Neutral Citation Number 2007 IEHC 110

THE HIGH COURT
JUDICIAL REVIEW

[2006 No. 925 JR]

BETWEEN

KATHLEEN COLL

APPLICANT

AND
DONEGAL COUNTY COUNCIL

RESPONDENT

AND
LIAM GILLESPIE

NOTICE PARTY

Judgment of Ms. Justice Dunne delivered on the 23rd day of March, 2007.

1. By a notice of motion dated 14th November, 2006, the respondent herein sought the following relief:-

> A. An order varying the grant of leave so as to provide that the grant and/or continuance of leave to apply for judicial review herein shall not operate as a stay on any further actions of the respondent pursuant to the decision at issue in these proceedings or otherwise howsoever.
>
> B. An order pursuant to the Rules of the Superior Courts, O. 84, r. 20(6) that the applicant provide an undertaking as to damages in respect of the grant and/or continuance of leave in the within proceedings.
>
> C. An order pursuant to the Rules of the Superior Courts, O. 84, r. 20(6) requiring the applicant to furnish security for costs to the respondent herein.

2. The application was grounded upon the affidavit of Patrick McMullan sworn on 14th November, 2006 and a number of other affidavits were subsequently referred to in the course of the hearing before me.

3. I do not propose to set out the entire history of the matter, but it is necessary to sketch in some background to the application. The notice party herein obtained planning permission to develop a filling station and supermarket at the junction of Strand Road and Bunbeg Road, Co. Donegal. It was a condition of the permission that there should be a road re-alignment as a result of the development which involved the extinguishment of a public right of way.

4. A motion was passed on 29th May, 2006, by the elected members of the respondent for the extinguishment of the public right of way at Strand Road, as required by the condition in the planning permission. It is that decision which is the subject of the present challenge.

5. The order granting leave provided, *inter alia*,

> "That any further actions pursuant to the challenged decision to extinguish the public right of way over the said portion of the Strand Road, Bunbeg, be stayed until the determination of the judicial review or until further order …."

6. The current proceedings are not the first challenge brought by the applicant in respect of the extinguishment of the public right of way. The applicant previously sought to challenge an earlier decision of the respondent to extinguish the public right of way pursuant to the provisions of s. 73 of the Roads Act, 1993. Those proceedings came on for hearing in the High Court before Peart J. and in his judgment delivered therein on 7th July, 2005, he refused the reliefs sought in that application. Costs of the proceedings were awarded against the applicant.

7. The previous proceedings have some relevance to the applications currently before the court. As indicated, one of the reliefs sought herein is security for costs against the applicant. Reference has been made in the affidavit of Patrick McMullan to the fact that the order for costs made against the applicant in the previous proceedings cannot be paid by her as she is in her solicitor's words "a man of straw". It is on that basis that security for costs is now sought. It was pointed out that the notice party herein will suffer significant financial consequences as a result of further delays in the development, assuming that the applicant is ultimately unsuccessful in these proceedings.

8. Reference was made by counsel for the respondent to a number of authorities in relation to the issue of security for costs, but none of those authorities dealt with an application in respect of judicial review proceedings involving an individual as opposed to a company or a person residing outside the jurisdiction. A number of the authorities referred to application for security for costs in respect of appeals to the Supreme Court.

9. A passage in Delaney and McGrath, *Civil Procedure in the Superior Courts* (2nd Ed.) at para. 27.55 is of some assistance. The author's comment:-

> "Conversely, it is interesting that the insulating effect which limited liability status confers on individuals who for example wish to challenge a planning decision also raises the spectre of an order for security for costs. So, in cases where an order could not be made against an individual or group of individuals, it may be made against a limited liability company pursuant to the provisions of s. 390 of the Companies Act, 1963."

10. It is worth considering one passage from the judgement of Morris J. in the case of *Lancefort Ltd. V An Bord Pleanala* 1998 2 I. R. 511 where he stated at p. 514:

> "The second point on this issue arises in the following way. Counsel for the Applicant submits that in recent cases, and in particular, *Maher v Phelan*, 1996 1 I. R. 95, Carroll J. held that an order should not be made when the application is based on Order 29, Rule 1. Counsel cites the following passage from her judgement at page 89 in support of that submission:-
>
> > "…as the law stands it is not possible to get an order for security for costs against an individual litigant resident in the jurisdiction regardless of circumstances. Different considerations apply to companies which are not relevant to consider here…"

> Since an individual litigant being a plaintiff resident in Ireland cannot be ordered to pay security for costs therefore a plaintiff resident outside Ireland within the E. U. should not be so ordered."

11. It was suggested on behalf of the respondent that an order for security for costs could be made in this case pursuant to the inherent jurisdiction of the court to prevent an abuse of process in circumstances where the applicant is a "man of straw" and not in a position to meet an order for costs and demonstrated by the position in relation to the previous judicial review proceedings. In the absence of any authority to support the respondent's contentions in this regard and having regard to the passage referred to above from the Judgement in the *Lancefort* case and fortified by the passage referred to above from Delaney and McGrath, I cannot see any basis at this stage to make an order for security for costs.

12. As indicated above, the second relief sought related to the issue of an undertaking as to damages pursuant to the provisions of O. 84, r. 20(6) of the Rules of the Superior Courts. Order 84, r. 20(6) provides:-

> "If the Court grants leave, it may impose such terms as to costs as it thinks fit and may require an undertaking as to damages."

13. Reference was made in the course of argument to the decision of the High Court in the case of *Broadnet Ireland Limited v. Office of the Director of Telecommunications Regulation* [2000] 3 I.R. 281. In that case a company which obtained leave to apply for judicial review was required to provide an undertaking as to damages. She noted that that case was the first occasion on which the High Court had been asked to require an undertaking as to damages from an applicant for judicial review who had not sought a stay or an interim or an interlocutory injunction. She went on to say at p. 295 of the judgment:-

> "I am satisfied as a matter of construction of sub-rule 6 in the overall context of O. 84, that the courts jurisdiction to require an undertaking as to damages provided for in that sub-rule is not limited to situations in which a stay is granted under sub-rule 7(a) or an interim injunction is granted under sub-rule 7(b). Sub-rule (6) by implication recognises that granting leave to impugn the decision of a public body may have the potential to cause damage and having regard to the provisions of r. 22(2), which requires service of an application for judicial review 'on all persons directly affected', recognises that it has the potential not only to cause damage to the public body in question but also to third parties affected by the decision of the public body. In any such situation the court has a discretion to condition the leave by imposing a term or terms including a requirement that the person seeking the leave give an undertaking as to damages. In my view, sub-rule (6) is open to the construction that the court may, at leave stage, on its own motion so condition the grant of leave. While it is not disputed in the instant case that, after leave is granted, the court can entertain an application from a respondent or a notice party that an undertaking as to damages should be required, I have no doubt that this course is open under sub-rule 6, because the application for leave being an ex parte application, a respondent or a notice party has no opportunity to seek an undertaking until after leave is granted. I would suggest, however, that an application by a respondent or a notice party should seek, as some of the parties in the instant case have sought, that it be a term of the continuance of leave and the proceedings that an undertaking as to damages be given by the applicant. As a matter of substance, that is what all of the parties seeking an undertaking as to damages in the instant case seek."

14. In coming to that conclusion Laffoy J. then went on to consider the basis upon which the court should exercise the discretion given by sub-rule 6 and in that regard she identified as being most helpful the decision in the case of the House of Lords in *American Cyanamid Company v. Ethicon Limited* [1975] A.C. 397. She then went on to say at p. 300:-

> "In considering whether to exercise the discretion under sub-rule 6 to require an undertaking as to damages as a condition to the grant or continuance of leave to apply for judicial review, the essential test is whether such requirement is necessary in the interests of justice or, put another way, whether it is necessary to mitigate in justice to parties directly affected by the existence of the pending application. If, in substance, the existence of the application has an effect similar to the effect of an interlocutory injunction in private litigation – that activity which would otherwise be engaged in is put 'on hold' pending final determination of the controversy, with resulting loss and damage – in my view, it is appropriate for the court to adopt the approach traditionally adopted in private law litigation in determining whether an interlocutory injunction should be granted and to require that the applicant should give an undertaking to make good that loss and damage if it is ultimately found that the applicant's case is unsustainable, provided there is no countervailing factor arising from the public law nature of the jurisdiction it exercises under O. 84 which precludes it from adopting that approach."

15. Having regard to the circumstances of the applicant in the instant case, counsel on behalf of the respondent urged that as the applicant is a "man of straw", this was a case in which a fortified undertaking should be obtained. In the decision in Broadnet, Laffoy J. dealt with the question of a fortified undertaking. Having referred to a passage from *Bean on Injunctions*, 7th Ed. at p. 29 which stated:-

> "But where there are doubts about the plaintiff's resources, the court has a discretion to require either security or the payment of money into court to 'fortify' the undertaking, or (as an alternative) an undertaking, from a more financially secure person or body. This might apply if the applicant is legally aided; or a minor or patient…; or resident outside the jurisdiction (*Harman Pictures N.V. v. Osborne* [1967] 1 W.L.R. 723); or an unquoted company. In cases where the plaintiff is a subsidiary of a large company and apparently lacking funds it is common for the parent company to be invited to guarantee the undertaking in damages in writing."

16. Laffoy J. then went on to note as follows:-

> "It is undoubtedly the case that an undertaking from Broadnet would be worthless unless secured. Using the terminology used by the Director, it seems to me that Broadnet 'backers' should guarantee each undertaking required in the instant case. …"

17. I do not think that there is any doubt that this is a case in which it could be said that an undertaking as to damages from the applicant would be worthless unless secured. Having regard to her own solicitor's comment in the correspondence referred to above to the effect that she is "a man of straw" it could not be said that an undertaking, unless secured, would be of any value. Counsel on behalf of the applicant referred to the decision of the High Court in the case of *O'Connell v. Environmental Protection Agency,* (Unreported, Herbert J., 5th July, 2001) in which, having referred to the Broadnet Ireland Limited case, Herbert J. at p. 18 stated:-

> "Counsel for Colette O'Connell in my judgment correctly pointed to the very real difference between a limited liability company with no assets or capital and Colette O'Connell for whom as a person resident in the State of full age and not

> under any legal or other disability or incapacity and with some interest in immovable property in the State, an undertaking to pay damages was a very serious matter indeed. The fact that the potential loss to Dungarvan Energy Limited might exceed her ability to make good that loss is no basis for regarding her undertaking as worthless and an abuse of the process of the court. I therefore refuse the application that the undertaking to pay damages which the court requires to be given by Colette O'Connell should be supported in any way whatever by the giving of security or the payment of money into court or otherwise. Counsel informed the court that he had carefully advised Colette O'Connell as to the possible consequences of this undertaking and that he was satisfied that she fully understood them and was prepared to give the undertaking it sought by the court."

18. While counsel for the applicant relied on that case in relation to the discussion therein as to the issue of protection of private property rights as against the public law rights at issue in that case, the passage quoted above is of some assistance in weighing the considerations to be borne in mind when exercising the discretion under O. 84, r. 20(6).

19. I note that in the O'Connell case, Herbert J. was of the view that the fact that private law interests of the applicant in that case were involved together with public law issues, that it was appropriate to look for an undertaking as to damages. As he put it at p.18 of his judgement:-

> "…I have concluded that the real substance of this Application is the preservation and protection of private property rights which are normally protected by private law remedies and the apparent public law aspects of this challenge are in fact subsidiary though important issues."

20. A similar approach can be seen in the decision in *Seery v An Bord Pleanala and Ors*., The High Court, unreported, 25 January, 2001, a decision of Finnegan J. At p. 3 of his judgement, he said:-

> "The whole tenor of the Applicants' objection to the proposed development before the planning authority and An Bord Pleanala and on the application for leave before me related to a small portion of the proposed development which would overlook the applicants' dwelling house. In these circumstances it seems to me that this application does not have the necessary public nature to constitute a countervailing factor such as to justify my exercising my discretion in favour of the applicants and not seek an undertaking as to damages."

21. This is a case in which it cannot be said that any private law right of the applicant is engaged. The issue before the court arises only in respect of a public law matter. Therefore, this is a factor to be considered in exercising the discretion of the court under Order 84, Rule 20 (6). That the public law nature of an applicant is a significant countervailing factor to the requirement to furnish an undertaking as to damages was noted by Laffoy J in *Broadnet*, (p. 300) referred to above, Finnegan J. in *Seery* (p. 153) and Herbert J. in *O'Connell* (p. 3). In the circumstances of this case, it seems to me that the public law nature of the claim is such that I do not think I should exercise my discretion to require an undertaking as to damages. I think the position might be different were this one of a series of unsuccessful challenges brought by the applicant to stop a particular development. I am conscious of the fact that this is the second application by the applicant herein which has an impact on the notice party's development. Nonetheless, I do not think that the fact that the applicant has previously made one unsuccessful application for Judicial Review, albeit on different grounds, is such as to warrant the requirement of an undertaking as to damages where no private law right of the applicant is engaged. Nonetheless, if the court were satisfied that the use of a particular applicant who is a "man of straw" was a deliberate tactic to frustrate the possibility of an undertaking being obtained, fortified or otherwise, that could amount to an abuse of process such as to merit the requirement of an undertaking as to damages even where the matters at issue are of a public law nature. I am not satisfied that there is such an abuse of process in the present case.

22. Another issue that has to be considered is whether or not the stay should be continued. Reliance has been placed by counsel on behalf of the respondent on the decision in the case of *McDonnell v. Brady* [2001] 3 I.R. 588. In the course of the judgment of the Supreme Court in that case, Keane C.J. commented:

> "While the learned High Court judge took the view that the onus was on the respondents to satisfy the court, in the light of the criteria laid down in *American Cyanamid v. Ethicon Limited* [1975] A.C. 396, including the balance of convenience, that the stay granted should be discharged, it could be plausibly contended that, on the contrary, the onus rests on the applicant to satisfy the court, where it is challenged, that it should be kept in place. There is nothing in the wording of O. 87, r. 20(7)(a), to suggest that, where an applicant for leave seeks an order of prohibition or certiorari, he is further entitled *ex debito justitiae*, to a direction that the proceedings should be stayed. There seems no reason in logic why the applicant, where the grant of the stay is subsequently challenged should not be under an onus to satisfy the court that it is an appropriate case in which to grant such a stay."

23. Accordingly, it was held in that case that the principles applicable to the granting or discharge of a stay were the same as those governing the granting of interlocutory injunctions. It was noted by Finnegan J. in the case of *Seery v. An Bord Pleanála* [2001] 2 I.L.R.M. 151 at p. 152:-

> "On an application for interlocutory injunctive relief a court would not attempt to resolve conflicts of fact or questions of law or otherwise evaluate the strength or weakness of the respective position of the parties and it should not do so here."

24. I therefore do not propose to consider or evaluate the respective cases of the parties herein. Suffice to say that the applicant succeeded in being granted leave to seek judicial review and that being so has clearly demonstrated that there are arguable grounds for doing so.

25. The works affected by the stay relate and can only relate to implementing the decision to extinguish the public right of way. I note from the submissions on behalf of the applicant that there would be no objection to "technical and/or administrative matters which the respondent could usefully carry out" prior to the hearing of the application for judicial review, however, there is an objection to works being carried out on the existing road prior to the conclusion of this matter.

26. I accept that in the present case the notice party has been delayed in his development for a very considerable time with the consequence as set out in the affidavit of Mr. Gillespie, the notice party sworn herein on the 14th April, 2005, to the effect that he has been occasioned further expense and losses as a result of the delays herein. I also note the decision in the case of *McDonnell v. Brady* to the effect that the granting of a stay should be considered in the same light as the granting of an interlocutory injunction. That decision was followed by the case of *Norbrook Laboratories v Irish Medicines Board,* unrep., High Court, Kelly J. 21 December 2001. Having regard to the principles referred to in *McDonnell v. Brady*, I do not think this is an appropriate case in which to lift the

stay in its entirety. Counsel for the notice party made very helpful submissions on the issue as to the strength of the applicant's case but in essence what should be considered is where the balance of convenience lies as pointed out by Kelly J. in *Norbrook* at p. 6 of the judgement in that case. Bearing in mind that the works presently stayed involve the re-alignment of the public road it is my view that the balance of convenience favours the applicant. However, as was noted earlier, there is no objection to some preliminary works being carried out and I will hear the parties as to the extent to which this can be done.