Neutral Citation Number: [2007] IEHC 24

THE HIGH COURT

Record No. 1997/12470 P

BETWEEN

DWYER NOLAN DEVELOPMENTS LIMITED

PLAINTIFF

AND

KINGSCROFT DEVELOPMENTS LIMITED

DEFENDANT

Judgment of Miss Justice Laffoy delivered 9th February, 2007.

The Court's Function

1. In order to define with precision the court's current function in this matter, it is necessary to consider the background in some detail.

2. These proceedings were initiated by plenary summons which was issued on 22nd October, 1997. At an early stage a motion brought by the defendant to have the proceedings dismissed on the ground that the claims were frivolous and vexatious and an abuse of process was partly successful. However, what I described as the "nub of the plaintiff's case" in an *ex tempore* judgment which I delivered on 30th January, 1998 on the motion remained in the case. That was whether the plaintiff's allegation that the defendant had acted wrongfully in denying that the plaintiff had a right of way over lands of the defendant and in not agreeing and providing for that right of way in a planning application and by not providing for the line of the right of way was well founded. The right of way claimed by the plaintiff was for the benefit of lands retained by the plaintiff (the retained lands) on the sale in 1994 by the plaintiff to the defendant of contiguous lands with the benefit of a 1993 planning permission, which, if implemented, would have afforded vehicular access to and from the retained lands from and to the public road over the roads on the lands sold to the defendant. The site layout sanctioned in the 1993 planning permission provided for a proposed estate road on the lands sold to the defendant extending to the boundary of the retained lands. However, as a result of an application made by the defendant for planning permission for a revised layout, which was granted in 1996, the lands sold to the defendant were developed in accordance with that permission in a manner whereby the road in question, which has been referred to as road 14 in these proceedings, did not extend to the boundary of the retained lands.

3. The substantive proceedings came on for hearing before Kinlen J. in due course. He delivered judgment on 30th July, 1998. The judgment is reported at [1999] 1 I.L.R.M. 141. Kinlen J. set out his decision at p. 154 in the following terms:

> "The court has decided that … the plaintiff was and is entitled to a right of way to his land locked property.
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> It seems to the court that if both parties applied to the local authority to provide access through the reserved woodland they might resolve this issue. The area for industrial development will bring work and wealth but if sterile will be useless.
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> The court proposes to adjourn this matter for six months to enable the problem to be resolved. If this solution is not achieved the court would wish to be addressed on alternative orders in view of the court's findings."

4. As I understand it, the reference to "the reserved woodland" is a reference to an area which was designated public open space in the defendant's 1996 planning permission and what Kinlen J. envisaged was an extension of road 14 through that area to the boundary of the retained lands. The reference to the "area for industrial development" is a reference to the retained lands, which at the time were, and still are, zoned for light industrial development in the relevant development plan. These observations prompt me to refer to factual features of some significance. The retained lands were, and are, within the functional area of Bray Urban District Council (now Bray Town Council), whereas the lands sold to the defendant, including the area over which the extension to road 14 would be constructed, were, and are, within the functional area of Wicklow County Council, being zoned residential. These differences explain why the plaintiff did not deal with the retained lands in the same way as it dealt with the lands sold to the defendant.

5. In his judgment, in outlining submissions made by counsel for the plaintiff, Kinlen J. recorded the following (at p. 149):

> "However, he concedes that the defendant has left a gap through which the plaintiff may be allowed in if compelled by this Court. There is physical interference by the construction of the houses. The difference is that the sole surviving means of access is across land designated as open space under the planning permission upon which the defendant has acted. He argues that it is highly unlikely that a road would be permitted across a reserved open space. The result is that his client is left to his land which would have no commercial value. He concedes that if he got planning permission there is then no damage whatsoever to the value of the site and he would be happy as he would have been had the defendant complied with its obligations. If he does not get a road through the sole remaining means of access with planning permission then he has a worthless site. He is not looking for damages. He wants that for which he contracted."

6. Following the delivery of the judgment of Kinlen J., in 1998 the defendant submitted two separate applications to the planning authority, Wicklow County Council, for the extension of road 14 to the boundary of the retained lands. Both applications were refused. The defendant appealed to An Bord Pleanála, which refused both applications in early August, 1999. The same reason was ascribed for the refusal in each case, which was stated as follows:

> "Having regard to the permission granted by the planning authority on 6th September, 1996 under planning register reference No. 4460/96, it is considered that the proposed road extension would be premature in the absence of a determination by the planning authority of a road layout to serve the area to which the proposed development would give access, particularly having regard to the undeveloped nature of that area."

7. Subsequently, by letter dated 24th March, 2000 to the plaintiff's solicitors, the defendant's solicitors suggested that it was clear from its decisions that An Bord Pleanála did not wish to grant a road "to nowhere" and that this was not unreasonable. The plaintiff was called on to make a planning application to Bray Urban District Council for the retained lands and it was intimated that the defendant would be willing to make a planning application at the same time to Wicklow County Council in relation to the proposed extension of road 14 to facilitate the plaintiff's application. There was no response by the plaintiff to that suggestion. The plaintiff has never applied for planning permission for the development of the retained lands, which comprise an area of 3.05 acres of level wooded land of irregular shape traversed by a stream and lying between the lands sold and developed by the defendant as Hollybrook Park Estate on the east and an industrial estate, apparently known as Bray Business Park, to the west. The retained lands have remained

unused.

8. The matter was brought back before Kinlen J. in July 2001. On 4th July, 2001 he made an order, which was expressed to be made "in accordance with the judgment delivered herein on 30th day of July, 1998 wherein the court found that the plaintiff was and is entitled to a right of way to his land locked property". The material part of the order was in the following terms:

> "… the court doth declare that the plaintiff was and is entitled to a right of way at all times by day and by night with or without motor cars or motor lorries and all other manner of vehicles howsoever propelled or drawn whether laden or unladen to go pass and re-pass over and along the lands owned by the defendant (and comprised in folio 16366F County Wicklow) leading to and from the lands owned by the plaintiff (and comprised in folio 14185F County Wicklow) to and from the public road and to a reasonable access to the said public road from the said lands owned by the plaintiff over that part of the said lands shown coloured yellow on the map annexed as a schedule hereto leading from the end of what is shown on the said map as to end of road 14 and the boundary of the plaintiff's said lands."

9. In fact, the map scheduled to that order does not show any area coloured yellow. However, my understanding is that the area in question is an area which would extend road 14 westward to the boundary of the retained lands to the north-west of the dwelling house No. 154 Hollybrook Park Estate. In the interests of clarity I will refer to this area as "the road 14 extension area".

10. The order of 4th July, 2001 went on to order that "the matter of damages and related matters be adjourned and that both parties ensure that these matters are dealt with expeditiously", with provision being made for delivery of points of claim and points of defence. Costs were reserved.

11. The observations of Kinlen J. in an *ex tempore* judgment delivered when he made the order of 4th July, 2001, which was approved by him on 5th October, 2001, amplify the order and his intentions. Having described the terrain to the west of road 14, he commented that he was of the opinion that with goodwill on both sides "the problem could easily be solved with proper consultants and a joint application to the two local authorities". He also recorded that at that late stage the defendant was prepared to grant the declaration sought in the statement of claim, although during the trial it was opposed to the whole idea and, in fact, denied the existence of the right of way. It was on that basis that the court made the declaration contained in the order. However, Kinlen J. went on to state that the matter did not end there and he recorded that the plaintiff did not at that point in time want the right of way, although counsel for the plaintiff had been very insistent on it, but wanted money, compensation. He further recorded that the behaviour of the defendant had been regrettable. He then continued as follows:

> "The court does direct the issue of damages should be addressed by the court as to the date on which damages should be assessed and the nature of the damages and as to whether in fact the land is landlocked. It seems to me on a casual observation that this may not be so and having regard to the devaluation of the land and injurious affection this will require a full hearing, including argument as to the date on which damages should be ascertained and the interest payable thereon. These are all issues to be tried as a separate issue in the High Court."

12. Accordingly, the court's function now is to determine whether, given the declaration made in the order of 4th July, 2001, in the factual circumstances which prevail, the plaintiff is entitled to damages and, if so, the measure of such damages.

Events since 4th July, 2001

13. The plaintiff delivered points of claim on 7th January, 2002, claiming damages, *inter alia*, for nuisance and wrongful interference with its right of way. The particular of loss and damage pleaded was a diminution in value of the plaintiff's interest in the retained lands in the amount of €1,645,597.98, on the basis that that figure represented the then current open market value of the retained lands with vacant possession and with the benefit of proper access over the defendant's lands, whereas the then current open market value of the retained lands without the benefit of such access was nugatory.

14. The defendant delivered points of defence on 26th March, 2002.

15. Nothing happened after that for four years until February, 2006 when the plaintiff brought a motion to re-enter the proceedings. At that stage the defendant was given leave to amend its points of defence. Amended points of defence were delivered on 1st March, 2006, wherein the defendant objected in point of law that the plaintiff had been guilty of prolonged, inordinate and inexcusable delay in prosecuting the action and in seeking the relief claimed, by reason of which, it was alleged, the plaintiff was not entitled to recover damages. Further, it was alleged that, by reason of the delay, the defendant was prejudiced in the defence of the proceedings.

16. There was undoubtedly delay on the part of the plaintiff which has been neither explained nor justified. However, the defendant has not established any prejudice on account of the delay. Further, having regard to the history of the proceedings, and, in particular, the approach adopted by the defendant in the earlier hearings which Kinlen J. felt was to be deprecated, I am of the view that the balance of justice, which in the final analysis is the test to be applied, would not favour depriving the plaintiff of an award for damages to which the plaintiff would otherwise be entitled on the ground of the delay complained of.

17. The only other matter of significance which has occurred since 2001 is that a deed of dedication has been executed by the defendant in favour of all of the residents of Hollybrook Park Estate in relation to the areas designated for open space in the lands developed by it. In that deed, which was dated 23rd March 2004, there was granted to all of the residents of Hollybrook Park Estate in perpetuity the right at all times to use the lands shown outlined in red on the map annexed thereto for recreational and amenity purposes. The defendant assented to the registration of the right as a burden on the relevant folio, folio 16366F County Wicklow, with the intent that the right should be enforceable by any of the residents or their successors, the local authority or the planning authority for the area. While, having regard to the scale to which the map annexed to the deed is drawn, it is difficult to form a view on whether the area dedicated excludes the road 14 extension area, that is to say, a sufficient area on the north-west of No. 154 Hollybrook Park Estate to extend road 14 to the boundary of the retained lands, the evidence of the defendant's architect is that there was excluded a sufficient area to provide for an extension to road 14 comprising of a carriageway 6.5 metres wide, a grass verge 1.5 metres wide and a footpath 1.8 metres wide. However, it is not clear on the evidence whether the deed of dedication has been submitted to the Land Registry for registration.

18. The court was informed that the roads and services within Hollybrook Park Estate have been taken in charge by the local authority.

The current position

19. The current position is that, as the roads within Hollybrook Park Estate are in the charge of the local authority, they are public

roads, so that the defendant has the same entitlement to use them as any other member of the public. Further, the court has declared that the plaintiff is entitled to a right of reasonable access, which I understand to mean a vehicular right of way, over the road 14 extension area. That right ultimately derives from the contract for sale by the plaintiff to the defendant in 1994, which was given effect to by a transfer of 6th July, 1995. Accordingly, subject to the plaintiff's right being registered as a burden on the relevant folio in the Land Registry, there is legally secured to the plaintiff the proprietary right, the easement, for which it bargained in 1994. If necessary, the court can order the registration of that right as a burden on the relevant folio, subject to the parties producing an agreed suitable map, which complies with the Land Registry mapping requirements.

20. On the evidence, the title position is that the defendant remains the owner in fee simple on folio 16366F of the road 14 extension area untrammelled by the rights created by the deed of dedication. Indeed, given the existence of the court declaration, it would not have been within the competence of the defendant to create rights over this area inconsistent with the right of the plaintiff declared by the court order.

21. On the evidence, the position on the ground is that there is a strip of land available between the north-west boundary of No. 154 Hollybrook Park Estate and the southern boundary of the dedicated open space to accommodate the road 14 extension area to a width of approximately 10 metres. However, the strip is a landscaped area, not a hard surfaced road. Therefore, it is usable as a pedestrian access and, possibly, for access by means of an agricultural tractor or a four-wheel- drive vehicle, as the An Bord Pleanála Inspector pointed out in his report dated 29th July, 1999, but not by regular vehicular traffic. In the absence of planning permission under which it is permitted to hard surface it, it cannot be used by ordinary vehicular traffic.

Actionable nuisance / entitlement to damages
22. As is stated in Gale on Easements, 16th edition, (Sweet & Maxwell, 1997) at para. 13.-04, as regards the disturbance of private rights of way, it has been laid down that, whereas in a public highway any obstruction is a wrong if appreciable, in the case of a private right of way the obstruction is not actionable unless it is substantial. Again, it has been said that for obstruction of a private way, the dominant owner cannot complain unless he can prove injury; unlike the case of trespass, which gives a right of action though no damage be proved.

23. In determining whether there is an actionable nuisance in this case, the question which arises is whether, in the absence of a hard-surfaced road for which planning permission exists on the road 14 extension area, the defendant is not complying with its obligation to allow reasonable access from the retained lands over that area to a substantial degree. Even allowing for the nature and condition of the dominant tenement, the retained lands, being an unused wooded area on which no development other than an exempted development can be carried out, it seems to me that the inability of the plaintiff to use the access for ordinary vehicular traffic is a substantial interference.

24. Therefore, I am of a view that the plaintiff has established that there is an actionable nuisance and that it is entitled to damages.

Proper basis of measurement of damages
25. As a matter of law, where the nuisance does not entail physical damage to the land, diminution in value and cost of abatement appear as acceptable measures of damages (per McGregor on Damages, 17th edition, Sweet & Maxwell, 2003 at para. 34.-05). In this case, no question of abatement arises.

26. Evidence of diminution in value was given by Mr. Synnott of James Synnott & Associates, Licensed Valuers, on behalf of the plaintiff. His valuation was as of 1st February, 2001. On this point, counsel for the plaintiff submitted that the appropriate valuation date was a date following refusal of the defendant's planning application. Mr. Synnott gave his opinion of –

> (a) the then current market value of the retained lands with access for industrial development to and from the Southern Cross route, which he put at €1,645,597.98; and
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> (b) the then current use value without such access and on the basis that the retained lands are landlocked, which, effectively, he put at nil.

27. The defendant's valuer, Mr. Ringrose of Allen & Townsend Associates Ltd., Chartered Surveyors and Property Consultants, valued the retained lands as of 8th January, 2007 on the following bases:

> (1) on the assumption that no access is afforded across the road 14 extension area to the retained lands (€750,000); and
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> (2) on the assumption that access is afforded and planning permission has been granted for an access roadway across the road 14 extension area to the retained lands (€1,500,000).

28. It seems to me that there is a fundamental flaw in predicating the diminution in value on the basis that, if the defendant had not infringed the plaintiff's right of access over the road 14 extension area, the market value of the retained lands would reflect the current zoning together with access through Hollybrook Park Estate to facilitate development in accordance with the zoning. The flaw is obvious if one considers what the position would have been if the defendant had developed in accordance with the 1993 planning permission and had constructed road 14 to the boundary of the retained lands. If that had happened, the retained lands would have been accessed by a hard-surfaced road but it would have been a hard-surfaced road which was constructed in the context of a planning permission granted by Wicklow County Council for residential development on what became the defendant's lands. As such it could not be assumed that, on an application by the owner of the retained lands to Bray Town Council to develop the retained lands for light industrial purposes, or even for residential purposes, it would have been determined by the relevant planning authority, or on appeal, that the accessing of the proposed development over that road would be in accordance with the proper planning and development of the area. In fact, what happened when the defendant applied for planning permission after the judgment of Kinlen J. was delivered illustrates the imponderability of what the position of the owner of the retained lands would have been in such a hypothetical situation, in that An Bord Pleanála decided that the access issue could not be determined in vacuo and without regard to a proposal to develop the retained lands. Put another way, a vehicular right of access over an estate road within Hollybrook Park Estate, would not necessarily have facilitated development of the retained lands in terms of access.

29. In my view, the diminution in value which falls to be measured in the circumstances which prevail here is the diminution in value by reason of the fact that the road 14 extension area is not hard-surfaced and does not have the benefit of a planning permission for a hard-surfaced area to the boundary of the retained lands as they now are.

30. There is another imponderable which informs that conclusion. Whether the planning authority, or An Bord Pleanála on appeal, will permit a development on the retained lands to be accessed through Hollybrook Park Estate via a road on the road 14 extension area

has never been properly tested. Just as one would be speculating in attempting to predict the outcome of a planning application to develop the retained lands for light industrial purposes with access through Hollybrook Park Estate, if Hollybrook Park Estate had been developed in accordance with the 1993 planning permission and road 14 extended to the boundary of the retained lands, equally, one would be speculating if one attempted to assess the outcome of dual planning applications on the lines suggested in the defendant's solicitor's letter of 28th March, 2000. As the report of the inspector to An Bord Pleanála and the reason ascribed for the decision of An Bord Pleanála indicates, whether a planning permission to access a development on the retained lands through Hollybrook Park Estate would be successful would turn on a range of factors which have never been addressed or tested.

31. Therefore, in my view, the proper approach to measuring the damages to which the plaintiff is entitled cannot countenance an assumption that, but for the defendant's unlawful activity, the retained lands would have a value which reflects the ability, as opposed to possible potential, to develop them for light industrial purposes or residential purposes with access through Hollybrook Park Estate to the Southern Cross link road.

32. There is another aspect to the second imponderable factor. There is a duty on the plaintiff to mitigate its loss. As a matter of law, a claimant must take all reasonable steps to mitigate the loss to him consequent on the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the claimant cannot recover for avoidable loss (per McGregor at para. 7-004). That principle, in my view, would have required the plaintiff to accede to the suggestion of the defendant's solicitors contained in the letter of 20th March, 2000 and participate in dual applications for planning permission. Having regard to the reason ascribed by An Bord Pleanála for refusing the applications made by the defendant following the judgment of Kinlen J. and the rationalisation of that reason contained in the report of the Inspector to An Bord Pleanála, one could not conclude definitively, or even as a matter of probability, whether dual applications would or would not be successful. The plaintiff could have eliminated that imponderable but did not. That being the case, there is no basis in law for measuring the plaintiff's loss on the basis that the retained lands cannot in the future be developed with the benefit of access over the road 14 extension area.

33. I consider, however, that, in order to give effect to what was agreed in 1994, the plaintiff should continue to have the right to make an application (which would be deemed to be made with the consent of the owner of the road 14 extension area) to construct a hard surfaced road on that area and, subject to obtaining planning permission, to construct the road. This can be achieved if the declaration already made by the court is expanded to provide for the right. While this approach was not canvassed at the hearing, neither party can have a sustainable objection to it, in that –

(i) the plaintiff, being under a duty to mitigate its loss, cannot be seen

to object, and

(ii) it is consistent with the approach which the defendant has urged since the judgment of Kinlen J. was delivered.

34. While on the topic of mitigation of loss, I should, perhaps, say that I attach no weight to the fact that the plaintiff has not sought to obtain access for the retained lands through the Bray Business Park. The failure of the plaintiff to attempt to negotiate the acquisition of such an access from the owner of Bray Business Park, in my view, does not constitute a failure to mitigate.

Quantum

35. Returning to the finding that the defendant has disturbed the plaintiff's right of access in a substantial manner, in that the plaintiff has not the benefit of a hard-surfaced access to the boundary of the retained lands suitable for vehicular traffic which is authorised by a planning permission, but taking account of the rights which the plaintiff will have under the expanded declaration, the quantum of the damages to which the plaintiff is entitled to compensate for the resulting loss, in my view, is not of the order suggested by the valuation evidence. However, there is a quantifiable loss and I reject the defendant's argument to the contrary. The defendant is in the wrong, and that being the case, it seems to me that the damages should be awarded at this juncture.

36. While acknowledging that, because the valuation evidence adduced did not address the pertinent question, I have to do so without applying any particular scientific basis, I measure the damages at €100,000.