by the public of the definition of the terms "use" and "works" in the context of the 2000 Act, a position the courts have eschewed. The respondent points to what is described as the factual reality, being that the only way to access the electronic gate is to go through the outer gate, so the electronic gate requires a use of the outer gate which is inconsistent with Condition 4 of its planning permission.
28. Regarding the electronic gate's potential as a traffic hazard, the respondent refers to Article 9 (1)(a)(iii) of the Planning Regulations and argues that the development would endanger public safety, as it would lead to an increase in traffic and result in a potential traffic hazard.

Waste Trailer

29. The respondent disputes the appellant's submission that the waste trailer is immune from enforcement. While there is some disagreement between the parties as to the precise date on which the appellant began to use the waste trailer, the respondent argues that

irrespective of the date, the fact that the waste trailer has moved location on the appellant's grounds within the limitation period contained in s. 160 means that it cannot avail of that limitation period.

30. Should the appellant wish to establish that the waste trailer is immune from enforcement proceedings, the onus is on him to prove that the trailer has been in the same location since a date before the limitation period which he cannot do, having admitted to moving the trailer. In oral submissions the respondent relied on the decision of Hogan J. in *Wicklow County Council v. Fortune* (No 1) [2012] IEHC 406 in this respect.

Analysis

Electronic Gate

31. The respondent seeks to prevent the appellant from relying on the argument that the electronic gate was an exempted development on the basis that the argument was not identified in his affidavit. However, it is clear this argument was made in the Circuit Court (see the written submissions of the appellant in the Circuit Court) and was addressed by Linnane J. In those circumstances, the respondent cannot assert it was taken by surprise by the appearance of this argument in the appeal. No application was made for an adjournment to allow affidavit evidence to be introduced by the respondent in this respect and the respondent has responded fully to the argument made in oral and written submissions. In those circumstances, I will entertain the argument made by the appellant in this respect.
32. It is common case that the gate is exempted development unless it loses the benefit of that exemption by either Article 9 (1)(a)(i) (a development will not be exempted if it contravenes a condition) or Article 9 (1)(a)(iii) (a development will not be exempted if it endangers public safety by reason of traffic hazard).
33. These are alternate rather than cumulative grounds and if I find that one applies, then the benefit of the exemption is lost. I will consider the traffic issue first. The background to the erection of the fence is set out in Mr. Nugent's affidavit. He refers to the erection of the sliding gate and wall at the boundary of the lands with the public road R108 and then says as follows:

Subsequent to this, I received a request from a neighbour, asking me to change the location of the gate, so that vehicles entering the site would not have to wait on the R108 while the gate was being opened. The request was sensible and for the sake of good neighbour relations, I erected a sliding gate at a location set back more than 23 metres from the public road. To preserve the security of the premises, I caused to be erected a fence, within my lands, along that 23 metre length.

34. Later at paragraph 27 he said: "[the gate] remains an even better solution for neighbouring residential amenity than the gate already permitted by the Council under permission reference no. FO9A/0234, given the advantage of a set back gate for road users of the R108 where visitors can idle on my lands while waiting for the gate to open."

35. At paragraph 49 he avers:

I currently employ more than fifty staff in this rural area and supply over three hundred customers with quality Irish farm produce... In the event that I am forced to cease the use of the shed for storing farm produce, it will result in the choking of my business and almost certainly the resulting loss of employment to some or perhaps all my employees”.

36. In the application for retention planning permission made in 2018, which application included retention of the electronic gate, the description of the development is as follows:

“The retention permission is sought for retention of development to enhance security for our farm yard and sustain our food packing business into the future. The elements that make up this planning application include the following: Planning retention of inner security gate and fencing, retention of car parking area and full planning for surfacing, drainage and all associated site works”.

37. At paragraph 41 of his first affidavit of 8 February 2019, Mr. Boylan says that there is a legitimate planning concern in terms of the use of the subject matter site for purposes connected with the existing processing business where this involves the continued use of forklifts across the R108. In response, Mr. Nugent avers that he cannot be accused of unauthorised development on the public road by using that public road for transport. In response to that averment, Mr. Boylan says in his third affidavit of 13 June 2019 that planning considerations govern how any proposed development may access a public road. Here, he says the sheds are being used for a non-agricultural use and the specific issue of forklift and vehicle shuttling between Site A and B, using a 100m or so stretch of the R108 to in turn use the sheds, is a particular concern in planning terms.

38. Based on this evidence, I must decide whether the gate loses its exemption because it endangers public safety by reason of traffic hazard or obstruction of road users. I fully accept that heavy use of the R108 by forklift trucks in the context of non-agricultural use of Site A might cause a traffic hazard or obstruction. However, I must go on to ask whether the construction or use of the gate causes a traffic hazard since it is only if this is the case that the gate loses the benefit of the exemption.

39. This is a difficult question because, as argued by the appellant, the gate might be considered beneficial from a traffic point of view as it allows for the queueing of traffic between the outer gate and the inner gate, thus reducing traffic on the R108. But viewed overall, the purpose of the inner electronic gate is to facilitate large volumes of traffic for the purpose of impermissible non-agricultural use (such use being found to have occurred by Linnane J., which finding was not appealed). That is clear, *inter alia*, from the retention application, quoted above, and from the affidavit evidence of Mr. Nugent. That is because the gate permits the queueing of vehicles, and thus in turn facilitates significant quantities of vehicles accessing the site, which volumes themselves cause a traffic hazard.

40. In short, I conclude that the existence of the electronic gate facilitates large quantities of forklifts and other vehicles, shuttling between Site B and Site A, which quantities constitute a traffic hazard, as evidenced by the affidavit of Mr. Boylan.
41. The legal representative for the appellant relied upon the case of *Cunningham v. An Bord Pleanála* [2013] IEHC 234, where a shed had been erected to facilitate the storage of a tractor. Mr. Cunningham had upgraded an entrance to his farm lands to provide a new access point onto the N59 but had been refused retention permission for the shed (which was close to the access point) on the basis that the additional traffic generated would interfere with the flow of traffic on the N59 and would endanger public safety by being a traffic hazard. An Bord Pleanála ruled that the development was not exempted development as access to the development was via a gateway onto the N59 and sightlines at the junction of the access and public road were severely restricted in both directions and therefore the restriction on exempted works under Article 9 (1)(a)(iii) applied.
42. However, Hogan J. identified the absence of a nexus between the traffic hazard and the construction of the development, noting at paragraph 30 as follows:

30. *But here lies the conundrum. Article 9(1)(iii) does not permit the disapplication of the exemption simply by reference to considerations of road safety in the abstract. Instead, as the language of that provision shows, it is rather the "carrying out" of the development which must pose the threat to public safety by reason of the presence of a traffic hazard or the obstruction of road users.*

31. *In other words, while the Board (correctly) identified the nature of the traffic hazard (recital (b) of the decision), it did not demonstrate that there was any connection between this finding and the ultimate conclusion (recital (c)) that the exemption was disappplied by Article 9(1)(iii). In the present case, it would accordingly have been necessary for the Board to go further and thereby identify how the carrying out of the development (i.e., in this instance, the construction of the shed) would endanger public safety. It is true that the Inspector had endeavoured to make this connection – by positing a direct connection between the construction of the shed and the future projected vehicular use of the access point to the N59 road - but the nature of the changes made by the Board to the draft order which had been prepared by its Inspector leads ineluctably to the conclusion that this particular reasoning had been disavowed by the Board.*

Conclusions on the Article 9(1)(iii) exemption

32. *For the reasons stated, the Board's decision really proceeds on the basis that the access point simply presented a traffic hazard. That, however, is in itself insufficient to justify the disapplication of the exemption, since Article 9(1)(iii) requires that not simply the Board identify the presence of a traffic hazard, but rather that "the carrying out of such development wouldendanger public safety by reason of*

traffic hazard." This latter test represents an altogether different test from that actually posed by the Board.

43. Applying the logic of *Cunningham*, I may only disapply the exemption on the basis of Article 9 (1)(a)(iii) if I am satisfied that the carrying out of the development will endanger public safety. For the reasons identified above, i.e. that the development will facilitate increased volumes of traffic on the R108, I am so satisfied. In other words, it is not a situation like that in *Cunningham*, where the situation in relation to traffic would be the same whether the gate had been constructed or not. As explained above, the electronic gate facilitates significant additional volumes of traffic between Sites A and B on the R108, which cause a traffic hazard. Accordingly, I conclude that the exemption is disapplied and that the electronic gate is therefore not exempted development.
44. Because of my conclusion in this regard, I do not need to go on and consider whether the alternate basis suggested by the respondent for the disapplication of the exemption, i.e. Article 9 (1)(a)(i) also applies.

Trailer

45. There was a considerable dispute at hearing about whether the appellant should be entitled to rely on additional evidence, namely a declaration by Mr. Paul O'Neill, an affidavit of Mr. John McDermott and a Google Street View image from April 2009. Objection was taken given that this evidence had not been put before the Circuit Court, no application had been made to admit it prior to the hearing of this appeal, and the respondent says the appellant could not identify why the evidence could not have been obtained and used at the Circuit Court hearing.
46. However, I do not need to decide this issue since, for the reasons identified below, even if the appellant had been entitled to rely upon the new evidence, I have concluded it would not avail him.
47. The position in relation to the trailer is as follows. The appellant does not argue that the trailer does not require planning permission, or that permission exists for the trailer. Rather he argues that the trailer is protected from any enforcement action under s. 160(6)(a)(i) as it has been in situ for more than 7 years, being used for the relevant purpose i.e. the storage of food waste, since 2008 or at latest 2009. The relevant section provides as follows:
- (6)(a) An application to the High Court or Circuit Court for an order under this section shall not be made—*
- (i) in respect of a development where no permission has been granted, after the expiration of a period of 7 years from the date of the commencement of the development,*
48. The respondent says in reply that on the appellant's own admission the trailer has been moved around in the relevant period, being from 25 June 2009 (when retention permission F09A/0234 was granted for the outer gate and the appellant indicated an

intention to abandon any non-agricultural use of the site, thus creating a new planning unit) to February 2020 (when the appellant was obliged to comply with the Circuit Court order) and that therefore the appellant cannot avail of s. 160(6)(a)(i) as this only applies to situations where there has been a fixed state of affairs for the requisite time period.

49. Second, the respondent asserts that in any case, the exemption cannot be availed of because of the provisions of s. 160(6)(b) which provides "*an application for an order under this section may be made at any time in respect of any condition to which the development is subject concerning the ongoing use of the land*".
50. The question of whether a structure that has been moved can avail of the provisions of s. 160(6)(a)(i) has been relatively recently considered in the case of *County Council of Wicklow v Fortune* (No. 3) [2013] IEHC 397. In that case, the applicant had sought an order under s. 160 requiring Ms. Fortune to remove a mobile home and caravan from a site in circumstances where there was no planning permission for same. Ms. Fortune argued that no enforcement action could be taken given that the mobile home and caravan had been there for more than 7 years. Hogan J. held at paragraph 46 as follows:

"It follows, therefore, that in the onus rests on the party alleging that a particular mobile home or caravan enjoys the benefit of the limitation period to show that the mobile home or caravan has rested on the same location for the last seven years immediately preceeding the commencement of these proceeding, save where any movement of the caravan or mobile home was either purely de minimis or for the purposes of temporary repair and alteration...As O'Neill J. demonstrated in Martin, it is not enough to show that there was a user of the caravan or mobile home on the homeowner's land for the last seven years. If there were the rule, then it would mean that, for example, an adjoining landowner would be powerless to object to the movement of a mobile home from one part of the site to another."

At paragraph 47 Hogan J. concluded that "*as O'Neill J. pointed out in Martin, mere general user of a mobile home or a caravan on a particular site is not enough: one must also show that it has remained in the same location on the site in question*".

51. Before addressing the evidence in this respect, I note that it is well established that the seven year limitation period is a matter of defence and the onus of proof lies with the party asserting it (see for example *County Council of Wicklow v. Whelan* [2017] IEHC 480 and *Pierson v. Keegan Quarries Ltd.* [2010] IEHC 404). Here it appears undisputed that the trailer has been on the lands for a period of more than seven years, whether one takes the relevant start date as being 2008 or 2009. However, as Hogan J. identifies in *Fortune*, the onus rests on the party who alleges that a mobile structure enjoys the benefit of the limitation period to show that the mobile structure has rested on the same location for the last seven years prior to the commencement of the proceedings.
52. It is agreed between the parties that the waste trailer was located at various times both outside and inside a shed. That is clear, *inter alia*, from photo numbers 66 (trailer inside shed no. 3) and 90 (trailer in the field) of the photographs provided by the respondent as

part of the planning enforcement file, at SB1 to the First Affidavit of Sean Boylan sworn 8 February 2019. In the affidavit of Mr. Nugent sworn 30 April 2019, at paragraph 44, he refers to a trailer being located on the lands the subject of the proceedings. He states the trailer is used to store an animal feed product and that they have used the lands for that purpose since at least 2008. He does not identify the location of the trailer.

53. In the Legal Submissions of the appellant, it is candidly acknowledged that the trailer has been moved from place to place. At paragraph 2.3(d) the following is submitted:

"Insofar as reliance might be placed on temporary movement, from time to time, of the trailer from the specific place marked on the aerial photograph attached to the order, that does not comprise abandonment of the use that is immune from enforcement or other material change in the use of the structure or other land. The trailer is mobile, designed for movement and is sometimes moved."

54. A similar admission is made at paragraph 4.12 where it is said:

"Insofar as reliance might be placed on temporary movement, from time to time, of the trailer from the specific place marked on the aerial photograph attached to the order, that does not comprise abandonment of the use that is immune from enforcement or other material change in the use of the structure or other land. The trailer is mobile, designed for movement and is sometimes moved. It has been used persistently from 2008."

55. For the sake of completeness, I note that the further evidence sought to be relied upon is evidence showing the trailer in place from April 2009 and an affidavit of John McDermott and a declaration of Paul O'Neill, which attest to the period of time during which the trailer has been in use. None of that evidence seeks to identify that the trailer has not been moved. Therefore, its admission (upon which I make no decision) would not alter the difficulty for the appellant in this respect.

56. The doctrine of stare decisis, as identified in *Irish Trust Bank Ltd. v. Central Bank of Ireland* [1976] ILRM 50 and *Re Worldport Ireland Ltd.* [2005] IEHC 189, means that I should only depart from decisions of the High Court if there are substantial reasons for believing that the judgment was wrong, for example if that judgment was not based upon a review of relevant authority, where there is a clear error in the judgment or where the jurisprudence of the court can be said to have moved on since the decision was given. *Fortune* makes it clear that the benefit of the limitation period is only conferred on a party who can show that the mobile structure has rested on the same location for the seven years prior to the proceedings. No argument was made to the effect that I should depart from this part of the decision in *Fortune* either on the grounds identified above or on any other ground. Nor can I see any basis for departing from the decision.

57. In oral submissions an argument was made on behalf of the appellant that I should treat the movement as *de minimis* and that it was within the "tolerance of *Fortune*". Given the decision in *Fortune*, if the appellant wishes to assert that he comes within what is an

exception to the normal approach, i.e. that the movement should be disregarded as it is *de minimis*, he bears the burden of establishing that the movement was indeed *de minimis*. He has placed no evidence before the Court to that effect. I have recited above the appellant's affidavit evidence in relation to the location of the trailer, which does not address at all the movement of same. The photos that the respondent has put in evidence clearly show the trailer in differing locations, not just within and without a shed, but also varying in its location on the lands. No evidence has been put forward by the appellant controverting that or identifying the period of time which the trailer spent in one location as opposed to another. Submissions were made by the appellant to the effect that the vast majority of the respondent's photos showed the trailer in the same location and only a minority showed it in a different location. In my view, the photos put forward by the respondent clearly establish movement of the trailer and this is admitted by the appellant in its submissions. Further, the movement itself cannot be considered *de minimis* in circumstances where at times the trailer was within a shed and other times it was outside a shed. Those are quite different environments. Nor was any case made by the appellant that the movement in question was only a matter of a few metres.

58. In the circumstances the appellant has not identified any evidential basis upon which I could conclude that the movement of the trailer was *de minimis*. Rather I must proceed on the basis of the approach in the written submissions of the appellant, i.e. the trailer is mobile, is designed for movement, and is sometimes moved.
59. In those circumstances, the appellant has failed to satisfy the necessary requirement of continuous location. Accordingly, I find that the appellant cannot rely on s. 160(6)(a)(i). That was the only defence put forward by the appellant, who accepted the trailer was an unauthorised development. Accordingly, the respondent is entitled to an order under s. 160 ordering the removal of the trailer.

Conclusion

60. For the reasons set out in this judgment, I conclude that the electronic gate is not exempted development, as it endangers public safety by reason of traffic hazard and thus loses the exemption by virtue of Article 9 (1)(a)(iii) of the Planning and Development Regulations.
61. Equally, I conclude that the trailer is unauthorised development and does not benefit from s. 160(6)(a)(i) of the 2000 Act, the appellant not having established that the admitted movement of the trailer from place to place on the site was *de minimis*.
62. I am conscious that both the gate and the trailer have already been removed and therefore it seems appropriate that I hear from the parties on the form of Order required. I will hear submissions on costs at the same time. I suggest that the matter be put in on Tuesday 5 October at 10.45 remotely. The parties have liberty to apply through the registrar if that time is not suitable.