Neutral Citation Number: [2008] IEHC 465

THE HIGH COURT

2004 19 MCA

IN THE MATTER OF AN APPLICATION PURSUANT TO S. 160 OF THE PLANNING AND DEVELOPMENT ACT 2000, AND THE REGULATIONS MADE THEREUNDER

BETWEEN

DUBLIN CITY COUNCIL

APPLICANT

AND
DAVID GRANT

RESPONDENT

Judgment delivered by Mr. Justice Declan Budd on the 24th November, 2008.

1. Under s. 160 of the PDA 2000, application can be made to the High Court or the Circuit Court for certain orders in situations where an unauthorised development has been, is being, or is likely to be carried out or continued. These orders can involve requiring any person to do or to cease to do anything that the court considers necessary to ensure that the unauthorised development is not carried out or continued, or (insofar as is practicable), that any land is restored to its condition prior to the commencement of unauthorised development or that any development is carried out in conformity with planning permission. The applicant, Dublin City Council, sought orders pursuant to s. 160 of the PDA 2000, directing the respondent to forthwith cease all development of the interiors and exteriors of the property situate at No. 7-10 Gardiner Street Upper, Dublin 1, and directing the respondent to restore the property. On 26th July, 2004, Quirke J. made an order directing that the respondent forthwith cease all development works of the interiors and exteriors of the property. The respondent appeared in person in the High Court for the hearing of the application on the 26th July, 2004, and was present when the order was made and the terms of the order were explained by Quirke J. to him, when he sought clarification of the order. In September 2004, the applicant Council became aware that new plumbing work had been carried out and a new service pipe had been fitted and it became clear that a contractor was working in the front basement areas and was fitting a new gas supply. A motion was brought to attach and/or to commit the respondent for failure to comply with the order made on the 26th July, 2004, and eventually the respondent fully accepted that the works were in contravention of the orders which had been made and he unreservedly apologised to the court for the breach on his part of the order, and he asked the court to accept that the extent of the work was minimal and involved the replacement of one gas service with another.

2. On the 24th January, 2005, Quirke J. made an order by consent directing the respondent to carry out refurbishment works to restore the properties situate at No. 7-10 Gardiner Street Upper, Dublin 1, in accordance with the recommendations of David Slattery, Conservation Architect. The carrying out of the work was by consent to be carried out subject to ten conditions contained in the order and a number of items contained in para. 2, 3, 4, 5, 6, and 7 of the Order, which for particularity I annex hereto. The respondent had bought the four houses in late 2003, when they were still separate houses and laid out in bed-sitters. The houses were not interconnected, except for some minor connections. The respondent began work in November 2003, without having made a planning application and made opes interlinking the properties at basement level and hall floor level and this work involved structural walls on the first, second and third floors. Decorative plasterwork was removed and/or en-suite bathrooms were installed in bedrooms and partitions and suspended ceilings were put in causing damage to the fabric of the building. Substantial inappropriate structural alterations were also carried out.

3. On the 31st January, 2005, a motion to attach and commit the respondent came before O'Neill J. which motion was adjourned generally with liberty to re-enter. In February 2005, the respondent was seeking approval of a Mr. Brady as contractor for minor matters. He was also still trying to change some of the matters which had been agreed. The respondent was reluctant to remove services installed and to take out bathrooms and other alterations so as to restore the building to its previous condition. Jack Coughlan Associates, being conservation architects, were engaged by the respondent, but the respondent subsequently dispensed with this firm and when the applicant's Architect David Slattery, contacted Mr. Coughlan, he found that he was no longer supervising work being done. In September 2005, a meeting had taken place to progress matters, but subsequently Mr. Coughlan wrote to Mr. Slattery on 16th November, 2005, saying that his authority had been withdrawn by the respondent.

4. In or about March 2005, the respondent was the subject of adverse publicity in an RTE programme. The respondent in the following months had a number of meetings with senior officials of the applicant, notably on 17th May, 2005, but at this stage he made no mention of having any financial difficulties. Correspondence and further meetings ensued with complaints from the applicant, that such work as was being done was often incomplete and of unacceptable standard. The applicant City Council indicated that the respondent was failing to comply with the High Court order made on the 24th January, 2005, by Quirke J. which, it should be noted was an order made by consent.

5. A motion seeking an order for leave to attach and commit the respondent by reason of failure of the respondent to comply with the order made on the 24th January, 2005, came before me on the 27th February, 2006. In his affidavit of 13th February, 2006, the respondent agreed that he undertook and carried out some works to the premises 7-10 Upper Gardiner Street, Dublin 1, but the works carried out were not to the satisfaction of the applicant or its representatives, particularly the Planning Enforcement Officer and David Slattery, the conservation architect engaged by the applicant. A number of meetings had taken place at the premises in early 2005, and the respondent had engaged a structural engineer and a firm of conservation architects on his behalf and they attended. Jack Coughlan Associates had submitted a survey of the basement area and the specifications for the electrification of the front steps of the properties No. 8 and 9 and for internal plasterwork to be carried out in the basement and on upper floor levels. Such specifications met with the approval of Mr. Slattery and some progress was being made.

6. At para. 7 of his affidavit, the respondent accepted unreservedly that some of the work carried out to the premises in the early part of 2005, was fairly criticised by the professional representatives of the applicant and he also accepted unreservedly that he was failing to comply with the terms of the settlement that formed part of the order made by this Court on the 24th January, 2005. The respondent also made the point that the media coverage received in respect of his practice as an architect, caused his professional income to be reduced and his health suffered as a result.

7. At para. 10 of his affidavit, he made clear that he owned a number of properties and that he was proposing to offer his premises at No. 61 Haddington Road, Dublin 4, where he resided and carried on practice as an architect, for sale. The property was put up for auction on Thursday, 9th February, 2006, but the reserve of €1.6 million was not reached. The respondent also paid certain costs and expenses and fees so that when the matter came before me on the 27th February, 2006, there were some indications that the respondent was endeavouring to comply with the order of the court.

8. Accordingly on the 27th February, 2006, the court ordered that:-

1. The order of the court made on the 24th January, 2005, prevails: and

2. The undertaking given by counsel on behalf of the respondent be as follows:-

a. That the respondent do sell his properties at Haddington Rd, Dublin and the premises Kilmacullagh House, Newtownmountkennedy, Co. Wicklow and that the solicitors having carriage of the sale do retain the net proceeds of the said sales for the purpose of funding the completion of the works outlined in the above dated order;

b. That the respondent do furnish the Dublin City Council with valuations of the above properties and details of charges and all other liabilities of the sale of the properties within fourteen days from today's date; and this motion do stand adjourned to the 29th May, 2006, with liberty to apply.

9. The respondent spent some time in hospital after a fall. The matter was adjourned on many occasions to enable the respondent to take steps to raise the necessary funds to carry out the refurbishment work and over time he made many efforts to try to raise finance but his ignoring of the requirements of the planning code and the adverse publicity which this had attracted caused difficulty for him in raising the necessary finance. In his efforts to sell No. 61 Haddington Road, he ran into the difficulty that there was an unauthorised two storey extension for which he was responsible and this made a considerable difficulty in his efforts to sell this property. He had another valuable property at No. 7 Adelaide Road and again he ran into difficulty in respect of selling this property. This property at No. 7 Adelaide Road was mortgaged with the Bank of Scotland having a priority. He had a site at Kilcoole, Co. Wicklow, of some 5.7 acres, which were being sold to Wicklow County Council for €1.1 million. However, the proceeds from this sale were subject to a charge in favour of the Bank of Scotland. There was a tenant in Kilmacullagh House in Newtownmountkennedy and the respondent had difficulty in gaining vacant possession. In mid 2006, the respondent parted company with his then solicitor and in June 2006, Cahir O'Higgins & Co., Solicitors, came on record for the respondent. Mr. O'Higgins of that firm did much diligent work to try to assist the respondent in setting out his assets and in efforts to try to raise funds in order to carry out the remedial works required by the applicant. The respondent's delays in removing the extension to the rear of 61 Haddington Rd., so that the premises would be compliant with the planning permission, were regrettably slow and the respondent had further financial woes in that the Revenue Commissioners obtained judgment for €1,111,561.57 in respect of capital gains tax.

10. Time and again the respondent held out the hope that one or other of the premises would be sold and that he would have funds to carry out the restoration. When the lands at Kilcoole were sold for €800,000.00 the Bank of Scotland had to be paid in priority.

11. The respondent did put in a number of affidavits purporting to set out his assets and his efforts to raise funds and to sell his properties. However, time and again his efforts met with difficulties to the extent that he caused doubt as to his *bona fides* because of the procrastinations. For example, why did he not move more quickly to remove the extension at No. 61 Haddington Rd. which was contrary to planning permission? Again when he was trying to sell No. 7 Adelaide Rd. and there was a contract for the sale, why did he not move to enforce the contract of sale? In July 2007, the respondent indicated that he was prepared to sell the four premises at Upper Gardiner St. together with an adjacent site to the rear which has the benefit of planning permission. It was made clear by counsel on behalf of the applicant Council that any such sale would have to be done in such a way as to ensure that the necessary repairs and refurbishment would be carried out in a manner consistent with the requirements of the applicant.

12. In November 2007, the applicant became aware that the respondent had an interest in a hotel in London, since the 5th May, 2006, in that the Countryside Hotel had been purchased in or about March or April 2006, for a sum of about £1.4 million stg. subject to a charge in favour of the Abbey National. The court was not made aware of these property dealings in England until the applicant brought these transactions to the attention of the court. It became apparent that the respondent had borrowed in excess of €900,000.00 to buy property in England and it appeared that he had managed to raise a loan of about €2.5 million in order to purchase the hotel and a sum of about €335000 to purchase a property in Northumberland Avenue in London. It is a pity that the respondent did not use his energies to raise finance there and carry out the repairs and renovations to the four buildings to be preserved in Upper Gardiner St. at a time when funding was likely to be more readily available than at present. Mr. O'Higgins for the respondent has submitted that his client has been trying to carry out a two pronged strategy of, on the one hand trying to raise funds to do the remedial work and then on the other hand trying to sell the four premises and the site at Upper Gardiner St.

13. This Court has now been trying for nearly three years to encourage the respondent to carry out his duty in restoring these four listed buildings as agreed and in compliance with the order of this Court. The respondent was less than forthright in respect of his property dealings outside Ireland, nor did he alert the applicant Council to the existence of claims, proceedings and judgments in favour of the Collector General.

14. I am deeply concerned by the length of time and the apparent lack of focus of the respondent in concentrating on dealing with the refurbishment of the premises to which he consented and which was embodied in the order made by Quirke J. on the 24th January, 2005. An order under s. 160 of the PDA 2000, can involve requiring any person to do anything that the court considers necessary to ensure that unauthorised development is not carried out or continued and that any land is restored to its condition prior to unauthorised development.

15. Counsel for the applicant, Carol O'Farrell cited *Morris v. Garvey* [1983] I.R. 319, at p. 324, where Henchy J. said of s. 27, the forerunner of s. 160:-

> "When subs. 2 of s. 27 is invoked, the High Court becomes the guardian and supervisor of the carrying out of the permitted development according to its limitations. In carrying out that function, the court must balance the duty and benefit of the developer under the permission, as granted, against the environmental and ecological rights and amenities of the public, present and future, particularly those closely or immediately affected by the contravention of the permission. It would require exceptional circumstances (such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship, or such like extenuating or excusing factors) before the court should refrain from making whatever order (including an order of attachment for contempt in default of compliance) as is 'necessary to ensure that the development is carried out in conformity with the permission'. An order which merely restrains the developer from proceeding with the unpermitted work would not alone fail to achieve that aim but would often make matters worse by producing a partially completed structure which would be offensive to the eye as well as having the effect of devaluing neighbouring property."

16. In the present case the respondent was carrying out work without planning permission so the coercive order to restore the state of the premises is all the more justifiable. I also note that the courts have repeatedly emphasised that the discretion enjoyed under s. 160 is a very wide one, and in this case the applicant represents the public interest in having these four houses protected because of their artistic, architectural and historical value. Thus the applicant is under a duty to ensure that such structures are protected and

preserved. The respondent has assets in the form of a number of properties. He has procrastinated over a period of time, but it is imperative that he should grasp the nettle and make available the funds from his assets to carry out the refurbishments as agreed in the order by consent, meanwhile keeping in touch with the applicant and its officials and experts and ensuring that the work is properly supervised by approved contractors and a conservation architect.

17. I note that the respondent himself said that he thought that the work would cost €500,000.00 and that mention was made on behalf of the applicant of figures of €750,000.00 to €1 million as being needed. I am mindful that the respondent in this case has not taken any technical points and has been candid in admission in respect of many matters including his failure to carry out the agreed refurbishment. I think it is imperative that the respondent now gives strong focus to the need to carry out his obligations under the consent order. The court has been more than patient with the prevarications and the procrastinations. "Procrastination is the thief of time" particularly in compliance with mandatory injunctions.

18. When the respondent sold the 5.7 acres at Kilcoole to Wicklow County Council, he received more than a €1 million. This was used to repay money owing to Bank of Scotland and the idea behind this was that this would give him more equity in the Gardiner St. premises in order to carry out the works required. As for No. 7 Adelaide Road as already noted there is a sale pending to a purchaser and one would have expected him to have moved for specific performance. As for No. 61 Haddington Road there is a need for the respondent to regularise the planning situation by demolishing the extension. This is a valuable property and it would seem that after the mortgage to the Bank of Scotland has been paid off, there should be a sum available to carry out much of the required refurbishments in Upper Gardiner St. There is also the property at the rear of the Upper Gardiner St. which has got planning permission. For months now the court has been encouraging the respondent to get on with making arrangements to deal with his predicament. At least at present there should be contractors eager to have the work involved in such restoration work.

19. In *Laois County Council v. Richard Scully, Michael Scully, Eileen Scully, Scully Skips Limited and Edward Boyhan*, Peart J. on the 23rd January, 2007, gave judgment in the case of an illegal landfill operation at Timahoe, Co. Laois, in which the court had made an order pursuant to s. 57 of the Waste Management Act 1996-2003, requiring the respondents to cease an illegal land filling operation and to remove all waste on that land to an authorised waste disposal facility and to remediate the land. In that case the leachate from the illegal land fill was affecting the groundwater.

20. The order in the present case was made by consent and so the respondent himself was a party to the agreement as to what work has to be carried out and the conditions under which it was to be carried out. At least the respondent in this case has not raised technical matters in order to avoid doing what he agreed to do and which he agreed should be contained in the order of the court. This has been to his credit as submitted by his solicitor.

> "Be wise today; 'tis madness to defer" (Edward Young 1683-1765).

21. The court would therefore order the committal of the respondent to prison for a period of six months, but will now suspend this order for a period of twelve months on condition that the respondent has completed within that period of twelve months the programme of works contained in the order of the High Court, (Quirke J.) on 24th January, 2005. It is imperative that the respondent through his solicitor maintains contact with the applicant Council and keeps them in touch with progress being made as supervision and monitoring of the carrying out of the agreed works is necessary. I will also give liberty to apply to both parties on notice to the other party.