Neutral Citation Number: [2006] IEHC 109
[2005 No. 98 JR]

BETWEEN

LUKE MORIARTY

APPLICANT

AND
SOUTH DUBLIN COUNTY COUNCIL

RESPONDENT

Judgment of Mr Justice Hanna delivered on the 24th day of November, 2005

1. In this case, the applicant describes himself as a shop keeper of Palmerston in the county of Dublin. In his affidavit of the 2nd February 2005 he avers that he owns and operates a super value supermarket premises in Palmerston aforesaid.

2. Insofar as the applicant's ownership of the said business is material to the matters under consideration, it appears that this is a less than accurate description of the applicant's position.

3. The business and premises as it happens are leasehold premises leased to Ladgrove Stores Limited. The applicant is a director and the secretary of that company, holding a 99.4% shareholding. Nevertheless, the legal owner of the leasehold interest and operator of the premises and business is Ladgrove Stores Limited.

4. The respondent is the planning authority for the relevant area and the first named notice party with the former owner of the lands, with which we are concerned; they have no continuing interest in the said lands and have been discharged from the proceedings.

5. The second named notice party, Lidl Ireland, is the current owner of the material lands at Cherry Orchard Industrial Estate, Ballyfermot, Dublin 2. It is their intention, subject to the same being lawfully authorised, to construct, develop and maintain a retail outlet in the order of 1,645 square metres including some 1,200 square metres approximately of sales area.

6. The chronology of this case is roughly as follows: firstly, on the 3rd of February 2004, and during the currency of the 1998 South Dublin Development Plan, there was a decision of South Dublin County Council to grant planning permission arising from an application brought by on behalf of the notice party, Lidl Ireland Limited. On the 19th March 2004 an appeal against that decision was submitted to An Bord Pleanála on behalf of the applicant.

7. On the 3rd September 2004, An Bord Pleanála refused permission on grounds of material contravention of the development plan, being the development plan dated 1998.

8. On the 8th October 2004, a second application, which is the subject matter of this judicial review application, was made for a discount food store by M&J Gleeson & Co, being the former owners of the land.

9. On the 10th November 2004, South Dublin County Council adopted what was referred to as the South Dublin County Development Plan for 2004 to 2010.

10. On the 30th November 2004, the decision to grant planning permission by South Dublin County Council was made with regard to the application, the second application which was made on the 8th October 2004.

11. On the 8th December 2004, a matter of days after the decision to grant permission, the South Dublin County Development Plan 2004 to 2010 came into effect, four weeks having elapsed since it was voted into being by South Dublin County Council.

12. Thereafter, judicial review proceedings were bought by the present applicant. I will return to those but I think it is notable to refer to a somewhat curious twist which then occurred in that planning permission was applied for subsequent to all of these proceedings and this was granted and confirmed on appeal by An Bord Pleanála within the past seven days.

13. Accordingly, the situation is that the notice party now does have planning permission, on foot of what appears to be a valid planning permission affirmed by An Bord Pleanála, subject of course to the matter being scrutinised by Mr Galligan on behalf of his client.

14. This grant did not feature at all in any of the papers and I suppose it's rather like Banquo featuring at a well known Shakespearean dinner party. Mr Galligan will in due course no doubt peruse this but one has to take account of the fact that strictly speaking there is no evidence of what had transpired subsequent to the JR proceedings apart from a photocopy of this decision of An Bord Pleanála.

15. However, its authenticity has not been challenged and I suppose, were I to proceed to the matter of exercising discretion, it is something that might be taken into account. One might be concerned that we have been engaged in some sort of moot, while indeed other litigants were turned away from this court, but overall it seems to me that the outcome could only have a bearing, as far as this case is concerned, were I to turn to the question of discretion.

The application for judicial review

16. This arose on the foot of a motion dated the 2nd February 2005 and by order made the 4th April 2005. Quirke J gave liberty to seek an order of certiorari quashing the decision of the 30th November 2004 granting planning permission to the notice party to a declaration that the proposed declaration would amount to a material contravention of the South Dublin County Development Plan 1998 and that it was ultra vires the powers of the council in the absence of the initiation of the procedures under section 34(6) of the Planning and Development Act 2000.

17. Thirdly, a declaration that the proposed development was similar in all respects to that refused by An Bord Pleanála and the planning authority was bound by that authority.

Material contravention

18. Counsel on behalf of the respondent conceded that the decision by the county council to grant planning permission occurred during the currency of the 1998 Development Plan, albeit by a few days.

19. One must look, therefore, at subsection (17) of section 12 of the Planning and Development Act 2000 and it seems to me in so

doing that the provision of that section is quite clear and that is:

> "A development plan made under this section shall have effect 4 weeks from the day that it is made."

20. The law could not be more clear. That being so, and since there could appear to be no major dispute between the parties, that the plans submitted for the approval by the county council leading to their respective decisions of 3rd February 2004, the 30th November 2004, were substantially the same, it would seem to follow that the decision of An Bord Pleanála of 3rd September 2004 continued to govern the situation to the extent that the county council was bound by it.

21. What did change the landscape was the imminent arrival of the 2004 to 2010 development plan. It seems clear that the planning officer in his report and the council in their decision of the 30th November 2004 kept their eye on that particular ball and disregarded the 1998 Development Plan. This was perhaps understandable in the circumstances, but given the clear provision of subsection (17) it was a mistaken view.

22. The imminence of the legal effectiveness of the 2004 Plan did not render the 1998 Plan irrelevant, as the planning officer seems to have thought judging from his report. Thus, given the decision above referred to of An Bord Pleanála, the planning application should have triggered the mechanism provided for in section 34(6) of the Planning and Development Act 2000 dealing with material contravention.

23. Whether this in the overall scheme of things would have altered the position which we have all ultimately arrived is open to serious doubt. This, however, is a review and it is not an appeal by way of rehearing.

Locus Standi
24. It was argued by the applicant that the court cannot revisit the issue of locus standi to seek judicial review, this having been determined by Quirke J when he granted leave to seek judicial review on the 4th April 2000.

25. The statutory requirements to obtain leave are set out in section 50 of the 2000 Act and I will cite them here. Section 50 (4) (b) provides as follows that:

> "(b) An application for leave to apply for judicial review shall be made by motion, on notice (grounded in the manner specified in the Order in respect of an ex parte motion for leave)—"

26. I will not refer to all of the subsections there but I will come to the concluding part of that subsection which states as follows:

> "And leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed, and that the applicant has a substantial interest in the matter which is the subject of the application."

27. Now, it goes on in sub paragraph (c) to say that:

> "(c) Without prejudice to the generality of paragraph (b), leave shall not be granted to an applicant unless the applicant shows to the satisfaction of the High Court that—"

28. Various roman numerals in capitals follow governing the situation where there has been participation by a complainant under the planning regulations in the planning process. At (ii) it says that in the case of a person other than a person to whom the previous subsections apply, in other words a person who did not involve themselves in the planning process, there were good and sufficient reasons for his or her not making objections, submissions or observations, as the case may be.

29. The applicant contends that the court had already determined the question of substantial interest, application for leave, and that it is only the question of the validity of the decision of the county council which remains to be determined.

30. The operative part of the order of Quirke J makes no finding or declaration to the effect contended for by the applicant. The order grants leave in the terms therein specified and reserves costs. That is the extent of the order. That is not to understate the significance of such an order, given that the threshold which an applicant must meet is very high as compared and contrasted to and with an ordinary judicial review application, see *McNamara v. An Bord Pleanala* [1995] 2 ILRM 125 and *Jackson Way Properties Ltd v. Minister for the Environment* Unreported, Supreme Court, 2 July 1999.

31. Of course, this application, as are all such, was made on notice and as such applications for leave can be and often are fiercely contested to a degree such as might render insipid and consentualistic more everyday full judicial review hearings but the prize is, and remains, leave.

32. I cannot see how, in its natural and ordinary meaning, the statute grants leave on one aspect of the matter and determines conclusively another. Why, for example, reserve the question of costs if the applicant has already had a concluding and conclusive victory on one aspect of his claim. It makes no sense to me to split up the preconditions with which a court must be satisfied upon an application for leave.

33. Leave is a filtering process, even in circumstances like here where there is an enhanced burden upon an applicant and where the successful applicant must go on to face a weightier challenge in terms of the degree to which that such applicant must satisfy the deciding court.

34. How can it be said that the locus standi is to be determined by reference to a shorter yardstick than the question of the judicial review itself?

35. I am of the view that it is open to the court to hear submissions and receive evidence and ultimately to determine on full hearing whether or not the applicant has fulfilled all of the criteria laid down by section 50(4) (b) and (b)(iv) and (c)(ii).

Does the applicant have substantial interest?
36. The fact that this question may now arise in a way different to that posed to the court on the application for leave fortifies my view as expressed above.

37. The applicant is not the owner of the premises or the business. The actual owner, Ladgrove Stores Limited, could have objected,

and indeed could have brought or joined in these proceedings. The respondent and indeed the notice party are entitled to know the true colour of their opposition. For example, questions may arise in the execution of an order for costs should the applicant suffer same. This, of course, cuts both ways.

38. The application for leave is a time restricted procedure and it is entirely understandable that parties involved might not have sufficient time to martial all the material evidence or make full and proper enquiries in advance of the hearing.

39. I feel that I should follow the logic of the decision of O'Higgins J in the *Springview Management Company Ltd. v. Cavan Development Ltd.* 2001 Irish Law Reports Monthly page 437. The applicant is not the owner and therefore I find that he does not have a substantial interest.

40. The applicant cannot dip in and out of corporate status, nor can any other party, at will. There are defined instances when the veil of corporate status may be lifted. I see no reason to hold that this is one such.

41. Even if the applicant could fit into the shoes of the true legal owner, has he established the loss such as would give rise to a special interest? I find there is insufficient evidence before me so to hold. I feel that the evidence would require something significantly more than what was stated on affidavit before me. There was no significant attempt at analysis, examining market trends or comparative figures comparing the effect of such developments as is proposed by the notice party on, no doubt, considerable retail outlets such as that operated by Ladgrove Stores Limited.

42. I am not persuaded that the nature of the proposed development is likely to impact on Ladgrove's business and thus am of the view that no special interest has been demonstrated

Non-participation
43. As a consequence of my findings above, the applicant is therefore in no better position than any other member of the public to offer objection. He is given no special dispensation with regards to watchfulness or alertness when it comes to spotting or noticing applications for planning permission.

44. The law provides for the manner whereby such applications are published to the general public. It is conceded that the notice party has complied with all the requirements of the planning regulations so far as public notification goes.

45. The applicant, having previously objected successfully to an almost identical application by the notice party and engaged the planning consultants in the process, would be, if anything, on a higher state of alert than an ordinary member of the public but this cannot be held to give him a greater right than such ordinary member of the public. Accordingly, no good and sufficient reasons have been demonstrated.

46. That being so, it seems to me that there is no point in going on to the issue of the question of discretion, having regard to the findings which I have made. Having said that, for the purpose of completeness, I should observe that in the view of what has transpired since, I would, in all probability, exercise my discretion against the applicant. Accordingly, I refuse the relief sought.