

THE HIGH COURT

2010 168 MCA

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

KEITH SMYTH

APPLICANT

AND

DAN MORRISSEY IRELAND LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Hedigan delivered on the 25th day of January 2012

1. The applicant resides at Ballyburn, Castledermot, County Kildare. The respondent is a limited liability company in the quarrying and concrete production industry and has its registered office at Bennekerry, Carlow, County Carlow.

2. The applicant seeks the following reliefs:

(i) An order pursuant to section 160 of the Planning and Development Act 2000 requiring the respondent, its servants or agents, and all persons acting in concert with them to cease all unauthorised development of lands at Ballyburn Road Castledermot, County Kildare.

(ii) An order requiring the respondent, its servants or agents, and all persons acting in concert with them to carry out the development of lands the subject matter of planning permission 05/20091 in accordance with the said permission and the conditions attached thereto.

(iii) An order pursuant to section 160 of the Planning and Development Act 2000 requiring the respondent, its servants or agents, and all persons acting in concert with them to restore the lands at Ballyburn Road, Castledermot, County Kildare to their condition prior to the commencement of the unauthorised development.

Background Facts

3.1 On 1st September, 2005, the respondent submitted a planning application for a quarry to Kildare County Council. The application included upgrading of the Ballyburn Road which leads to the quarry. In October 2005, various letters of objection were sent to Kildare County Council on behalf of residents of the Ballyburn Road. On 26th October, 2005, Kildare County Council sought further information in relation to the planning application. On 18th May, 2006, Kildare County Council's road design department wrote a letter outlining the conditions to apply to the road. On 27th September, 2006, Kildare County Council granted planning permission for the quarry requiring improvement of the Ballyburn Road. On 23rd October, 2006, this decision was appealed to An Bord Pleanála. On 8th August, 2007, An Bord Pleanála granted planning permission subject to 29 conditions.

3.2 Conditions 1 and 5 are relevant to the Ballyburn Road. Condition 1 states:-

"The development shall be carried out in accordance with the plans and particulars lodged with the application, as amended by further plans and particulars received by the planning authority on the 28th day of March 2006 and the 3rd day of August 2006, except as may be otherwise required in order to comply with the following conditions..."

Condition 5 states:-

"No works permitted by this grant of permission shall commence until the planning authority have confirmed in writing that the following works have been completed to their satisfactions:

"(a) the upgrading of the junction at Prumplestown Crossroads on the existing N9 to the west of the site;

(b) the Ballyburn Road has been improved in accordance with the details submitted to the planning authority on the 28th day of March, 2006 including public lighting and footpaths between the site entrance and Prumplestown Crossroads."

3.3 The details submitted to the planning authority on 28th March, 2006 included a drawing of the proposed road works. The drawing provided for a footpath to be constructed in front of the applicant's dwelling and provided for a roadway of between 6.0 and 6.5 metres outside the applicant's dwelling. In order for the respondent to widen the road, it was necessary for it to acquire some land. The respondent made the applicant an offer of €150,000 for 2 metres in front of the applicant's house. The applicant refused this offer. The respondent then acquired some land from the property across the road from the applicant's property. Instead of constructing the footpath on the applicant's side of the road, the respondent constructed a footpath on the opposite side of the road. The roadway eventually constructed had a width of 7.5 metres and the road has also been elevated by 0.2 metres.

3.4 In these proceedings, the applicant submits that the development has not been constructed in accordance with the planning permission granted and that it represents a danger to the applicant and other road users. The applicant is therefore seeking an order pursuant to s. 160 of the Planning and Development Act 2000, requiring the respondent to restore the Ballyburn Road to the condition it was in prior to the commencement of the development. This would involve a realignment of the road and the restoration of the level and width of the road to what it was before the works took place.

Applicant's Submissions

4.1 The applicant submits that the failure to construct a footpath has resulted in a situation whereby his vehicle has to substantially enter the carriageway of the road before he can achieve a safe line of sight to the left and right of his entrance. The applicant points out that previously, his property was set back some 2 metres from the road, and this verge enabled him to achieve an adequate line of sight. The applicant further submits that if the footpath shown on the drawing referred to in Condition 1 of An Bord Pleanála's permission was constructed as detailed, he would have adequate sight lines. Condition 1 of this permission required that the plans and particulars received by the planning authority on 28th March, 2006 be complied with insofar as they provided for a footpath in front of the applicant's dwelling and a roadway of between 6 and 6.5 metres outside the applicant's dwelling. While the width of the footpath is not specified in the drawing, an examination of the planning file discloses a letter from the roads design department of the Planning Authority dated 18th May, 2006, which said that the requirement of that department in relation to footpaths is that they be designed in accordance with the Department of the Environment and Local Government's 'Recommendations for Site Development Works for Housing Areas'. Those recommendations require that the width of such footpaths be 2 metres. It is evident from the expert evidence given by the applicant's engineer, Mr. Brennan, that the relevant standard for sight lines is as set out by the National Roads Authority (NRA), NRA document (TD 41/95 Vehicular Access Two All -Purpose Trunk Roads- Volume 6, Section 2, Part 7) and requires that a road designed for a speed of 60 Km/h should have a set back of 2.4m in order to provide a sight line distance of 90 metres.

4.2 The reference in Condition 1 to the plans and particulars received by the Planning Authority on 3rd August, 2006, incorporates a requirement that the surface of the road be covered with porous asphalt. The respondent has failed to provide porous asphalt with the result that the road is noisier and the standard of grip is less than that which would have been afforded with the asphalt surface. Nothing in the plans and particulars referred to in Condition 1 permitted the raising of the height of the road by more than 20cm. This has resulted in a steep incline for the applicant when exiting his property. In effect, he now has to perform a hill start. It also means that if he wishes to bring a trailer into his paddock he must use a jeep.

4.3 The applicant submits that once it is established that the development is not in accordance with the permission granted, then he has a prima facie entitlement to the relief sought. It is further submitted that while s. 160 provides the Court with a discretion as to whether or not to grant relief, this discretion ought only be exercised in circumstances where the deviations from the permission are *de minimus*. In the instant case, the deviations from the plans and particulars lodged have removed a footpath from the front of the applicant's property and this has given rise to a traffic hazard at the applicant's property. The applicant submits that the deviation is not *de minimus* and is in fact very material. Moreover, no justification is advanced for the deviation.

4.4 The only matters that are advanced in defence are as follows:-

- (a) The application has been brought for an ulterior motive.
- (b) Any complaint should have been made to Kildare County Council.
- (c) The relief sought will gravely discommode Kildare County Council and the public at large.
- (d) The solution to the sight line issue is in the applicant's own hands through the removal of the trees to the front of his property.
- (e) That Kildare County Council is the appropriate respondent.

(a) Insofar as it is alleged that the applicant has brought these proceedings for an ulterior purpose i.e. to secure the payment of monies, this is denied. The within proceedings cannot result in the payment of monies. (b) The applicant is under no legal obligation to make a formal complaint to Kildare County Council. The applicant complained to an area engineer and received assurances which have not been effected. A complaint to the Planning Authority is not a prerequisite to the commencement of s.160 proceedings.

(c) The applicant seeks no relief that will discommode Kildare County Council. No orders are sought against Kildare County Council. The respondent did not carry out the works in accordance with the permission granted by Kildare County Council. It is the respondent's obligation to put this situation right, not Kildare County Council's. The public will also be served in remedying a traffic hazard. (d) In relation to the trees at the front of the applicant's property, it is submitted that the applicant cannot be under an obligation to remove these trees at his own expense because the respondent has failed to comply with its permission. (e) Kildare County Council is not the developer of the road. They carried out no works in respect of its alignment. They are neither a proper respondent or notice party to these proceedings as the applicant has no quarrel with them. The respondent has sought to suggest that Kildare County Council have approved this alteration. No evidence is adduced in this regard. It is submitted that the onus of proving such satisfaction is on the respondent not the applicant. No certification of the road has occurred and there is no indication of any satisfaction on the part of the Council.

Respondent's Submissions

5.1 The respondent submits that the evidence advanced by the applicant is unsatisfactory. The applicant's grounding affidavit, which purports to be his own evidence, was largely lifted from a report by Mr. Brennan, the applicant's engineer. The applicant's affidavit did not state this, nor did it exhibit the said report. Therefore, a reader of the affidavit would have been wholly misled into thinking what it contained was Mr Smyth's own evidence. The respondent submits that when one compares the affidavit to the report on which it was based, it is clear that it is a very selective summary of that report. All references to Kildare County Council being at fault, and being answerable for the problems that are alleged to have arisen were omitted. Moreover, Mr. Smyth swore that the appeal to An Bord Pleanála of 23rd October, 2006, was his appeal. In fact, it emerged during his cross-examination that his name was not among those on this appeal. It emerged that Mr. and Mrs. Smyth had in fact brought a wholly separate appeal to An Bord Pleanála which he failed to exhibit in circumstances which remain unclear.

5.2 In opening the case, the applicant's counsel noted that it was a fairly draconian order that was being sought, insofar as the applicant was seeking the restoration of the levels to what they ought to be, the width of the road to what it ought to be, and a realignment of the road to the way it ought to have to been according to the original plan. It was conceded that quite a deal of expense would be incurred. It was conceded that, if the applicant was prepared, to transfer to the respondent 2 metres in front of his house and make that available, the problem could be solved. In the absence of any solution like that being suggested by the respondent, the position remained that the applicant had to simply insist that the road should be reconstructed in accordance with the strict terms of the planning permission. However, prior to the road being built, the respondent did make an offer to the applicant

of €150,000 for the 2 metres in front of his house but the applicant said no. The applicant sat back whilst the road was built. Now that the road has been completed, the applicant has decided to come to Court to demand the draconian order that it is ripped up and suggests that the alternative is that the respondent makes an offer to buy the 2 metres. The respondent submits that this case is a classic example of a "hostage strip". The applicant is using the threat of the road being ripped up to seek to compel the respondent to purchase a 2-metre strip in front of his home. The respondent further submits that it is an abuse of process to seek to use s.160 in this manner.

5.3 In a s.160 application, the applicant bears the onus of proof in relation to all aspects of his case. This was expressly stated by Finlay P. in *Dublin Corporation v. O'Sullivan* (Unreported, High Court, Finlay P., 21st December 1984). Similarly, in *Ryan v Roadstone* (Unreported, High Court, 6th March 2006), it was noted that the applicant must establish facts from which the court can raise the possible inference that what the applicant asserts is true. Despite the fact that the onus rests with the applicant, the applicant did not exercise his right to cross-examine any of the witnesses for the respondent who were in court throughout the case. Thus, for example, the applicant failed to challenge by way of cross-examination, paragraph 5.2 of Mr. Thompson's expert opinion which concludes that "any deviations from planning are minimal." By contrast, the applicant's expert, Mr. Brennan, who has put no formal report before the Court, expresses no opinion on the nature of any deviations. The respondent submits that even if the applicant succeeded in making out that there were deviations from the plan, he has not satisfied the court that these are material. The applicant adduces no evidence that Kildare County Council is dissatisfied with the works that were completed. It is contended on behalf of the applicant that it was the respondent, and not Kildare County Council that surfaced the road. This is not so. In fact, the road was surfaced by Kildare County Council.

5.4 The respondent submits that the motivation for the within proceedings relates to matters other than any genuine concerns about the road. Both the applicant and the applicant's father have instituted specific performance proceedings against the respondent. The s.160 proceedings are the third set of proceedings arising out of the road that were issued in or about the same period of time. The applicant is seeking to continue his opposition to the overall grant of permission for the quarry by mounting a collateral attack on the road. The applicant's grounding affidavit does not fully set out the background to the application or the full nature of the dealings between the parties and, in particular, omits to mention that the respondent gave the applicant's father a sum of €50,000 and the applicant's wife a Volkswagen Passat motorcar in order to make up for any inconvenience caused whilst the road was being upgraded. Whether an applicant has made frank disclosure is a factor to which the courts should have regard when exercising their discretion whether to grant or refuse relief in a s.160 application.

5.5 The respondent does not control the road and has no legal title to the road. It is Kildare County Council that controls the road. It was Kildare County Council that made the upgrade of its road a condition of the planning permission for the quarry and it was Kildare County Council that supervised the upgrading of the said road. All works that were conducted on the road by the respondent were carried out with the acquiescence and under the supervision of Kildare County Council. Therefore, the respondent submits that if the applicant has any complaint about the road, his remedy does not lie against the respondent, but rather, it lies against Kildare County Council. The respondent refers to '*Planning and Development Law*' (2nd Ed. 2007) where Simons notes in the context of s.160 that:-

"Generally, it would seem that the appropriate respondents to an application should be the owner and occupier of the relevant land" (p. 311)

Kildare County Council has taken the road in charge and is therefore in the position of owner or occupier of it. There is no evidence it would permit the respondent to engage in works on the road. The applicant is, effectively, asking this Court to order the respondent to make changes to someone else's property. Before making what counsel for the applicant admitted would be a "draconian order", the Court should at least have the benefit of knowing how this will affect other road users. Such a perspective could have been brought to these proceedings if Kildare County Council had been involved.

5.6 The respondent submits that there are a number of discretionary factors that militate against the grant of the relief sought in this case. Kildare County Council has not brought enforcement proceedings. In *Grimes v Punchestown Developments Company Ltd.* [2002] 1 ILRM 409 Herbert J., in exercising his discretion to refuse an injunction under the predecessor to s.160, had regard, *inter alia*, to the fact that the Planning Authority, as "official watchdog", was aware of the matters complained of and had not pursued enforcement action. This is the case herein. The respondent submits that the Court should exercise its discretion to refuse relief because of the practical difficulties and hardship which it would cause. Relief should also be refused on public interest grounds. In *Amphitheatre Ireland Ltd. v HSS Developments* [2009] IEHC 464, this Court held at 14:-

"While the Respondents may, in strict terms, be in technical breach of Condition 4, I am not satisfied that this is a ground on which relief should be granted to the Applicant under s.160 of the 2000 Act in this case. In exercising the Court's discretion in this respect, I have taken into account the fact the Council are aware of the status of the draft agreement and did not consider it necessary to take any enforcement proceedings against the Respondents at this time. I am also mindful of the public interest."

The respondent further submits that relief should be refused on the basis that the applicant is complaining about a situation which he helped to cause. The applicant complains about sight lines and his safety being put at risk, but declines to cut back his own hedge so as to preserve his safety, this is something which the court can and should take into account in deciding whether to accede to his s.160 application. The respondent submits that the balance of convenience lies in refusing the relief sought. After a huge amount of effort and expense the road has been upgraded from what was a country road to a modern road. The road is safe and there has not been a single accident on it. The road was built under the supervision of Kildare County Council. It would be disproportionate to now require the respondent to in effect tear up the road and it is hard to see how that would assist safety.

Decision of the Court

6.1 The applicant seeks the following reliefs:-

- (i) An order pursuant to section 160 of the Planning and Development Act 2000 requiring the respondent, its servants or agents, and all persons acting in concert with them to cease all unauthorised development of lands at Ballyburn Road Castledermot, Co Kildare.
- (ii) An order requiring the respondent, its servants or agents, and all persons acting in concert with them to carry out the development of lands the subject matter of planning permission 05/20091 in accordance with the said permission and the conditions attached thereto.
- (iii) An order pursuant to section 160 of the Planning and Development Act 2000 requiring the respondent, its servants or

agents, and all persons acting in concert with them to restore the lands at Ballyburn Road, Castledermot, County Kildare to the condition prior to the commencement of the unauthorised development.

6.2 Section 160(1) of the Planning and Development Act, 2000 provides:-

"Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

- (a) That the unauthorised development is not carried out or continued;
- (b) Insofar as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;
- (c) That any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject."

6.3 The relief which the applicant seeks is the restoration of the Ballyburn Road to the condition it was in prior to the commencement of the upgrading works carried out by the respondent. This would involve digging up and restoring the level and the width of the road, and realigning the road. The applicant's counsel describes the relief sought as "a fairly draconian order" and admits that "quite a deal of expense" would be incurred. The road has been upgraded at the insistence of Kildare County Council to facilitate a quarry, which, I am told, is shortly due to open. The applicant's engineer, Mr. Brennan, in his report of August 2009 suggested that Kildare County Council should be asked whether they were happy with the road. However, the applicant never took this simple step. In his evidence, the applicant's engineer asserted that it was for the respondent to prove that Kildare County Council was satisfied that the road was not an unauthorised development. It seems to me that in circumstances where the applicant wishes to alter the status quo and obtain an order digging up the road, it is for the applicant to adduce evidence proving that what he asserts is true and that the road is an unauthorised development.

6.4 The evidence put forward by and on behalf of the applicant has not been satisfactory. Mr Brennan's two affidavits do not comply with any of the rules applicable to expert witnesses. They do not set out Mr. Brennan's qualifications or experience. They do not set out whether he has any disclosable interest in the case. Both of Mr Brennan's affidavits pray for relief in terms of the notice of motion. It is inappropriate for an expert witness to do this. In his commenting on Mr. Thompson's report, Mr. Brennan quotes conditions from the permission by Kildare County Council stating that they were never appealed and have not been complied with. This is irrelevant as that permission was superceded by the permission from An Bord Pleanála. The applicant complains that a path of 2 metres was not constructed outside his home to allow him adequate sight lines. The applicant himself, however, acknowledges that the plans and particulars lodged with the application did not specify a width for the path. The applicant points out that the roads design department of the Planning Authority referred to the Department of the Environment's recommendations for site development works which stipulates that such paths should be two metres. The road department's requirements were not a part of An Bord Pleanala permission. The Board is capable of setting out the conditions it requires. I note that Mr. Brennan exhibited photos taken by Mr. Thompson but was not aware of the date they were taken. Scant regard was had for basic methodology in preparing expert reports for use in court proceedings.

6.5 While the applicant made a complaint to the area Engineer for Kildare County Council, he did not make a formal complaint to Kildare County Council. It was open to the applicant to fill out an 'Unauthorised Development Complaint Form' and send this to the Planning Department of Kildare County Council. On receipt of a complaint, the Development Inspector would carry out an inspection, and if necessary, issue a warning letter. If the developer failed to comply with the warning letter within the time specified, then an Enforcement Notice would issue. If the developer failed to comply with the Enforcement Notice, the Planning Authority may take the developer to court. I cannot understand why no such complaint was made. The applicant has not satisfactorily explained his failure to make such a complaint. Furthermore, the applicant did not cross-examine the respondent's expert engineer, Mr. Thompson. I must therefore accept the unchallenged evidence put forward by Mr. Thompson in paragraph 5.2 of his report that "any deviations from the planning are minimal". The applicant also did not cross-examine Mr. Morrissey who averred in his affidavit that Kildare County Council supervised the works. The applicant has not made Kildare County Council a notice party to these proceedings, and as a result, the Court does not know their attitude to this matter. I must assume they were aware of the condition of the road as they put on the final surface on the road. I think I may assume that Kildare County Council would have taken enforcement action if they had deemed the road to be dangerous.

6.6 It seems to me that there is present in this case an issue of delay on the part of the applicant. The applicant first wrote to the respondent on 20th May, 2009, and stated that he intended to obtain an engineering report in respect of the works to be done. The notice of motion issued over one year later, on 4th June, 2010. It seems to me that in circumstances where the applicant claims that the road poses a serious danger, there was an onus on him to act promptly. In my view, he did not do so and I am not satisfied that the delay has been explained.

6.7 I understand that with the old road, the applicant could safely pull out of his drive as there was a 2-metre verge which allowed him adequate sight lines. That situation no longer pertains. However, the respondent had to build a road of a certain width. The respondent offered €150,000.00 to purchase two metres at the front of the applicant's house. As is his undoubted entitlement, the applicant refused this offer. But this decision carried with it certain consequences. The respondent was forced to purchase land on the opposite side of the road. There was only a limited space for the widened road, so when the road was constructed, it was closer to the applicant's front wall than he would have wished. The verge in front of the applicant's house has been reduced to 0.8 meters and this affects his sight lines. Mr. Thompson has given evidence that safe sight lines could be achieved by simply removing overgrown plants at the front of his house. He has not been cross-examined, and in any event, it seems on the evidence I have before me, that this is manifestly correct. In these circumstances, it seems to me that it would be wholly disproportionate to require the road to be torn up lowered and realigned.

6.8 Taking this disproportionality, together with the applicant's failure to avail of the alternative remedy of complaining to Kildare County Council, together with his delay in issuing these proceedings against the respondent, it seems to me that I must refuse the relief sought.