THE COURT OF APPEAL

Finlay Geoghegan J.
Peart J.
Hogan J.

Appeal Number: 2016 52

H.C. 2013 No. 218 MCA

BETWEEN

RACHEL CAITRIONA MCCOY (AS PERSONAL REPRESENTATIVE OF MICHAEL MCCOY)

AND SOUTH DUBLIN COUNTY COUNCIL

APPLICANTS/RESPONDENTS

AND

SHILLELAGH QUARRIES LIMITED, JOHN MURPHY, DECLAN MURPHY, THOMAS MURPHY, SANDRA MURPHY AND MICHAEL MURPHY

RESPONDENTS/APPELLANTS

AND

JOAN MURPHY

NOTICE PARTY

JUDGMENT (ex tempore) delivered on the 9th day of May, 2017 by Ms. Justice Finlay Geoghegan

1. The appeal which we heard today is a limited appeal only. It is an appeal against one part only of an order made by the High Court (Baker J.) on 19th January, 2016. On that day the High Court made five orders, two of which relate to costs and which are not relevant at all and to which I do not propose referring, the other three are:-

2. The first two orders made by the High Court were what I would term substantive orders on the applications before it which were brought pursuant to s. 160 of the Planning and Development Act, 2000, as amended. In those two orders, the High Court ordered:-

> "1. The Respondents their servants and agents do cease works for the extraction of stone and gravel, the carrying out of rock and gravel processing activities, loading of materials and the transportation of the said materials from the quarry and all related and ancillary works on lands located at Aughfarrell, Brittas, County Dublin.
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> 2. The quarrying development located at lands at Aughfarrell, Brittas, County Dublin do cease forthwith."

3. Those two orders were made pursuant to a written judgment delivered by the Court on 16th October, 2015. In that judgment the trial judge considered carefully the issues which arose under s. 160, the first of which was whether or not the respondents were, as alleged, carrying out an unauthorised development. The particular activity is quarrying, and the trial judge having determined that it was an unauthorised development then addressed her mind to the second matter which arises under s. 160, that is whether or not the Court should exercise the discretion given it by s. 160 to make an order that the unauthorised development cease. That aspect of the judgment of 16th October, 2015 is a very significant part of the judgment, and the trial judge sets out the legal principles and refers to the relevant facts and the principles which apply as to how she should exercise her discretion. These principles are relevant to the subsequent decision which is under appeal, and I do not propose repeating what she said but I think it is relevant simply to cite her conclusion in relation to the discretion of the Court under s. 160, which she reached having referred to a number of the earlier decisions of both the Supreme Court and the High Court which are set out between paras. 62 and 65 of her judgment. At para. 65 she referred to the consideration given by Clarke J. in the High Court in *Cork Co. Co. v. Slattery Pre-cast Concrete* [2008] IEHC 291 to the issue of discretion, and then at para. 66 she stated:-

"Thus I consider that the court has discretion, that it must be exercised sparingly, that the imperative of Community law must be respected in the exercise of discretion, and that the court should have as its starting point the fact that a development is unauthorised and that it may not by the exercise of its discretion [that is to say the court's discretion] "tacitly accept" the breach to adopt the terminology of Clarke J. in *Cork County Council v. Slattery Precast Concrete Ltd.*"

4. She then set out the factors which had been referred to by McKechnie J. in *Leen v. Aer Rianta* [2003] 4 IR 394 and ultimately, having considered those, as well as a number of factors in favour of the respondents, she concluded at para. 87:-

> "Accordingly I consider that an order is to be made directing the cessation of operations at the quarry. I appreciate that a period of time will be required for the current operations to be wound down and I will hear counsel as to an appropriate stay on the order. The appropriate form of the orders will therefore stand over until further argument."
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> [From judgment handed down on 16th October, 2015]

5. There was, it appears, a factual error in that judgment, and the further hearing which she had envisaged in relation to hearing counsel as to an appropriate stay on the order for a period of time in order to allow the current operations to be wound down, was left over until 11th January, 2016. By that point in time the factual error was resolved by agreement between the parties, and the trial judge heard submissions on the stay.

6. The stay that was applied for, as appears from a further written judgment that she gave on 19th January, 2016,, was a stay pending appeal (that was one basis) and secondly, as appears from para. 22 of her subsequent judgment, a stay pending the

conclusion of a process which was identified as being an application which had been made for leave to apply for substituted consent pursuant to the European Union (Environment Impact Assessment and Habitats) (No. 2) Regulations, 2015 (S.I. No. 320 of 2015). Those regulations had been promulgated on 22nd July, 2015 and it appears from the judgment of the trial judge that she had been informed at the January hearing that an application for leave to apply for substituted consent had been made on behalf of the respondents, but she did not have the date upon which that application had been made.

7. Ultimately the trial judge, having again identified both the law which should apply and having considered the balancing factors, determined that a stay of two months should be granted. That stay was included in the order of 19th January and it is from that order alone that the appeal before us today was pursued. It is important to the decision which I have reached to emphasise that the original appeal to this Court was an appeal both against the substantive orders made and against the stay on those orders. However, as is stated in the written submissions before today's hearing, the appellant Quarry parties (to whom I am referring as the respondents as they were in the High Court) determined not to pursue an appeal against the substantive orders. Therefore this appeal is only against the period of two months fixed as the stay on the execution of order of 19th January.

8. The primary, or certainly a significant ground advanced by Mr. Hayden on behalf of the respondents relates to his submission as to one of the assumptions made by the trial judge in determining the stay period of two months. He relied heavily on her reasoning at both paras. 31 and 34 of her judgment of 19th January. At para. 31 she identified as one of a number of factors the:-

> "possibility that the respondents would achieve liberty to apply for substituted consent under S.I. 320 of 2015. I am advised that the respondents have now sought such leave, but not as to when this occurred nor whether any correspondence or notices have been served by the planning authority with regard to that application."

9. Then she came to her decision at the outset of para. 32:-

> "[t]aking all of these matters into account, it seems to me correct to grant a stay, albeit a short stay, and not the stay for twelve months sought by counsel on behalf of the respondents."

10. She then went on to explain why she took that view by reference to a number of dates as to what had occurred, and to which I will return. She then referred to the fact that S.I. 320 was promulgated on 22nd July, six months previously, and that her unapproved judgment was delivered on 16th October. She noted that the respondents had the opportunity, from that date at the latest, to seek to take advantage of a possible regularisation in their planning status. At para. 34, she stated:-

> "A further stay of two months on the order seems to me to do justice to all parties, the environment would be protected as it is mandated by statute, and the respondents would have the opportunity to seek to regularize what is now an unlawful development in that time. While I anticipate that the first respondent ought to have been in a position to give protective or other similar notice to its employees in anticipation of the conclusion of the litigation, a further two months would give those persons an opportunity to seek further employment elsewhere, or arrange their financial affairs."

11. Considering carefully both of the judgments delivered by the trial judge, I do not consider that she made the order granting a stay for a two month period alone upon an assumption that the respondents would have achieved a regularisation of their position within that two month period. Undoubtedly, she took into account as a factor the fact that they had already made an application, although she did not know when, and she took into account the possibility that they would achieve liberty to apply for substituted consent and she was giving them the two month period to give them a further opportunity to seek to regularise what is an unlawful development. However, I do not consider that she assumed that their position could have been regularised within that time. I say that particularly by reason of the fact that the 2015 Regulations set up, in effect, a double stage process for applications by, *inter alia*, quarries under that Regulation. They are required to apply firstly for leave to apply for substituted consent and if leave is granted then there is a further process before the determination of substituted consent.

12. The reason for which I have stressed how I consider what she intended at para. 34 of her judgment is that it seems to me to follow from that paragraph, that the application for judicial review by the late Mr. McCoy which may be considered to have delayed somewhat the application for leave to apply for substituted consent by the respondents, is not relevant to the consideration which this Court has to give on the appeal against the two month period fixed by way of a stay on the orders made by the High Court. It is common case between the parties that this Court in a number of decisions has set out the principles according to which it may exercise its discretion to allow an appeal against a discretionary order made by the High Court. It is not necessary to set those out but in very broad terms this Court will be slow to intervene to allow an appeal against a discretionary order made by the High Court unless the appellant establishes either that there was an incorrect application of principles by a High Court judge or that the resultant decision is one which is unjust as between the parties having regard to the particular circumstances.

13. I am not satisfied that the respondents have identified any incorrect application of principles by the trial judge in the judgment delivered on 19th January, 2016. She set out the law and she considered the relevant factors and she exercised her discretion. It seems to me that the only question for this Court is whether it can be said and whether the respondents have satisfied this Court that the decision made by her was one which is to be considered unjust as between the parties.

14. My conclusion is that it is not a decision which can be said to be an unjust result between the parties in circumstances where the respondents have not pursued before this Court any appeal against the substantive orders made by the High Court and my reasons are briefly these: The two month period fixed by the Court was a period which one must consider in the context of the exercise of its discretion, carefully balanced and reached to make the cessation orders in the first judgment. In that first judgment the trial judge weighed very carefully the competing interests between the parties and the appropriate legal principles and matters to be taken into account as to whether she should make a cessation order, and as I have indicated there is no appeal at all against that part of her judgments or order.

15. Having determined correctly that she should make a cessation order, and this was also accepted by the respondents to be correct, then s. 162(3) of the 2000 Act, as amended, does not apply to the order she made, the cessation order being a final order, and also as that subsection does not apply to an application for leave for substituted consent. Nevertheless it appears to me by analogy to be a strong legislative indicator that a court, where it determines that a development is unauthorised and makes a cessation order, should not then grant a stay simply by reason of the fact that the respondents either have commenced or are intending to regularise their planning position. Nonetheless, it is accepted by both sides that the Court retains a discretion and it is a discretion which was carefully considered by the trial judge in her first judgment in great detail, and in my view the principles applicable as to whether she should make a cessation order in the first place in circumstances where she is not considering primarily the question of a stay pending appeal are somewhat similar, albeit that she should, as she did, take into account the legislative considerations created by ss. 160 and 161. The Court of course retained discretion to grant a stay. In my view the period of two

months which she fixed was sufficient to allow the respondents to appeal; to lodge a notice of appeal to this Court, and to apply to this Court for a stay pending appeal in the event that they were pursuing an appeal against the substantive determination, or even where they were intending to appeal against the limited stay granted in the High Court. The applicants in the High Court agreed to the continuation of the stay pending the determination of the appeal today. As I have already indicated, I do not consider that the trial judge fixed the two months upon an assumption that there would be a final determination of the application for leave to apply for substituted consent which if granted does not of course of itself regularise the position of the respondents. For that reason, the subsequent events are not relevant and the matter that she clearly did take into account was the need for the respondents to wind down the operations albeit that this may be only for a temporary period if they are successful in their subsequent application.

16. The final matter which she took into account and which appears to me to be relevant are the time lines which were set out in both judgments as to when the respondents became clearly aware that the quarrying activity was an unauthorised development. The final decision of An Bord Pleanála on the first s. 5 application was made on 24th December, 2010 and from that date the respondents were aware of the fact that the Board considered this to be an unauthorised development. Further, these proceedings had commenced in July, 2013 and whilst there was a second application under s. 5, that was determined in a manner adverse to the respondents on 2nd February. As the trial judge pointed out, the hearing before her was in April, 2015, she gave her judgment in October, 2015 and the final order only came into effect on 19th January, 2016 and in all those circumstances it does not appear to me that the fixing of a two month stay is one which was or could be considered by this Court to be an unjust result and accordingly I will dismiss the appeal.

[Peart J.]
17. There is nothing I wish to add to what I have listened to carefully from Finlay Geoghegan J.

[Hogan J.]
18. It must be recalled in the present case that the quarry operated by Shillelagh Quarries has been operating unlawfully since the decision of An Bord Pleanála in December, 2010 in respect of the s. 5 application. Accordingly when Baker J. came to consider the matter in January 2016 having made the findings which she did make in her first judgment in October 2015 there were, I think, two factors she had to consider regarding any application for a stay: First, did the stay allow sufficient time to enable an orderly wind-down of the quarry operations, and, second, to permit an appeal to this Court whereby any stay she granted could be continued.

19. So far as the second consideration is concerned it has to be also recalled that Shillelagh Quarries did not contest her findings regarding the planning merits. It follows that it must be taken to have accepted that the quarry was being operated unlawfully, and her decision to grant a s. 160 order prohibiting the use of the quarry. So, in essence, therefore the second consideration fell away by reason of the fact that Shillelagh did not contest the intrinsic planning merits of that decision. Accordingly there is then left only one consideration regarding the stay, namely, whether it granted sufficient time to allow the orderly wind down of the quarrying operations.

20. For all the reasons set out by Finlay Geoghegan J. in her ruling, with which I respectfully agree, I cannot say that the two months allowed by Baker J. are insufficient for this purpose. I

21. A different argument regarding the granting of a stay was, however, pressed by Mr. Hayden SC in argument this morning. Mr. Hayden contended that the High Court should have granted a longer stay to enable an application from An Bord Pleanála for substituted consent to be made under s. 171(k) of the 2000 Act. However, I consider it is plain from the language of s. 162(3) of the 2000 Act that there is a clear legislative indication that stays should not generally be granted merely to enable the developer who is engaged in unauthorised development to apply to regularise their position. It is true that that subsection refers to retention permission and not to substitution permission, but again for the reasons set out Finlay Geoghegan J., I consider that this provision nonetheless applies by analogy to the present case. However, it is to be stressed that this is nature of the stay which is now sought here and in effect it is now the only ground advanced for a continuation of the stay.

22. In the light of the provisions of s. 162(3) and with other factors mentioned by Finlay Geoghegan J. and the fact that this quarry has been operating unlawfully for quite some time, I consider that absent special circumstances such, as for example, the technicality of any breach, the Court should be very slow to grant any further stay under this particular ground in the light of that clear legislative indication in s. 162(3). In these circumstances and for the reasons set out by Finlay Geoghegan J. in her ruling, I agree that the appeal should be dismissed and that no further extension of the stay granted by Baker J. should be granted.