Neutral Citation: [2016] IEHC 262

THE HIGH COURT

2014 No. 750 JR

Between:

ANDREW O'DONOGHUE

Applicant

and

JUDGE GERALD KEYES

Respondent

and

THE COURT SERVICES

Respondent

and

CLARE COUNTY COUNCIL

First Notice Party

and

JAMES PATRICK BURKE AND PATRICK JOSEPH EGAN

Second Notice Parties

JUDGMENT of Mr Justice Max Barrett delivered on 26th May, 2016.

Part 1

Overview

1. This case affords another example of the difficulties that continue to present as a result of our turn-of-the-century national economic 'boom and bust'. Mr O'Donoghue has come to court seeking an order of *mandamus* requiring Clare County Council to discharge the statutory obligation that he contends to arise for it under s.180(2) of the Planning and Development Act 2000, and so to take charge of 'Westpark', a housing estate at Spanish Point that has not been completed to the satisfaction of the planning authority, principally, it seems, because the development company collapsed.

2. Since November 2011, the Council has been in receipt of a valid request from the residents of 'Westpark' to take the estate into charge. So far,the Council has failed to discharge the mandatory obligation that Mr O'Donoghue contends to arise for it under s.180(2).In fact, the Council maintains that s.180(2) is not the applicable provision of the Act of 2000, and seeks instead to rely upons.180(2A). That latter provision was enacted into law in 2010. It was intended to enable planning authorities to deal with the problems posed by so-called 'ghost estates' and gives the man "*absolute discretion*" as to whether or not to take an estate into charge, in effect enabling them to allocate and prioritise scant resources in a manner that was not possible in the mandatory environment contemplated by s.180(2).

3. As a resident of 'Westpark' whose interests are directly and detrimentally affected by the Council's inaction pursuant to s.180(2), if that is the applicable provision (and the court finds later below that it is), Mr O'Donoghue undoubtedly has *locus standi* to bring the within application.

Part 2

Section 180 of the Planning and Development Act 2000

4. Section 180, as amended, currently provides as follows:

> *"Taking in charge of estates*
>
> *180. –(1) Where a development for which permission is granted under section 34 or under Part IV of the Act of 1963 includes the construction of 2 or more houses and the provision of new roads, open spaces, car parks, sewers, water mains or service connections (within the meaning of the Water Services Act 2007), and the development has been completed to the satisfaction of the planning authority in accordance with the permission and any conditions to which the permission is subject, the authority shall, where requested by the person carrying out the development, or subject to subsection (3), by the majority of the owners of the houses involved, as soon as may be, initiate the procedures under section 11 of the Roads Act, 1993.[1]*
>
> *(2) (a) Notwithstanding[2] subsection (1), where the development referred to in subsection (1) has not been completed to the satisfaction of the planning authority and enforcement proceedings have not been commenced by the planning authority within seven years beginning on the expiration, as respects the permission authorising the development, of the*

appropriate period, within the meaning of section 40 or the period as extended under section 42, as the case may be, the authority shall, where requested by the majority of the owners of the houses involved, comply with section 11 of the Roads Act, 1993, except that subsection (1)(b)(ii) of that subsection shall be disregarded.[3]

(b) In complying with paragraph (a), the authority may apply any security given under section 34(4)(g) for the satisfactory completion of the development in question.

(2A) (a)[4] Notwithstanding subsections (1) or (2)[5], where a development referred to in subsection (1) has not been completed to the satisfaction of the planning authority and either –

(i) enforcement proceedings have been commenced by the planning authority within seven years beginning on the expiration, as respects the permission authorising the development, of the appropriate period,

or

(ii) the planning authority considers that enforcement proceedings will not result in the satisfactory completion of the development by the developer,[6]

the authority may in its absolute discretion, at any time after the expiration as respects the permission of authorising the development of the appropriate period, where requested by a majority of the owners of the houses in question, initiate the procedures under section 11 of the Roads Act 1993.[7]

(b) In exercising its discretion and initiating procedures under section 11 of the Roads Act 1993, the authority may apply any security given under section 34(4)(g) for the satisfactory completion of the development in question.

(3) (a) The planning authority may hold a plebiscite to ascertain the wishes of the owners of the houses.

(b) The Minister may make or apply any regulations prescribing the procedure to be followed by the planning authority in ascertaining the wishes of the owners of the houses.

(4) (a) Where an order is made under section 11(1) of the Roads Act 1993 in compliance with subsection (1) or (2), the planning authority shall, in addition to the provisions of that section take in charge –

(i) (subject to paragraph (c)), any sewers[8], water mains[9] or service connections[10] within the attendant grounds of the development, and

(ii) public open spaces or public car parks within the attendant grounds of the development.

(b) Where an order is made under section 11(1) of the Roads Act 1993 in compliance with subsection (2A), the planning authority may, in addition to the provisions of that section take in charge –

(i) (subject to paragraph (c)) some or all of the sewers, water mains or service connections within the attendant grounds of the development, and

(ii) some or all of the public open spaces or public car parks within the attendant grounds of the development,

and may undertake,

(I) any works which, in the opinion of the authority, are necessary for the completion of such sewers, water mains or service connections, public open spaces or public car parks within the attendant grounds of the development, or

(II) any works as in the opinion of the authority, are necessary to make the development safe,

and may recover the costs of works referred to in clause (I) or (II) from the developer as a simple contract debt in a court of competent jurisdiction.

(c) A planning authority that is not a water services authority within the meaning of section 2 of the Act of 2007 shall not take in charge any sewers, water mains or service connections under paragraph (a)(i) or (b)(i), but shall request the relevant water services authority to do so.

(d) In paragraph (a)(ii), 'public open spaces' or 'public car parks' means open spaces or car parks to which the public have access whether as of right or by permission.

(e) In this subsection, 'public open spaces' means open spaces or car parks to which the public have access whether as of right or by permission.

(5) Where a planning authority acts in compliance with this section, references in section 11 of the Roads Act, 1993, to a road authority shall be deemed to include references to a planning authority.

(6) In this section 'appropriate period' has the meaning given to the term in section 40, as extended under section 42 or 42A as the case may be."

Notes

5. [1] Subsection (1) is not relevant to the within proceedings as the development in question has not been completed to the satisfaction of the planning authority, and the provision is in any event developer-driven.

6. [2] (and[5]). As used in s.180, the word "*Notwithstanding*" bears its ordinary dictionary meaning. So what is that meaning? A Google search of the word "*Notwithstanding*" and "definition" defines "*Notwithstanding*" to mean "*In spite of*" and offers the following

synonyms: "*Despite*", "*Regardless of"* and "*For all*". The Collins Online Dictionary yields the following definition "*In spite of*" and "Despite" and offers those words and "*Regardless of"* as synonyms. So, there is a broad consistency of meaning in the definitions available online. Turning then to, e.g., subsection (2A)(a),it reads "*Notwithstanding subsections (1) or (2)…"* and, having regard to the definitions and synonyms just considered can be read as meaning:

> *'In spite of subsection (1) or (2)…',*
>
> *'Despite subsection (1) or (2)…',*
>
> *'Regardless of subsection (1) or (2)…', and*
>
> *'For all that subsection (1) or (2) provides…'.*

7. One might perhaps quibble over whether subsection (2A)(a), given its use of the plural form "*subsections*" should more properly read 'Notwithstanding subsections (1) and (2)' (or if 'or' is intended, then "Notwithstanding subsection (1) or (2)). But either way the cumulative effect of the wording seems clear: subsection (2A) is intended to 'trump' each and both of subsections (1) and (2), both of which remain extant but are subject to the operation of subsection (2A) which prevails over either and both of them.

8. [3] The upshot of subsection (2), in and of itself and without regard to the balance of s.180, is that when the following pre-conditions are satisfied a planning authority must comply with s.11 of the Act of 1993: (i) the development referred to in subsection (1) has not been completed to the satisfaction of the planning authority; (ii) enforcement proceedings have not been commenced by the planning authority within the stated seven-year period; and (iii) a majority of the owners of the houses involved has requested such compliance. The court understands it not to be disputed between the parties to this application that these pre-conditions are satisfied in the case presenting.

9. [4] Following the national economic crash of 2008, it was evident that many housing developments would only be partly completed given the collapse of so many development companies. Faced with the problem of such so-called 'ghost estates', the Oireachtas enacted s.2A, giving an absolute discretion to local authorities in the circumstances referred to in that subsection. Mr O'Donoghue contends that the correct way to read subsections (2) and (2A) is that subsection (2) is a mandatory provision that applies in the circumstances to which it relates and subsection (2A) confers a discretionary power in the circumstances in which it applies, i.e. the two subsections operate in tandem and that subsection (2A) by stating *"Notwithstanding subsections (1) or (2)"* does not mean to 'trump' those earlier subsections. For the reasons stated at [2], the court respectfully concludes that precisely the opposite applies and that each and both of subsections (1) and (2) are in fact 'trumped' by subsection (2A) when the circumstances referred to in subsection (2A) present. This reading makes sense not just when one has regard to the plain English meaning of subsection (2A) but also when one has regard to the context in which it was enacted.

10. [5] See [2].

11. [6] Do the circumstances posited by subsection (2A)(i) and (ii) present in this case? It is common case that no enforcement proceedings as referred to in (i) have been commenced and that such proceedings cannot now be commenced as the seven-year period applicable to these proceedings expired in 2009. Thus the remaining question is whether *"the planning authority considers that enforcement proceedings will not result in the satisfactory completion of the development by the developer"?* The difficulty that the court perceives to present for the planning authority in this regard is that subsection (2A)(ii) is clearly intended to apply in the context where it is possible to bring enforcement proceedings and not intended to apply where the bringing of such proceedings is impossible because they are out of time . Otherwise one would have to read the Oireachtas as having meant, when it enacted subsection (2A)(ii),that 'the planning authority considers that the doing of the possible or the doing of the impossible will not result in the satisfactory completion of the development by the developer'. Such a reading would be absurd. Why would the Oireachtas refer to the planning authority considering that doing the impossible would not achieve a particular result? Doing the impossible is impossible, and no amount of consideration by a planning authority will change that immutable fact. So it is common case that (i) does not apply (and the court finds in any event that it does not apply) and (ii) (i.e. the only sensible reading of (ii)) also does not apply. So subsection (2A) has no consequence in the present case, subsection (1) does not apply for the reasons stated above, and thus subsection (2) applies. The three pre-conditions to the operation of subsection (2) all present and thus Clare County Council must, when it comes to Westpark, *"comply with section 11 of the Roads Act, 1993, except that subsection (1)(b)(ii) of that section shall be disregarded."*

12. [7] Notably, s.180(2A) states that the planning authority may *"initiate the procedures under section 11 of the Roads Act 1993"*. By contrast, s.180(2) requires that where the pre-conditions referred to therein are satisfied the planning authority *"shall…comply with section 11 of the Roads Act, 1993…".* Mr O'Donoghue rightly contends that the mere initiation of a process under s.180(2A) is a more diluted requirement to that of compliance which is imposed by s.180(2) and thus that an order of *mandamus* requiring the planning authority to proceed under s.180(2) has the result that the performance of the duty would not be meaningless or carry no advantage for him. The court notes too that s.180(4) of the Act of 2000 also has the effect that – contrary to the position which pertains under s.180(2A) whereby the planning authority may (by virtue of s.180(4)(b)) take in charge certain sewers, water mains, service connections, public open spaces and public car parks – a planning authority obligated to proceed under s.180(2) must (by virtue of s.180(4)(a)) take such spaces, places and things into charge. Clearly there is a very real benefit to Mr O'Donoghue that the planning authority would be required by virtue of the proposed order of *mandamus* to proceed under s.180(2) and thus be subject to the mandatory requirements of s.180(4)(a), thereby ensuring that the planning authority takes all pertinent elements of the 'Westpark' development into charge.

13. [8] By virtue of s.180(1), each of the terms "sewers", "water mains" and "*service*

[9] *connections*" bears the respective meaning given it in the Water Services

[10] Act 2007. That Act defines those terms as follows, in s.2:

> *"'sewer' means drainage pipes and sewers of every description, including storm water sewers, owned by, vested in or controlled by a water services authority, an authorised provider of water services or a person providing water services jointly with or on behalf of a water services authority or an authorised provider of water services, but does not include a drain or service connection",*
>
> *"'water main' means water supply pipes owned by, vested in or controlled by a water services authority, an authorised provider of water services or a person providing water services jointly with or on behalf of a water services authority or*

an authorised provider of water services, but does not include pipes, fittings and appliances to which the words 'distribution system' or 'service connection' interpreted in this section apply", and

"'service connection' means a water supply pipe or drainage pipe, together with any accessories and related fittings, extending from a waterworks or waste water works to the outer edge of the boundary to the curtilage of a premises, and used, or to be used as the case may be, for the purpose of connecting one or more premises with a waterworks or waste water works, and, where used or to be used for connecting more than one such premises it shall extend to the outer edge of the boundary to the curtilage of the premises which is furthermost from the said waterworks or waste water works".

14. Worth noting too is the definition of "*waste water works",* defined in s.2 as meaning:

"sewers and their accessories, and all other associated physical elements used for collection, storage or treatment of waste water, and any related land, which are owned by, vested in, controlled or used by any person providing or intending to provide water services".

15. A number of conclusions can be drawn from the foregoing definitions. First, the term "*waste waterworks*" includes sewers; however, the reverse does not hold true. Second, the significance of this fact in the context of subsection (4) is that when that provision states, at (a) that "*the planning authority* [assuming it is a water services authority] *shall, take in charge...any sewers, water mains or service connections…",* it does not require the taking in charge of waste waterworks. Nor indeed does it have a discretion to do so under (b). Such a reading makes sense not just in law but also in practice as sewers are placed under roads controlled, maintained and managed by a local authority whereas typically a waste water treatment plant (and certainly the one here) would not be under the roads but on land owned by the relevant estate and so due to be serviced by another party. Here, the court understands that the subsection (4) points arising have happily become moot as Irish Water Limited has confirmed in writing to Clare County Council that it accepts that a temporary taking in charge by the Council of the Westpark waste waterworks by the Council is now a matter that falls within the remit of Irish Water.

Part 3

Relief Sought

16. These proceedings were originally commenced by Mr O'Donoghue as a litigant in person. By the time the proceedings came to hearing, Mr O'Donohue had secured legal representation and the facts on the ground had changed to some extent – the court has referred to the helpful intervention of Irish Water Limited above. The ambit of Mr O'Donoghue's initial proceedings had also been confined by order of Kearns P.to the seeking of but one relief, viz. an order of *mandamus* directing Clare County Council to comply with its statutory obligations as described in s.180(2) of the Planning and Development Act 2000, as amended, as they apply to the estate of Westpark, Breaffa South, Spanish Point, County Clare, following an application of the householders of the said housing estate on 21st November, 2011.

17. The foregoing has the effect that much of the proceedings as initially formulated by Mr O'Donoghue, acting as a litigant in person and doubtless doing the best as he could without the benefit of professional legal advice, has fallen by the wayside and explains why, despite the abundance of parties to the proceedings, in effect it is now an application concerning him and Clare County Council.

Part 4

Some Case-Law

A. Overview.

18. The court considers below a number of cases that touch upon or relate to key elements of the remedy of *mandamus*, including (1) the public dimension of the remedy, (2) the requirement that before seeking performance of a legal duty by *mandamus*, performance of same must have been sought and refused, albeit not necessarily the subject of an express refusal, (3) the general reluctance on the part of the courts to order *mandamus* where an equally effective and convenient remedy is available, (4) the requirement that where *mandamus* of a statutorily imposed duty is sought, that the duty has been clearly and unambiguously expressed in the applicable statute, and (5) the related requirement that for an order of *mandamus* to issue for the enforcement of a statutory right it must appear that the statute in question imposes a duty, the performance or non-performance of which is not a matter of discretion.

B. R (Clonmel Asylum Committee) v.Considine

[1917] 2 I.R. 1

19. This was an application for an order of *mandamus* against an auditor of the accounts of a District Asylum seeking the bringing up and quashing of a certificate issued by him in respect of those accounts. With striking brevity, in an almost throw-away remark, Gibson J. stated, at 6, that *"Nor is mandamus allowed where there is another and equally effective and convenient remedy such as here exists."* There is no other, equally effective and convenient remedy for Mr Donoghue that is an alternative to that which he now seeks before this Court – though the court rather balks at describing the need to trek up from Clare to the Four Courts and take on all the financial risk which that process presently entails in order to secure an order of mandamus as a remedy that is "*convenient*". The relief that he seeks, as mentioned at note [7] above affords him a meaningful relief that is of real advantage to him. And the planning authority has been in receipt of a valid request since November 2011 and, to this time, has failed to perform its mandatory duty under s.180(2).

C.R (Butler) v. Navan UDC

[1926] I.R. 466

20. Butler is a case with a slightly Gothic flavour to it, in which the wall of a churchyard cemetery gave way, causing some of the wall and some of soil from the cemetery to spill into a street that ran below the cemetery. The church officials sought an order of mandamus compelling the local authority to repair the street by re-erecting the cemetery wall. The order was refused in the High

Court (the decision of which was affirmed, on appeal, by the Supreme Court), on the basis that it involved an attempt to secure the performance of a private right (and not the performance of a public duty) by a public body. Fitzgibbon J., giving judgment for the Supreme Court, observed, inter alia, at 470–1:

> *"It is an established rule that the prosecutor must make a specific demand for the performance of the public duty in question, and it must be shown that this demand has been refused, or has been followed by conduct which the Court considers as tantamount to a refusal….Even if the application were made by a suitable applicant, and the demand had been for the performance of a public duty, the Court, before granting the writ, which is a discretionary writ, can examine into the object of the proceedings. The history of the proceedings and the course of the case in the High Court show that the real aim and object of the application was not to make the road safe for the public, but to secure the graveyard from further injury. In this aspect of the case the remedy has been misconceived, and the discretion of the Court would be properly exercised in discharging the conditional order."*

21. Here, there has been a demand of the Council and this has been met by the Council with a denial that s.180(2) is even applicable, a lack of preparedness to exercise its (non-existent) discretion consistent with that demand, and ultimately with the response to these proceedings. So there is no doubt that there has been a demand and a refusal. As to looking to the object of the proceedings, Mr O'Donoghue is seeking that Clare County Council do what it is obliged to do by s.180(2), and thereby to obtain a meaningful relief that affords him a real advantage, nothing more and nothing less. There is nothing in that set of facts that would sway the court into refusing the order of *mandamus* sought.

D. State (Modern Homes (Ireland) Limited) v. Dublin Corporation

[1953] I.R. 202

22. *Modern Homes* identifies the criteria for granting an order of *mandamus*. It concerned the obligation under the Town and Regional Planning Act 1934 whereby a planning authority that had resolved to make a planning scheme was required to proceed with all convenient speed to make that planning scheme and submit it to Government for approval. Dublin Corporation had resolved to make a planning scheme and, when it dithered thereafter in preparing that scheme, an order of mandamus was sought by the applicant developer which maintained that the Corporation's inaction was detrimental to its business. The order of mandamus was granted by the High Court and its decision was affirmed on appeal. Maguire C.J., giving judgment for the Supreme Court, observed, at 227-9:

> *"[i] On the question of whether there has been a distinct demand and a refusal little need be said. The letter from the prosecutor's solicitor was a clear demand upon the appellants to carry out their statutory duty….*
>
> *[ii] The next point to be considered is whether the prosecutors have a sufficient interest to entitle them to an order of mandamus.*
>
> *[iii] The applicant for an order of mandamus must show that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought….*
>
> *[iv] An objection…strongly pressed is that the order should not be made because it would be futile….It is, of course, correct that an order will not be made if it is clear that it would be impossible of performance by reason of the circumstances that the doing of the act would involve a contravention of law or if the defendants have not the means of complying with the order….The appellants are asked to carry out their legal obligation and they have the means to carry out the order. It is to be assumed that they will obey an order of the Court to do that which it is their statutory duty to do."*

23. Applying those principles to the present case: [i] the court has concluded that there has been a demand and refusal; [ii] Mr O'Donoghue as a householder in 'Westpark' is clearly impacted to his detriment by the failure of the planning authority to do as is required of it by s.180(2), [iii] Mr O'Donoghue has a legal right to expect that the planning authority will do as it ought to do under s.180(2), given the satisfaction of the pre-conditions identified therein, including the requirement as to the householders' request, and [iv] there is no suggestion that the court's order in this case would be futile; like the appellants in Modern Homes, it is to be assumed that Clare County Council "*will obey an order of the Court to do that which it is their statutory duty to do"*; and if futility is to be measured in terms of some advantage that is to be derived from the compulsory application of s.180(2) over the discretionary application of s.180(2A), point [7] above identifies the abundant advantage arising.

E. State (Abenglen) v. Dublin Corporation

[1984] I.R. 381

24. *Abenglen* was a *certiorari* application but it is nonetheless of interest in the context of the present proceedings. There the prosecutors successfully applied for planning permission. However, the permission granted was subject to conditions that radically transformed what had been put forward in the planning application. Rather than appeal matters to An Bord Pleanála, the prosecutors applied for an order of *certiorari* quashing the permission granted. Cleverly – perhaps too clever by half – if they were successful in this application, no planning permission would have issued within two months of the initial application and the prosecutors would have won planning permission for their original proposal by default. The High Court granted the order of certiorari sought; this was reversed by a five-man Supreme Court on appeal, O'Higgins C.J., Walsh J. and Henchy J. delivering judgments. In the course of his judgment, O'Higgins C.J. observed as follows:

> *"The question immediately arises as to the effect of the existence of a right of appeal or an alternative remedy on the exercise of the court's discretion. It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which certiorari has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant. If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground for refusing relief. Other than these, there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with errors in the application of the code in question. In such cases, while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate."*

25. Again, the court does not see an alternative, equally effective and convenient remedy presenting for Mr O'Donoghue in this case. And, though mindful of the discretionary nature of the relief being sought, sees nothing on the facts presenting that would sway it against granting the relief sought.

F. State (Sheehan) v. Ireland

[1987] I.R. 550

26. *Sheehan* was a case in which application was made seeking an order of *mandamus* that a statutory provision, the commencement of which had been left by the Oireachtas to the discretion of the Government and which had not been commenced in the quarter-century between the enactment of the Act and the bringing of the proceedings, be commenced. The order was granted by the High Court but discharged on appeal by the Supreme Court because of the clearly discretionary nature of the provision in question. Per Finlay C.J., at 561:

> *"In my opinion, [the relevant statutory provision]…by vesting the power of bringing the section into operation in the Government rather than in a particular Minister, and the wording used, connoting an enabling rather than a mandatory power or discretion, would seem to point to the parliamentary recognition of the fact that the important law reform to be effected by the section was not to take effect unless and until the Government became satisfied that, in the light of the factors such as the necessary deployment of financial and other resources, the postulated reform could be carried into effect. The discretion vested in the Government…was not limited in any way, as to time or otherwise….*
>
> *Neither has counsel for the prosecutor referred to any decided case in which mandamus has issued to a person or body to perform a statutorily imposed duty of implementing a statutory provision save where the duty has been clearly and unambiguously expressed in the statute."*

27. Applying those principles here, for the reasons stated above, the court considers s.180(2) to be applicable to the facts at hand. Provided the pre-conditions referred to therein are satisfied (and they are), the planning authority has no choice as to its actions: *"[T]he authority shall…comply with section 11 of the Roads Act, 1993…".* So the planning authority does not enjoy any latitude of action in this regard, never mind the wide discretion that the Government enjoyed under the statutory provision at issue in Sheehan. Under s.180(2), a duty arises for a planning authority, the performance of which is not a matter of discretion, and it is a duty that has been clearly and unambiguously expressed. So Sheehan offers no basis on which to refuse the order for *mandamus* now sought.

G.The Minister for Labour v. Grace

[1993] 2 I.R. 53

28. In *Grace*, the Minister sought an order of mandamus directing a liquidator to complete a form that would facilitate the payment of holiday pay to a person who had worked at the company in liquidation. O'Hanlon J., in an *ex tempore* judgment, refused the order sought because there were alternative remedies available and the order being sought was in effect meaningless (as there was doubt whether there was any holiday pay actually due), stating, at 55:

> *"[F]or an order of mandamus to issue for the enforcement of a statutory right it must appear that the statute in question imposes a duty, the performance or non-performance of which is not a matter of discretion, and if a power or discretion only, as distinct from a duty, exists, an order of mandamus will not be granted by the court."*

29. Applying those principles here, for the reasons stated above, the court considers s.180(2) to be applicable to the facts at hand. Again, provided the pre-conditions referred to therein are satisfied (and they are), the Council *"shall…comply with section 11 of the Roads Act, 1993…".* That is a duty, the performance of which is not a matter of discretion. And, for the reasons identified at point [7] above, for the court to order the remedy is decidedly not a pointless measure. Nor does it appear to the court that there are alternative, equally effective and convenient remedies available. So Grace offers no basis on which to refuse the order for mandamus sought here.

H. Point Exhibition Company Limited v. Revenue Commissioners

[1993] 2 I.R. 551

30. *Point Exhibition* is support for the proposition that a demand need not be followed by an express refusal: the fact of refusal can be inferred. The applicant was the owner of the premises known as 'The Point' and now the site of the 3Arena. In May 1992, the applicant applied to the Revenue Commissioners for an excise licence. The Revenue Commissioners neither granted nor refused the excise licence, informing the applicant that the matter was under consideration. The applicant commenced judicial review proceedings seeking, inter alia, an order of *mandamus* directing the granting of the licence. Granting a declaration that the applicant was entitled to the licence sought, Geoghegan J. observed as follows, at 555:

> *"[I]n my view, the applicant was entitled to a decision one way or the other within a reasonable time. The respondents quite obviously did not make such decision within any time span that could be regarded as reasonable.*
>
> *Accordingly, the applicant is entitled to treat the delay as a refusal and to seek an order of mandamus directing the granting of the licence."*

31. Demand has been made in this case and the court is satisfied to conclude, for the reasons stated previously above, that a refusal has ensued.

Part 5

Conclusion

32. For all of the reasons stated above, the court will grant the order of mandamus sought.