Neutral Citation Number: [2005] IEHC 281

THE HIGH COURT

Record Number: 2005 No. 59 MCA

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

BETWEEN

THE COUNTY COUNCIL OF THE COUNTY OF LIMERICK

APPLICANT

AND

JOSEPH TOBIN TRADING AS HARRY TOBIN SAND AND GRAVEL

RESPONDENT

Judgment of Mr Justice Michael Peart Delievered on the 15th of August 2005

1. The applicant seeks an order under the provisions of Section 160 (1) of the Planning and Development Act, 2000 which provides as follows:

> *"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 cease to do, as the case may be, anything which 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) in so far 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."*

2. The circumstances in which this order is sought arise from a belief on the applicant's part that in recent times the respondent is engaged in an unauthorised use and development of land, namely by extracting sand and gravel from certain areas marked on a map attached to the Notice of Motion herein, which I shall refer to as areas "T", "X" and "Y", without having the necessary planning permission to do so.

3. The fact is that the respondent has been engaged in the business of extracting sand and gravel since about 1989 when he purchased three folios of land from the widow of the late owner at that time, Con Frawley. The respondent is making the case that what he is doing now by entering upon the areas referred to as "T", "X" and "Y" is simply a continuation of the use of this area of land which pre-dates 1st October 1964, and that he does not require planning permission. He says that when he purchased the lands in question from Mrs Frawley he did so in the knowledge/belief that there was pre-existing use as a sand and gravel quarry which pre-dated 1st October 1964. He says he also bought other land - "the Keane lands" - to the east/south of the Frawley land, and that he did so on the same basis of pre- October 1964 use. No evidence of that pre-October 1964 use of the land has yet been adduced at this stage, other than averments to that effect by the respondent. But he says in his affidavit that he intends to locate persons who can give evidence of matters at that time.

4. The applicant does not accept that there was any pre-October 1964 in respect of the areas of ground now being excavated, even if there may have been such use in respect of other areas to the north. It is also the case that there were planning permissions granted to the respondent's predecessors in title in respect of two areas to the north of "T", "X" and "Y" and which are coloured yellow and hatched yellow respectively on the map attached to the Notice of Motion. Those predecessors in title were Patrick Casey, and Phyllis Keane respectively. These areas of the quarry have now been virtually exhausted, hence the desire on the part of the respondent to move into the unexhausted areas the subject of this application.

5. The grounding affidavit also refers to some other areas, namely those marked "V", "W" and "P" on the same map, and the deponent, Michael O'Brien, a planning inspector, states that development on these areas, while not enjoying the benefit of planning permission, has been ongoing for a period in excess of five years and consequently are not the subject of the present application. This suggests that either the local authority was not aware that what it may have perceived as being unauthorised development was going on, or if it was so aware it turned a blind eye to it, so to speak.

6. This Court cannot determine on this interlocutory application the question of whether or not any pre-October 1964 usage of the land as a quarry absolves the respondent from being required to have planning permission for his present activity in areas, "T", "X" and "Y". That will have to await the substantive hearing. Such a hearing may well require the hearing of oral evidence from persons with first-hand knowledge of what may have taken place on this land generally before 1964, if such persons are still alive.

7. This affidavit also refers to the fact that in 1994 the local authority was required to bring a similar application under s. 27 of the 1976 Act in respect of another area, namely one marked "Z" on the same map. The respondent on that occasion was the father of the present respondent. That order was granted on the 28th June 1995. The present respondent refers to this order by saying that the granting of that order was "an unfortunate aberration" albeit one which he must accept. He explains this somewhat strange remark by saying that it was his father's intention to dispute the application for the order on the same basis as the dispute in the present application, namely pre-October 1064 use, but that his father was not represented in Court on the occasion when the order was made. He goes on:

> *"whilst he had a solicitor on record for him at the time there was an unfortunate situation in which he managed not to be represented at the hearing of the application, and that should be apparent from the Court documents."*

8. There is no reference to any appeal having been brought against the making of that order.

9. As far as the applicant is concerned, the respondent has engaged in these quarrying activities in the "T", "X" and "Y" areas without any planning permission to do so, and does not accept that any pre-October 1964 use which may have been applicable to any other area gives an entitlement to do so, and refers to the fact that there were permissions obtained in respect of the areas to which I have referred. In that regard, the applicant has sworn to breaches of numerous conditions of two of the permissions granted, and to the fact there are proceedings in the District Court relating to those alleged breaches which have been adjourned to October 2005 pending the outcome of the present application. These proceedings were following the service of an Enforcement Notice on the 20th

May 2004 to cease unauthorised quarrying operations outside the areas covered by the planning permissions referred to, and was in respect of the area marked "X" on the map.

10. Mr O'Brien avers that the present application came about when it came to the applicant's attention in June 2005 that the respondent had entered upon the "Y" lands and had broken an exit from the lands marked "Y" in the area marked "T" and into an area marked "I" on the same map.

11. The respondent in his first replying affidavit refers to the Ordnance Survey map of the area which he exhibits and points to the fact that what is described thereon as "Gravel Pit" appears to be on the area herein referred to as area "Y", and not on the area where the applicant places it on his map attached to the Notice of Motion, and he maintains that this indicates that the gravel pit on "Y" has been in existence for many years. In this regard I should add that Mr Tim Prior, a Chartered Mineral Surveyor, has sworn an affidavit in support of the respondent and he states, inter alia, that where the Ordnance Survey saw fit to mark a gravel pit in an area it means that significant excavation and extraction of sand and gravel has taken place in the area. A question which could arise in that regard for the present application is whether if there was excavation at some stage many years ago, whether it was abandoned, thereby causing a break in the usage prior to October 1964. In this regard, John Edwards SC for the applicant has referred to the objective test as to this question of abandonment, and to the judgment of Budd J. in Westmeath County Council v. Quirke, unreported, High Court, 28th June 1996, where it was held that when a quarry ceased to be used as such in 1965 and a new use commenced for the production of ground limestone, the previous use was abandoned such that its reactivation constituted a change of use. Again, that is a question in the present case which must await evidence at the hearing.

12. Presumably also, part of the evidence to be relied upon by the respondent would be whatever written assurances were given by the vendor by way of statutory declaration or otherwise as to pre-October 1964 usage as a sand and gravel quarry at the time that the purchase of these lands was being completed by the respondent. No doubt his solicitors's file in relation thereto would be of assistance in that regard. The onus would be on the respondent to satisfy the Court that there was the necessary evidence of pre-October 1964 use.

13. The applicant must on this application first satisfy the Court that there is a fair issue to be tried between the parties, before the Court will consider if an interlocutory injunction might be granted pending the determination of the substantive hearing. There is really no dispute about that in the present case, except that Simon Boyle SC for the respondent submits, relying on a passage from the judgment of Morris P. in Dublin City Council v. Lowe and another, unreported, High Court, 4th February 2000, that the applicant ought more appropriately have commenced this application by way of plenary summons, rather than by way of section 160 motion, since there are issues of fact to be determined before the Court can decide the matter, and oral evidence will be required. In that case, the respondents relied upon an existing user as a Defence to an application under the old section 27 of the 1976 Act. Morris P. at page 13 of the unreported judgment states as follows:

> *"In those circumstances in the ordinary way section 27 proceedings would have been inappropriate as there would be a clear issue to be tried which could only be tried, in my view, on full plenary hearing. The issue being whether there was a pre statute established user."*

14. In the present case, there is certainly an issue of fact to be determined, namely whether any pre-October 1964 usage can be of benefit to the respondent in order to remove his present activity on the areas mentioned from being categorised as "unauthorised use and development". But in my view it is clear that where a planning authority, or other person, considers that an authorised development or use is taking place, there would in many cases be an urgency in the situation which s. 160 is designed to meet, so that the Court can be accessed speedily and conveniently. In the case of the concerned citizen, as opposed to a planning authority, he or she may run into locus standi difficuties if proceedings were to be commenced outside the statutory framework of s. 160 since that section specifically recognises the entitlement to invoke it, even where he or she has no interest in the land in question.

15. Of course even in plenary proceedings, relief by way of interim injunction is available, and at short notice, but in planning matters the legislature has specifically provided the procedure under s.160, and it is reasonable that the planning authority in such circumstances would avail of that in the first instance. If, upon the interlocutory hearing, it appears that a Defence put forward by the respondent is one where oral evidence, and even pleadings and discovery are necessary or desirable, there does not seem to be any reason why the Court cannot order such directions as to pleadings and mode of trial as may be appropriate, and certainly there could in my view be no question that the planning authority could be non-suited as it were, having commenced its application by the method provided for in s.160, merely because the respondent raises a matter by way of defence which for its determination requires either pleadings or oral evidence.

16. Whether the proceedings are commenced by originating notice of motion or by plenary summons, the task of the court is broadly similar, namely to identify a fair issue to be tried, and give appropriate consideration to the other questions of irreparable harm, adequacy of damages and the balance of convenience.

17. As far as the question of irreparable harm and the adequacy of damages in the present case are concerned, it is not something which arises for consideration in an application of this kind, where the applicant is acting in the public interest rather than in order to protect some private commercial or other interest.

18. If the respondent is restrained there may be a claim for damages against the applicant in the event that the injunction ought not to have been granted. The assessment of those damages, given the nature of the business and the length of time that the respondent has carried on that business means that damages should be easily capable of assessment, and it must be presumed that the applicant would be capable of discharging any award of damages which might be made in due course.

19. The real issue for the Court's consideration is whether the balance of convenience lies in favour of restraining the activity in these areas pending final determination of the case, or whether the respondent should in the meantime be permitted to continue to extract sand and gravel from the disputed areas, with all that this would imply for the destruction of the land in question. There is of course power under the section for the Court to order the restoration of the lands in due course, should the use and development turn out to be unauthorised and requiring planning permission. But the problem about relying on the power to order restoration of the land in those circumstances is that the Court would be entitled to assume that these lands would be worked to their maximum potential by the respondents during whatever period of time elapses between now and the full hearing. If that be the case, there would be very considerable destruction of the landscape by the quarrying which would take place, perhaps over a period of six months or even twelve months. The prospect of these lands, after such excavation and quarrying, being restored to anything reasonably comparing to its present state is remote in my view. The best that could be hoped for would be that the large excavated area would be filled in some fashion, but its present character would be destroyed permanently.

20. The respondent has averred that in the event that he is restrained from carrying on his business in the areas affected, it would create great difficulties for him in his business as a sand and gravel quarrier at a crucial time of the year, and that he has contractual commitments on the basis of a continual supply. He states in his second affidavit that while he has other sites where quarrying takes place, his business dealings in connection with the sites the subject of the present application are distinct and that if an order is made as sought he will be unable to supply his customers.

21. In addition, the respondent has stated that he employs twenty people whose jobs are dependent on the continued excavation of the site in issue herein, so that not only would his business be put in jeopardy, but also the jobs of these employees.

22. Mr Boyle has submitted that the respondent's averments as to the consequences for him and his employees as a result of an injunction pending the determination of the case have not been disputed or controverted by the applicant. He has submitted that the Court must accept that if injunctive relief is granted it will result in the closure of the entire of the respondent's operation at the site in issue, and the respondent would be left with a claim in damages in the event that he was successful at the hearing of the case. He has also pointed to some aspects of the damage which he will suffer as being unquantifiable in the sense of lost contracts and goodwill, and that taking all these matters into account the balance of convenience lies in favour of not granting the interlocutory relief sought by the applicant. He submits that the prejudice to the planning authority does not outweigh these considerations. In sofar as the judgment of Hardiman J. in *Dunne v. DunLaoghaire-Rathdown County Council*, unreported 24th February 2003, expressed dissatisfaction with the evidence put forward by the respondent County Council in relation to how the alleged financial losses to the respondent were set forth, and the bald statement that that delay in completing the project was not sufficient, Mr Boyle gets over the bald statement of loss that is alleged will be suffered by the respondent in the present case by referring to the averment that there will be a complete shutdown of the respondent's operation at the site, and he submits that this needs no further elaboration by the respondent.

23. In the Dunne case the learned judge also referred to the difficulty in determining where the balance of convenience lies in these cases. He stated in this regard:

> *"The difficulty for a Court in dealing with any case on an interlocutory basis is that there is an ever present risk, either in granting or withholding relief, of doing an injustice to the party who succeeds in the end. One has to balance the risks of injustice to the respective parties. In this context it is significant that, if no relief is granted, the court will be effectively deciding the issue by inaction, since the apprehended interference with the alleged national monument will be complete long before the action can be tried."*

24. I am of the view that the respondent herein should not be permitted to continue with the present use, because in the event that the applicant is found to be correct that this use is an authorised use (and it certainly seems to this Court at this stage that whatever about the respondent's assertions on affidavit as to pre-October 1964 use, the proof of the matter may be a matter of some difficulty for him), the damage will have been done or substantially done by the time the case comes top trial, and the victory will indeed by pyrric, even though in his second affidavit the respondent is prepared to limit his further excavation to areas Y and T only pending the hearing, subject to an undertaking as to damages by the applicant.

25. The planning authority is looking after the public interest in ensuring that unauthorised development or use does not take place. This is a heavy responsibility, and one for which the legislature has provided assistance in the form, inter alia, of provisions such as s.160 injunctive relief. There is no question of bad faith on the part of the applicant. It is, as it sees it at the moment, attempting to put a halt to what it considers to be an unauthorised use of the land in question. It cannot simply accept what the respondent states as the reason for his belief that the use does not require permission. This is a matter which will require evidence to be adduced and tested in due course. Nor has the applicant in my view delayed in any relevant way so as to disentitle it to the relief sought. As far as this relief may be regarded as equitable relief, the applicant has come to court with "clean hands".

26. I consider that even though the respondent may well, and in all probability will, suffer some losses by the granting of interlocutory relief pending the hearing of this case, it is a loss which will be quantifiable in the event that the respondent is correct and can prove his case. That prospect of losses does not in my view trump the need to maintain the status quo from this point onwards as far as the integrity of these sites is concerned. Once that integrity is destroyed, even partially, it cannot be restored adequately thereafter, in much the same way as in Dunne, the integrity of the alleged national monument could not be restored in the event that the development was not halted pending the hearing of the case. Not to allow the relief sought in a case such as this would be to permit or at least encourage those intent on breaking the law in this way from taking their chances, so to speak, in the hope, if not the expectation, that by the time matters reach Court for the substantive hearing they will have been able to benefit significantly by their own misdeeds. That would set at nought the intention of the Oireachtas in enacting legislation such as this.

27. I therefore grant the relief sought and I will hear submissions as to what form of pleadings and discovery of documents should be directed, and what time limits ought to be placed on that exchange, so that as early as possible a hearing date can be achieved in order to minimise as far as may be possible, any prejudice to the respondent.