2005 IEHC 352

THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 368 J.R.]

BETWEEN

DERRY O'CONNOR, CAROLINE O'CONNOR, FINBARR SHEEHAN, CARMEL SHEEHAN, PAT O'SULLIVAN, DECLAN SHEEHAN, BINA SHEEHAN, MICHAEL HOWE AND MAY HOWE

APPLICANTS

AND
CORK COUNTY COUNCIL

RESPONDENT

AND
MALOBAR PARTNERSHIP

NOTICE PARTY

Judgment of Mr. Justice Roderick Murphy dated the 1st day of November, 2005.

1. Pleadings
1.1. Reliefs sought by applicants
The applicants, residents in the vicinity of the development at Coolroe Ballincollig, Co. Cork, being planning reference No. 05/1174, dated 1st March, 2005, seek the following reliefs:

> (1) An order of prohibition, or in the alternative, an injunction, prohibiting Cork County Council, the respondent herein, from further considering planning application 05/1174;
>
> (2) a declaration that if the planning application were valid the respondent had acted contrary to law in failing to place in the planning file a copy acknowledgement of the receipt of the application, and a declaration that they had acted contrary to law in falsely informing the applicants and each of them that a valid planning application had not been made in response to their numerous queries as to the status of that application.

By order dated 19th April, 2005 the High Court, MacMenamin J. gave leave to bring proceedings by way of judicial review on the ground that the respondent received the planning application 05/1174 on 1st March, 2005 and failed in its statutory duty to copy the statutory letter of acknowledgment to the relevant planning file with the result that when one of the applicants and the solicitor for the applicants on numerous occasions contacted the office of the respondent for information as to whether there was a valid application before the respondent in order that they make a submission to the respondent in relation to such application, they were on each occasion informed by servants or agents of the respondent that there was no valid application before the respondent, thereby causing the statutory five-week period for the making of submissions or observations to elapse without the applicants making submissions or observations as aforesaid.

1.2 Statement of opposition of notice party
The notice party says it is blameless in the matter and that to the extent that the applicants were ignorant of the planning application such ignorance derived from the failure of the respondent to properly enter details of the subject planning application in its weekly lists which derives from a statutory instrument rather than a statute. The presumption of the planning code is in favour of the development and any interference should be narrowly construed. The notice party is blameless and its constitutional right should not be prejudiced or interfered with by reason of a failure on the part of the applicant or the respondent. But for the application for judicial review the notice party would have been able to commence work on the development and has suffered significant and ongoing losses and additional costs.

A previous application, lodged on 18th February, 2005, 05/904, had been withdrawn by Malobar Partnership, the notice party.

2. Applicants' Affidavits
2.1 Affidavit of Brian Long
Mr. Long, solicitor for the applicants, said that on 1st March, 2005 he had a consultation with seven of the nine applicants (the other two of whom were represented by their husbands) who all resided in the vicinity of the development. Each desired to object to the planning application. Mr. Pat O'Sullivan, the fifth named applicant, informed him that he had gone to the offices of the respondent on 1st March, had inspected the planning file and that it appeared that the plans had been returned to the applicants. On 2nd March he wrote to Mr. John Lennon, consulting engineer, asking him to attend the planning office to inspect the file as a matter of urgency. On 11th March, 2005 he attended on the respondent's offices and was informed that the original application had been returned to the applicants and that a new application would have to be submitted. There was not on the file a letter of acknowledgment of receipt of a valid planning application.

His office contacted the offices of the respondent on 7th, 11th, 14th and 16th March, 2005 and on each occasion was informed by a servant or agent of the respondent that the original application for planning permission had been returned and not resubmitted.

He said that Mr. Pat O'Sullivan attended the office of the respondent on 18th and 25th March and on 5th April. On the latter date he was informed that a valid application had been submitted on 1st March, 2005. On being informed by Mr. O'Sullivan the deponent immediately contacted the office of the respondent and was informed by a servant of the respondent that a valid application had been lodged on 1st March, 2005 and that the five-week period for making observations had consequently elapsed. He then immediately wrote to the respondent by letter dated 6th April, 2005, which referred to his attendance with the consulting engineer on that date.

On examining the planning file he discovered that the application form carried two stamps of receipt; one was dated 18th February, 2005 and the other 1st March, 2005. There was no letter from the County Council to the effect that the first application was invalid. If it was valid, then the planning department should have so notified the applicant and if not, then the entire application should have been returned to the applicants with reasons given for the invalidation.

Mr. Long believed that the applicants' rights to object had been frustrated by the failure of the respondent to comply with the statutory requirements. To acknowledge receipt of a valid planning application before a submission or observation may only be made within the period of five weeks, commencing on the date of receipt by the planning authority of a valid planning application.

By letter dated 5th April, Mr. Long had pointed out that article 17 of the 2001 Regulations provided that any application for planning permission should:

> "Within a period of two weeks before the making of the planning application give notice of the intention to make the application in a newspaper in accordance with article 18 and give notice of the intention to make an application by the erection and fixing of a site notice in accordance with article 18."

He said that there was only one site notice and that if another set of plans were lodged on 1st March then a second notice should also have been erected.

2.2 Mr. O'Sullivan, by affidavit sworn on 7th June, 2005, said that he had become aware of the application for planning permission through the site notice which was affixed to the property and dated 16th February, 2005. On 1st March he visited the respondent's office and found an application for planning permission for the development of apartments under reference 05/904, with an application date of 18th February, 2005. He was told by a member of staff and was advised that the planning department had rejected that planning application as the documentation was incomplete and that if an application were resubmitted it would be registered under a new reference number. He said that he visited the public offices on other occasions and checked both the planning computer system, the public book list of planning applications and spoke with a member of the staff at the public counter and could find no reference whatever to any resubmission of the planning application. On 5th April, 2005 Mr. O'Sullivan visited the public offices and noticed an application on the computer system for the development under a new reference No. 05/1174, with an application date of 1st March, 2005. He was told that as five weeks had passed, no objection could be lodged or observation made. The failure of the respondent to properly display the details of the development frustrated his right to object.

2.3 The court has also considered the supplemental affidavit of Pat O'Sullivan exhibiting the registration of the notice party's application dated 1st March, 2005 as a new application; the affidavit of Deirdre O'Donovan who said that on four dates in March she had telephoned the planning department and was told that the original application of the notice party had been returned, that a new application had not been made as of each of the respective dates between 7th and 16th March and exhibits her telephone attendances. On 5th April, 2005 she was told that the application had been resubmitted on 1st March as application No. 05/1174 and that a decision was due on 25th April, 2005.

3. Respondent's Affidavit

Mr. Ger Shine, planning officer with the respondent, filed an affidavit on 14th June, 2005. He said that on 18th February, 2005 the notice party had lodged an application which failed to specify how the notice party proposed to comply with a condition implementing the social and affordable objectives of the respondent's housing strategy. The application was returned as invalid. All the particulars of that invalid application were returned to the notice party on 23rd February along with an explanatory letter and no documentation in relation to such application was retained by the respondent. Particulars of the invalid application were entered into the register under No. 05/904. On 21st February, 2005 the computerised public enquiry system was updated to reflect the fact that the invalid application had been rejected and two days later the computerised mapping system was updated.

Mr. Shine says that on 1st March, 2005 the notice party lodged a further planning application including a proposal specifying how compliance with social and affordable objectives was to be met. This application was deemed valid. An acknowledgement dated 8th March, 2005 was sent to the notice party. Particulars of the second application were entered onto the register as 05/1174 within three working days of the receipt. The computerised public enquiry system was updated on 2nd March and the computerised mapping system updated the following day. On 3rd March, 2005 a copy of the acknowledgment was entered on the planning file and was available for inspection from that date.

The respondent was satisfied with regard to the newspaper and site notice.

Mr. Shine says that it ought to have been apparent to Mr. Long that the file he was inspecting was not the invalid planning application, the entirety of which had been returned to the notice party. It was not possible to record who made enquiries either by telephone or at the public counter regarding applications. Mr. Shine said that he was unaware of representations being made on the four dates in March referred to by Mr. Long but believed that it was unlikely that such representations were made, either to Mr. Long or to Mr. Pat O'Sullivan. A valid acknowledgment regarding the second application was issued.

Mr. Shine said that the applicants appeared to have been erroneously under the belief that neither an objection nor an observation could be made until after the planning authority had deemed the application as being valid under the 2001 Regulations. He believed that it was quite possible that Mr. O'Sullivan incorrectly used the public enquiry system on each occasion by using "Ballincollig" as his search criterion. It is a separate townland from the townland of Coolroe where the subject lands were located. He could also have used the name of the notice party or interrogated the public enquiry system by making use of the digitised mapping facility to ascertain the extent of the particular site in question.

Mr. Shine referred to Mr. O'Sullivan's reference to the list of planning applications maintained on foot of article 27 of the Planning and Development Regulations, 2001. Unfortunately, he says, the second valid application of the notice party did not appear on the planning list furnished to Mr. O'Sullivan as a result of an error whereby the date of the planning application was input as "2004" as opposed to "2005".

No additional data had been added to the system between 2nd March and 5th April, 2005.

4. Notice party response

4.1 Affidavit of Mr. O'Brien

Mr. O'Brien is a partner in Malobar Partnership, the notice party to the proceedings. Mr. O'Brien caused a search to be carried out on the website on 25th March, 2005 to check the status of the planning application. He said that the results of that search were printed out and clearly showed that the planning application had been received on 1st March and that any submissions might be made thereon by 2nd April, 2005, as was clear from the exhibit to that affidavit.

But for the present judicial review, the notice party would have been able to commence work on the development the subject of the impugned planning application/decision on or about 1st June, 2005. Purchase of the land was financed by a substantial loan in respect of which interest was accruing. The applicants had obtained an interlocutory injunction on 11th April, 2005 restraining the respondent from granting the planning permission but no undertaking as to damage was given concerning losses which had been resulting to the notice party as a result of the same. The request for an undertaking was not replied to.

4.2 Affidavit of Mr. McCullagh

Harry McCullagh, solicitor for the notice party, by affidavit sworn 15th July, 2005, observed that the application for judicial review was based entirely on allegations of failure by the respondent to maintain properly the planning register to reflect the notice party's planning application and an allegation that its officials repeatedly and erroneously informed the applicants that the notice party's planning application had not been made. No allegation of wrongdoing or error was made against the notice party which had acted entirely properly throughout. He said that an application for an interlocutory order pending the substantive judicial review application was originally returnable for 5th May and obtained on 11th July, 2005, restraining the respondent's consideration of the planning application pending further order. In apparent breach of the interim order the respondent invited the notice party under article 33 of the 2001 Planning Regulations to submit further information in respect of the applicant which was answered by the notice party's engineer on 10th June, 2005.

It appeared that on 5th July, 2005 the matter had been partially resolved between the applicants and the respondent on the basis that the notice party ought to be required to re-advertise the planning application thereby entitling the applicant to make observations thereon.

Mr. McCullagh says that this was in clear and deliberate contempt of the court order in the case; that the notice party was entirely innocent and that its planning application had been delayed. The attempt by the respondent to settle the case with the applicants was deeply prejudicial to the interests of the notice party. While the notice party is prepared to reluctantly acquiesce in the re-advertisement of the planning application so as to avoid lengthy and costly litigation and delay, it prays the court to make an order providing for the payment of the notice party's tax costs in full and on a solicitor/own client basis.

A letter to that effect from Harry McCullagh & Company, Solicitors, to the respondent's legal department dated 6th July, 2005 was exhibited.

5. Respondent's reply
The affidavit of Stephen McDevitt, solicitor for the respondent was filed on 23rd July, 2005. He referred to Mr. McCullagh's "groundless allegations".

He referred to a letter dated 30th July, 2005 which, he says, was not included in Mr. McCullagh's affidavit.

In that letter the County Solicitor, Ms. Mary Roche, stated that the applicants had agreed to lift the interim injunction so that the respondent would be in a position to deal with the notice party's planning application. Any further delay in reaching a determination on the application had therefore been eliminated. She noted the notice party's acquiescence in the proposed "settlement" and re-advertisement.

Ms. Roche said that there had been no contempt; that the request of the respondent for further information dated 22nd April, 2005 was a *bona fide* request without any knowledge of the interim injunction. The court order had only been notified to them on that date. The notice party acquiesced.

Mr. McDevitt said it was incorrect that the court order expressly restrained the respondent from considering the planning application. Implicit in the letter of 24th June, 2005 was an acknowledgement that the respondent was prohibited from making a determination on the requirement to publish a newspaper notice. The interim injunction was granted at the request of and for the benefit of the applicant and not for the benefit of the notice party who had waived any complaint that they might have.

It not being clear whether the notice party complied with the request to take down the site notice in respect of the first application and that a newly erected site notice would have alerted the applicants to the new application. However, the applicants had not strictly challenged the issue of the site notice.

6. Decision of the Court
The computer printout of the planning applications received from 28/02/05 to 04/03/05 ranged numerically from 05/1158 to 05/1196. One reference, 05/1174, is missing between number 05/1173 which is O'Leary's application for a conversion of a garage to a bedroom, received on 1st March, 2005 and Brown's application number 05/1175, for an extension to a dwelling house received on the same day. It would appear that 29 applications from 05/1164 to 05/1193 were received on 1st March, 2005. However, only 28 appeared from the computer printout exhibited.

The planning authority, in making a facility available to the public, must ensure its accuracy. It is not submitted that members of the public, the applicants in the present case, have an obligation to search the planning file when there is a computerised facility made available. While this is not the actual record it is provided to facilitate the public and must, necessarily, be accurate.

Mr. Shine has fairly said that it was unfortunate that the second application of the notice party did not appear on the planning list furnished to Mr. O'Sullivan, one of the applicants, as a result of an error whereby the date of the planning application was input as 2004 rather than 2005.

It is clear that the system failed by reason of the misdating of the notice party's second application. It was dated 2004 rather than 2005. There needs to be a programme which would alert such an omission in the sequence of planning applications.

The parties have attempted to resolve and settle the difficulty which has arisen.

The net issue remaining in these proceedings is the scope of the proposed settlement, the issue of contempt and the costs of the parties.

It does not seem to the court that the respondent acted other than by way of resolving the difficulties occasioned by its error. There was no contempt. It seems to the court that this difficulty can best be redressed by way of costs.

The agreement between the applicants and the respondent did not extend to the issue of costs. The notice party claimed costs as against the respondent on the basis that they were entirely innocent and were entitled to the benefit of the planning permission granted.

I accept the evidence of the applicants in relation to the queries made to the respondent during the month of March. They were misled and, it seems to me, the staff of the respondent themselves may very well have been misled by the absence of a reference to planning permission 05/1174 from the computer printout. Notwithstanding the gap between 05/1173 and 05/1175 which should have caused some query by the respondent, it would be expecting too much from members of the public to query that lacuna. Moreover, it

seems to me, that the facility of the computer printout to staff and public alike needs to be verified by the respondents themselves from the primary source.

The applicants should be awarded their costs as against the respondent.

The notice party reluctantly acquiesced in the lifting of the injunction and to the re-advertisement of the application. The notice party is entirely innocent with respect to the misleading of the applicants. In the circumstances the notice party is also entitled to its costs as against the respondent.