

THE HIGH COURT**[2005 No. 1323 J.R.]****BETWEEN****THOMAS HARDING****APPLICANT****AND****CORK COUNTY COUNCIL AND AN BORD PLEANÁLA****RESPONDENTS****AND****ECES PROJECTS LIMITED NOW KNOWN AS KINSALE DEVELOPMENTS LIMITED****NOTICE PARTY****Judgment of Mr. Justice Clarke delivered the 31st January, 2007.****1. Introduction**

1.1 These proceedings have already been the subject of three judgments of this court. The applicant ("Mr. Harding") seeks to challenge a decision of the first named respondent ("Cork Council") in which it gave notice of intention to grant a planning permission to the notice party ("Kinsale Limited"). So far as the decision of this court is concerned those proceedings are now at an end and have been dismissed.

1.2 That decision is however, subject to a certificate which permits an appeal to be brought to the Supreme Court and, in those circumstances, the question which now arises is as to whether it is appropriate to grant a form of stay or injunction pending that appeal which would have the effect of preventing the second named respondent ("The Board") from processing an appeal in the planning process ("the planning appeal") pending the outcome of the appeal in the judicial review proceedings ("the court appeal"). This judgment is directed to that issue.

2. Procedural History

2.1 The first significant determination of this court in these proceedings was made on 28th February, 2006 when Kelly J. delivered a judgment (2006) IEHC 80 in which, for the reasons set out, an order was made which had the effect of staying the planning appeal pending the result of the judicial review proceedings in this court.

2.2 On 12th October, 2006 I delivered a judgment ("the leave judgment") in relation to Mr. Harding's application for leave to bring judicial review proceedings. For the reasons set out in that judgment I concluded that Mr. Harding had failed to meet the "substantial interest" threshold for standing as imposed by s. 50 of the Planning and Development Act 2000. The parties sought time to consider the text of the written judgment which was delivered on that date. When the matter next came before me it was indicated on behalf of Mr. Harding that it was his intention to seek the necessary certificate so as to enable an appeal to be brought to the Supreme Court. Other ancillary matters such as the costs of the leave application were also raised.

2.3 The case was then put back for further consideration in relation to whether or not it was appropriate to grant the certificate required by s. 50 of the 2000 Act so that an appeal could be brought. For the reasons set out in a further judgment of 30th November, 2006, ("the certification judgment") I decided that it was appropriate to give such a certificate. As a result Mr. Harding is now entitled to pursue an appeal to the Supreme Court. As soon as I indicated that I was prepared to give such a certificate, counsel for Mr. Harding raised the question of the continuance of the order made by Kelly J. (which would in effect prevent the Board from considering the planning appeal) pending the resolution of the appeal to the Supreme Court of the refusal to give leave to seek judicial review. For a variety of reasons, which it is not necessary to specify here, it took some little time before argument could be addressed on that issue. When argument was addressed, one significant issue of principle was raised which led me to the view that I should consider the matter further and this reserved judgment is the result of those deliberations.

2.4 The issue of principle raised concerned the jurisdiction of this court to make an order of the type sought. Before going on to consider that matter I should note that the Board adopted a neutral position in respect of this application just as it had in respect of the original application which was the subject of the judgment of Kelly J.

3. The Jurisdiction

3.1 Counsel for Kinsale Limited argues that this court does not have a jurisdiction to make an order of the type sought. In substance it is contended that this court's jurisdiction in relation to the case is spent when it delivers judgment. In the circumstances it is suggested that any entitlement to make an order, which would have the effect of preventing the planning appeal going ahead pending the court appeal, is a matter for the Supreme Court.

3.2 In the stay judgment Kelly J. had to consider the jurisdictional basis for the order then sought from him which, as I have pointed out, was designed to prevent the planning appeal going ahead pending the hearing of the judicial review application. As Kelly J. points out it was not open to Mr. Harding to place reliance on the provisions of Order 84 Rule 20(7) of the R.S.C. because leave had not, at that time, been granted to seek judicial review. Obviously, in most cases, leave is sought ex parte and a party is, therefore, either granted or refused leave on the first occasion when the matter comes before the court. However cases such as those which arise in the environmental or immigration field are different in that, by statute, leave can only be sought on notice. A period will, therefore, necessarily elapse where there is pending before this court an application for leave on notice. In those circumstances Kelly J. was satisfied that there "is jurisdiction in this court to make an order of the type sought, either pursuant to Order 84 Rule 25 or, if I am wrong in that regard, pursuant to the inherent jurisdiction of the court". I fully agree with the conclusions of Kelly J. and the reasoning for coming to that view as set out between pages 5 and 9 of the judgment.

3.3 The question which I have to decide is as to whether a similar jurisdiction exists pending appeal. Counsel for Mr. Harding drew my attention to a passage from Gee on Commercial Injunctions (5th Ed) at para. 23.036 in which the author states the following:-

"If an applicant wishes to appeal against a decision declining to grant or continue an injunction, he may apply for an injunction pending appeal.

The High Court may refuse to grant an injunction at an inter partes application made either before the trial or at the end of the trial, but still grant an injunction pending an appeal. Ordinarily an application for relief pending appeal must be made in the first instance to the judge who refused the relief, although another judge of the court of first instance does have jurisdiction to deal with the application. Even if the court of first instance is not minded to grant the injunction pending an appeal, the court will normally maintain the status quo pending the hearing of an application to the single judge or the

Court of Appeal (as the case may be).

The Court of Appeal's jurisdiction to grant an injunction pending appeal is an original jurisdiction which is concurrent to that of the High Court."

3.4 The author places reliance on *Ketchum International plc v. Group Publications Holdings* (1997) 1 LR 4; *Erinford Properties v. Cheshire County Council* (1974) Ch 261; *Williams v. Minister for Environment and Heritage* (2003) 199 A.L.R. 352 and *Ryan Property Trust Limited v. Du Cane Court Limited* (1962) 1 WLR 10 85.

3.5 While the work from which that passage is taken concerns commercial injunctions there is no reason, it seem to me, at least so far as the issues with which I am concerned, to distinguish the principles applicable to the grant or refusal of commercial injunctions from any other type of injunction. Nor do I see any reason for distinguishing the jurisdiction on this issue of the courts in Ireland from those of the courts of the United Kingdom. It seems clear, therefore, that both this court and the Supreme Court have a jurisdiction to put in place any appropriate form of injunctive relief pending appeal. It is also clear from *Erinford Properties* that the general principle applied by the court is to seek to preserve the status quo so that the appeal, if successful, is not rendered nugatory.

3.6 It takes only a very simple analysis to see what would be the adverse consequences of it being the case that this court did not have the jurisdiction asserted. If that were to be the case then there would necessarily be a gap between the time when this court dismissed a plaintiff's claim and the time when that plaintiff (as appellant to the Supreme Court) could, in practice make an application for an appropriate form of order to the Supreme Court. In at least some cases serious or irrevocable damage could arise during such a period. It could, in the words of *Erinford*, in an extreme case, render the appeal nugatory. Just as, therefore, this court has a jurisdiction to grant interim or interlocutory injunctions to preserve the status quo pending a trial, so also, in my view, has this court, in an appropriate case, a jurisdiction to continue such injunctions (or to grant new or different injunctions) so as to preserve the position pending an appeal. I am therefore more than satisfied that I have a jurisdiction to make the order sought if it is appropriate for the purposes of preserving the status quo pending the hearing of the appeal.

3.7 It does not, of course, follow that the mere fact that a party had the benefit of an interlocutory order pending the resolution of the proceedings in the High Court, necessarily means that he should also have the benefit of such an order pending any appeal. Circumstances may change, not least because the case has now been tried and at least some of the issues which might have originally been before the court may have disappeared as a result of the trial and the judgment of the court arising from it.

3.8 However the main factors which are advanced by the parties to the application currently before me are the same as those which were considered by Kelly J. As pointed out by Kelly J. if an order is not made which would have the effect of staying the progress of the planning appeal then Mr. Harding's proceedings will become moot. At this stage it is equally clear that the appeal, which Mr. Harding wishes to bring, would be moot if the Board were to determine the planning appeal prior to the result of the Supreme Court judicial review appeal. If anything, this side of the scales is even weightier in favour of a stay, having regard to the fact that I have now certified that the point of law which will arise for consideration in the appeal to the Supreme Court is a point of law of exceptional public importance and that it is in the public interest that it may be determined. To render such an appeal moot is a step which should not lightly be taken.

3.9 On the other side of the equation, the complaint made on behalf of Kinsale Limited is, as it was before Kelly J., directed toward the financial consequences of delay in obtaining a final decision on the planning process in this case which would, if it be successful from Kinsale Limited's point of view, allow the development to go ahead. However as pointed out by Kelly J. the evidence in relation to such losses was vague when the matter was before him and, in my view, is equally vague now. One of the principal areas of contention between the parties concerns is the availability of tax breaks which have a time limit to them. However on the basis of the affidavit sworn by Mr. Paul Duggan of Kinsale Limited in relation to this application, it seems clear that the time has now passed when Kinsale Limited will be in a position to satisfy the conditions necessary to obtain the benefit of the tax relief concerned. Therefore any adverse consequence of delay on the availability of the tax relief concerned has already occurred. As pointed out by Kelly J. the initial project expenditure had already been incurred by the time of the application before him.

3.10 In addition it is suggested that Mr. Harding is a person of very limited means and that he is, in substance, "fronting for others" who have the requisite resources to fund these proceedings. There is no doubt but that there are issues as to whether Mr. Harding's connection with the issues which arise in this case is sufficiently proximate to justify him being said to have a substantial interest, so as to satisfy the requirements of s. 50 of the 2000 Act. However that is the very issue which is now to be decided by the Supreme Court. If I am wrong in the view which I have taken as to whether Mr. Harding has such a substantial interest, then it follows that Mr. Harding's connections with the issues involved in these proceedings will be sufficiently close to establish that he has a "substantial interest". Given that possibility it seems to me that it would be wrong to reach any conclusion at this stage which would suggest that Mr. Harding is a "front" or is otherwise not bona fide.

4. Conclusions

4.1 I have, therefore, come to the view that the balancing considerations are, if anything, more in favour of Mr. Harding now than they were at the time when the matter was considered by Kelly J. In those circumstances I am satisfied that it is appropriate to exercise the jurisdiction which I have identified in favour of continuing the order of Kelly J.

4.2 However, one further matter does arise. It seems to me that there is some merit in the contention made on behalf of Kinsale Limited that every effort should be made to ensure the earliest possible trial of the appeal in the Supreme Court. It would be wholly inappropriate for me to attempt to prescribe the course of such an appeal. That is a matter entirely within the jurisdiction of the Supreme Court. However it does seem to me that it is, nonetheless, appropriate for me to continue the order of Kelly J. only until the 30th June next. That should afford Mr. Harding a more than ample opportunity to file all necessary papers to enable the Supreme Court to consider the time frame within which an appeal can be heard. In the event that the appeal is not heard prior to that date then it will, of course, be necessary for Mr. Harding to seek an extension of the order which I intend to make from the Supreme Court. It will be for the Supreme Court, at that stage, to consider whether the expedition with which this appeal has been progressed is appropriate and whether, in all the circumstances, the order should be continued further.