

**THE HIGH COURT
JUDICIAL REVIEW**

2004 922 JR

BETWEEN

**MICHAEL MCDOWELL
AND
NIAMH BRENNAN**

APPLICANTS

**AND
ROSCOMMON COUNTY COUNCIL**

RESPONDENT

Judgment of Finnegan P. delivered on the 21st day of December 2004

The Facts

1. On the 18th December 1998 Ms Anne McDonagh applied for planning permission in respect of lands owned by her south of Carnadoe Bridge in the townland of Lavagh, Rooskey, Co. Roscommon. Planning permission was granted on the 30th August 1999. The development is described in the planning permission as follows –

“Dwelling house, septic tank and Bord na Mona Puraflo effluent disposal system and new vehicular entrance on to the public road on site south of Carnadoe Bridge, Lavagh townland, Rooskey, Co. Roscommon.”

2. Condition 11 attached to the planning permission provides as follows –

“(11) Subject to the foregoing conditions the development, including entrance, shall be carried out in accordance with the elevations and floor plans submitted on the 18th December 1998 and the site layout plan on the 12th July 1999.”

3. The following documents were submitted with the application –

1. Site location map.
2. Site layout plan.
3. Elevations to north, south, east and west.
4. Floor plans for levels 1 and 2, 2 and 3, 4 and roof plan.

5 Sections A – A showing the east elevation and B – B showing the north elevation. On the 21st April 1999 a revised site layout drawing was submitted with an elevation to the west and a cross section C – C. This latter showed a cross section through the building in a west/east direction. It also shows levels at three points: the level of the public road (140.0D), finished floor level at ground floor (151.0D) and to the rear of the dwelling (154.0D). The cross section C – C conflicts with the form of application for planning permission which gives the finished floor level at first floor level as 8.4 m. above the road. The revised site layout shows the contours of the site and discloses that the site rises steeply from west to east. On the 12th July 1999 a further revised site layout plan was lodged showing a relocation of the Puraflo unit and percolation area but otherwise is identical to that furnished on the 21st April 1999.

4. The Applicants agreed to purchase the site in April 2004. They retained their own architects Jennings O'Donovan (“the architects”). The purchase was completed on the 25th June 2004. On the 21st May 2004 the architects lodged a commencement notice giving as the commencement date the 8th June 2004 and the proposed completion date 30th August 2004 the date of expiration of the planning permission. (The Respondents consider the expiration of the planning permission to be the 29th August 2004 but nothing turns on this). It is necessary at this point to describe the dwelling for which planning permission was granted. There are three floor levels. At the lowest level there are three bedrooms, four bathrooms and storage areas: having regard to the information furnished to assist in completing the form of application for planning permission this is basement level. At the next level there is the entrance, a living room, dining room, study, conservatory, kitchen and utility area: on the same basis this is the ground floor level. At the upper level there is a bedroom, bathroom and dressing room. In the drawings the finished floor level of the lowest level is level 1, the finished floor level at the next level is level 3 and the finished floor level for the next level is level 4. In applying for planning permission the architects retained by Ms McDonagh were aware of the sensitive nature of the site and in their covering letter to the application they indicated that in their plans they had taken into account the steep nature of the site. The dwelling was to be largely screened by trees. It was designed as split level to integrate into the slope and natural materials were to be used for the external finishes. The finishes were set out in a specification lodged with the application.

5. On the 21st June 2004 the architects wrote to the Respondent as follows –

“I am writing to you in regard to the proposed house with the above planning reference. A contour survey was taken of the site and it indicates that the site is steeper than what was shown on the planning drawings. Therefore, we have taken the finished floor level (which is 8.4m above the adjoining road level) to correspond to the ground floor rather than the basement floor. (See enclosed proposed cross section drawing). This results in the house being more cut into the slope and requiring less fill than was originally indicated on the planning cross section C – C. We hope that this is to your satisfaction and please do not hesitate to contact this office if you have any queries.”

6. The approach suggested by the architects is consistent with the information given in the application for planning permission but not with the section C – C in the cross section lodged on the 21st April 1999. There was no reply to this letter. The Applicants continued with the development in accordance with the letter – that is level 3 (the middle floor level of the three levels) was constructed at a level 8.4 metres above the adjoining road level. *The Application for an Extension of the Planning Permission*. On the 12th August 2004 the applicants sought an extension of the planning permission. At that date ground works had been completed and the basement slab and retaining walls had been constructed. The dwelling itself is of timber frame construction and at the time of the application all pre production and design tasks had been completed, all materials procured and manufacture had commenced. The prescribed form was duly completed. The period of extension sought was three months from the 30th August 2004. The application was assigned to Frank Flanagan, Assistant Senior Planner for attention on the 17th August 2004 with the request that he deal with

the matter prior to the 1st October 2004. Mr. Flanagan inspected the site on the 18th August and thereafter he requested that further information be obtained and a letter dated 25th August 2004 was addressed to the architects in the following terms –

"I refer to your recent application in this Planning Authority for extension of duration of the above planning permission reference PD/98/1221.

I wish to inform you that there are a number of issues which require clarification in relation to this application which are as follows:-

1. Condition No. 11 attached to the planning permission reference PD/98/1221 refers to a site layout plan submitted on the 12th July 1999. There is no record of such a drawing on the file. It cannot, therefore, be established if the works carried out to date are consistent with the planning permission granted.
2. A letter was submitted from Griffner Coillte regarding the construction of a timber frame house. However the writer of the letter was unavailable to provide further information to this Planning Authority.

I would be obliged if you would please clarify the above issues, provide a copy of the map in question and details of proposed finishes to dwelling."

7. This letter was replied to on the 27th August 2004: a copy of the revised site layout plan was furnished with the letter: the name of a contact within Griffner Coillte was furnished. Having been furnished with the site layout plan as requested the Respondent did not communicate to the architects that it had a concern about compliance with the planning permission or afford the Applicants the opportunity to deal with those concerns and the materiality of any non compliance. By this time the Applicants letter of the 21st June 2004 was on the planning file. By memorandum dated 4th October 2004 Mr. Flanagan reported as follows –

"The developers in this instance are, by their own admission (letter dated 21st June 2004) constructing a dwelling that is significantly different (2.2m lower) than that for which permission was granted.

The question of extension to the duration of the permission therefore does not arise, as the dwelling under construction does not have the benefit of planning permission."

8. The matter was then passed to Mr. John Coughlan to whom it fell to make a decision on the application for an extension. In his Affidavit he avers that he considered the following –

1. The planning file.
2. The letter of 21st June 2004.
3. The drawing accompanying the said letter.
4. The application
5. The memo of Frank Flanagan

9. He considered the dwelling as constructed to be non compliant with the planning permission having formed the view that it was 2.6 metres lower than that for which planning permission had been granted it being set into the ground. In his Affidavit he sets out the basis of his decision –

"I considered, that as the development was materially different from that for which the permission was granted, that the development under construction was not the development to which the permission related, and therefore an extension of time could not be granted."

10. On the 5th October 2004 the Respondent communicated the refusal of the extension sought and in a letter set out the grounds for the refusal as follows –

"I enclose herewith decision to refuse permission for extension to this permission as the development under construction is significantly different from that for which planning permission reference PD/98/1221 refers.

The question of an extension to the duration of the permission therefore, does not arise, as the dwelling under construction does not have the benefit of planning permission."

11. The notification of the decision enclosed with the letter gives the following reason for refusal –

"The dwelling under construction is significantly different from that for which planning permission was granted".

12. From the foregoing it is quite clear that the reason for the refusal was the perception by the Respondent, be that correct or incorrect, that the dwelling in course of construction was not in compliance with the planning permission the level 3 (the first floor level) being at the level at which level 1 (the basement floor level) ought to have been constructed.

The Statutory Framework

13. The Local Government (Planning and Development) Act 1982 section 2 introduced a provision into the planning code whereby the duration of a planning permission was limited, the period in the case of a permission granted after 1st November 1982 being five years beginning on the date of the grant. Section 4 of the Act conferred upon a planning authority power to extend the period. Section 4 of the 1982 Act is restated with minor amendments in the Planning and Development Act 2000 section 42. Section 42 provides as follows –

42.—(1) On application a planning authority shall, as regards a particular permission, extend the appropriate period, by such additional period as the authority considers requisite to enable the development to which the permission relates to be completed, if each of the following requirements is complied with—

- (a) the application is in accordance with such regulations under this Act as apply to it;
- (b) any requirements of, or made under, those regulations are complied with as regards the application;
- (c) the authority is satisfied in relation to the permission that—
 - (i) the development to which the permission relates commenced before the expiration of the appropriate period sought to be extended,
 - (ii) substantial works were carried out pursuant to the permission during that period, and
 - (iii) the development will be completed within a reasonable time;
- (d) the application is made prior to the end of the appropriate period.

(2) Where—

- (a) an application is duly made under this section to a planning authority,
- (b) any requirements of, or made under, regulations under section 43 are complied with as regards the application, and
- (c) the planning authority does not give notice to the applicant of its decision as regards the application within the period of 8 weeks beginning on—
 - (i) in case all of the requirements referred to in paragraph (b) are complied with on or before the day of receipt by the planning authority of the application, that day, and
 - (ii) in any other case, the day on which all of those requirements stand complied with, subject to section 246(3), a decision by the planning authority to extend, or to further extend, as may be appropriate, the period, which in relation to the relevant permission is the appropriate period, by such additional period as is specified in the application, shall be deemed to have been given by the planning authority on the last day of the 8 week period.

(3) (a) Where a decision to extend an appropriate period is given under subsection (1), or, pursuant to subsection (2), such a decision is deemed to have been given, the planning authority shall not further extend the appropriate period, unless each of the following requirements is complied with—

- (i) an application in that behalf is made to it in accordance with the regulations under section 43;
- (ii) any requirements of, or made under, the regulations are complied with as regards the application;
- (iii) the authority is satisfied that the relevant development has not been completed due to circumstances beyond the control of the person carrying out the development.

(b) An appropriate period shall be further extended under this subsection only for such period as the planning authority considers requisite to enable the relevant development to be completed.

(4) Particulars of any application made to a planning authority under this section and of the decision of the planning authority in respect of the application shall be recorded on the relevant entry in the register.

(5) Where a decision to extend, or further to extend, is given under this section, or, pursuant to subsection (2), such a decision is deemed to have been given, section 40 shall, in relation to the permission to which the decision relates, be construed and have effect subject to and in accordance with the terms of the decision.

14. The Planning and Development Regulations 2001 (S.I. No. 600 of 2001) in Part 4 Chapter 3 in Regulations 40 to 47 inclusive deal with the extension of duration of planning permission. Regulation 42 sets out the particulars to be given on an application for an extension. Regulation 46 requires the Planning Authority in the case of a decision to refuse to extend to give the reasons for such refusal. Both the application and the notification of the decision to refuse in this case comply with the Regulations.

Construction of the Planning and Development Act 2000 section 42

15. In the course of submissions I was referred to three decisions on the Local Government (Planning and Development) Act 1982 section 4 which are of assistance in construing the 2000 Act section 42. Considering the same however I have regard to the differences between the two sections which appear to me to be as follows –

- (i) The words “and only if” contained in section 4 do not appear in section 42.
- (ii) Section 42(1)(d) sets out an additional matter upon which the Planning Authority must be satisfied.

16. The first relevant case is *State (McCoy) v Dun Laoghaire Corporation* 1985 ILRM 533. In relation to section 4(1) of the 1982 Act Gannon J. said –

“Section 4(1) of the 1982 Act is expressed in mandatory terms bearing both positive and negative aspects. It confers on the Planning Authority not merely the power but rather the obligation to extend the duration of a planning permission in relation to uncompleted development upon which a developer has embarked.”

17. This is equally true of section 42. Again in the course of his Judgment Gannon J. refers to the meaning of “the particular permission”: the effect of the phrase is that the Planning Authority must have regard to the permission in question and not other permissions whether relating to the same development or other developments. In dealing with section 4(1)(c) of the 1982 Act he points out that there are set out therein factual matters upon which the Planning Authority is required to make an assessment or evaluation and in relation to (iii) the Planning Authority must be satisfied as to the probability that the development will be completed

within a reasonable time. Section 4 of the 1982 Act precludes consideration of any other matters and the power to extend the permission or not may not be exercised in any other manner or upon any other considerations. I am satisfied that these considerations apply equally where the application is made pursuant to section 42 of the Act of 2000.

18. In *Littondale Limited v Wicklow County Council* 1996 2 ILRM 519 Laffoy J. took the same view of the provisions in section 4(1) of the 1982 Act. If the conditions set out in section 4(1) are complied with the Planning Authority must extend the duration of the permission and consideration of matters other than the conditions set out there is precluded. While the issue in that case was whether substantial works had been carried out Laffoy J. in setting out the function of the Court correctly states my function on this application. At page 536 she said –

“I have quoted extensively from the Judgment of the Supreme Court in *O’Keeffe v An Bord Pleanala* for the purpose of emphasising the parameters of the Court’s function on an application such as this application. On this aspect of the Applicant’s case, it is not the Court’s function to determine on the merits whether substantial works were carried out pursuant to the 1981 permission between 31 December 1981 and 31 October 1987 in the light of the evidence adduced in this Court. The Court’s function is to review the manner in which the Respondent concluded that substantial works had not been carried out pursuant to the 1981 permission within that period having regard to the material which was before the Respondent when the decision was made on the Applicant’s application.”

19. Thus I am not concerned as to whether the conclusion arrived at by the Respondent that the dwelling under construction is significantly different from that for which planning permission was granted is correct: that is a matter which can only be determined, it seems to me, in plenary proceedings or in proceedings under Part VIII of the Act of 2000. My function is to review the manner in which the decision was arrived at and determine whether or not the same accords with the requirements of section 42.

20. The third case is *Garden Village Construction Company Limited v Wicklow County Council* 1994 3 I.R. 413. In that case the Supreme Court again dealt with the meaning of “particular permission”. It was there held that on an application for an extension of duration the Planning Authority may only look at the actual permission which they are being asked to extend. Thus they could not look at substantial works carried out pursuant to that permission and could look at works carried out pursuant to other permissions which benefited the lands the subject matter of the particular permission in question.

The Issue for Determination

21. The Planning Authority having concluded (the correctness of that conclusion not being a matter for my consideration) that the development being undertaken was not in compliance with the particular planning permission were they entitled to have regard to that conclusion and on the basis of the same refuse to extend the duration of the planning permission? The Respondents argument is that they have notwithstanding the wording of section 42 of the Act of 2000 and the decisions to which I have referred a residual discretion which they were entitled to exercise and refuse the extension. They argue that it would be illogical for them to extend the duration in the light of their conclusion as a development when completed would not be in compliance with the planning permission. There are a number of factors which militate against my accepting this view:

1. The wording of section 42 is clear. It provides that if the Planning Authority are satisfied on certain matters the Planning Authority must grant an extension. It is clear on the authorities that to take into account any other matter, fact or circumstance is *ultra vires*.

2. Where a development is being carried out but not in compliance with the relevant permission a Planning Authority has conferred upon it wide powers pursuant to Part VIII of the Act of 2000. Section 42 is contained within Part III of the Act. I am satisfied that in refusing the extension of duration in this case the Respondent was seeking to utilise Part III of the Act of 2000 for the purposes of Part VIII of the Act of 2000. In *Re Thomas Crowley* 1964 I.R. 106 the Solicitor applied for a practising certificate and this was refused pursuant to the provisions of the Solicitors Act 1954 section 49(1) which permitted the Incorporated Law Society of Ireland to refuse a practising certificate in specified circumstances: one of the circumstances listed is the failure to give a sufficient and satisfactory explanation. In the circumstances of that case the Supreme Court held that the power under section 49 was in fact being operated in circumstances where the disciplinary provisions of the Act (in that case the provisions of the Solicitors (Amendment) Act 1960) were appropriate. In short the provisions were being operated for an improper purpose. Again in *Kennedy v Law Society of Ireland* Supreme Court 20th December 2001 the Court considered that the Society had operated its powers to appoint an investigating accountant where the dominant purpose of so doing was outside the purpose for which those powers were conferred – to ascertain whether the accounts regulations had been complied with. In this case I am satisfied that the primary object of section 42 of the Act of 2000 is to enable a development already commenced to which a planning permission relates to be completed: it is not permissible to use the section to prevent the completion of a development to which the planning permission relates which the Planning Authority has concluded does not comply fully with that permission. What the Planning Authority must consider is whether the development relates to the permission and not whether it is in full compliance with the same. It is not permissible to use a statutory power conferred for a particular purpose for some other purpose.

22. The Respondent further contends that as it has concluded that the development does not comply with the planning permission it cannot be said that the planning permission relates to the development in fact being undertaken. In any particular set of circumstances the position may be that the development is fully in compliance with the planning permission or the development relates to the planning permission but is not fully in compliance with it. In the latter case it will be clear that the development although not in compliance therewith relates to a particular planning permission rather than to some other planning permission or to no planning permission at all. The reasons stated for the refusal recognise a relationship between the development and this particular planning permission. I am satisfied from a perusal of the plans that the development is that contemplated by the planning permission. I am further satisfied that the true effect of section 42 is that the Planning Authority must therefore consider the application in that light having regard to the matters enumerated in the section and those matters only. This it has failed to do by taking into account a matter not specified in the section that is compliance with the planning permission.

23. The approach adopted in *White v Dublin Corporation* 2004 2 ILRM 509 is also relevant. In that case the Supreme Court Fennelly J. was considering a decision by a Planning Authority as to whether modification of plans in the course of an application should be re-notified. The official dealing with the matter decided that re-notification was not necessary as the level of overlooking resulting from the modifications was acceptable. Fennelly J. considered that the planning official had asked himself the wrong question. That, I am satisfied is what happened here. It is not the Planning Authority’s function pursuant to section 42 of the Act of 2000 to enquire as to whether the development insofar as it had been completed was in compliance with planning permission and on the basis of its conclusion on that enquiry to decide on the application: rather it is confined to the matters specified in section 42 in reaching its decision. The Planning Authority having reached a conclusion on compliance did not proceed to a consideration of the matters on

which section 42 requires it to be satisfied and indeed determined that its conclusion in relation to compliance precluded it from considering the matter further.

Conclusion

24. I am satisfied that the Planning Authority misconstrued the scope of their function under section 42 of the Act of 2002. They took into account their conclusion that there was non compliance with the planning permission and relied upon such non compliance simpliciter as the reason for their refusal. This they were not entitled to do and the decision accordingly was ultra vires. The decision to refuse accordingly must be quashed.

25. The Applicants relied on several other grounds principally a denial of natural justice in that the Applicants were not afforded an opportunity of dealing with the Planning Authority's concerns in relation to compliance with the planning permission. Having regard to the view which I have taken on the true construction of section 42 of the Act of 2000 and of the reason relied upon by the Planning Authority for refusing an extension it is unnecessary that I should consider this ground or the other grounds relied upon. The decision on this application relates to the decision making process and not to the decision itself. The correctness or otherwise of the decision is a matter to be determined on the merits in plenary proceedings, and I understand that such proceedings have already been instituted, or in proceedings under Part VIII of the Act of 2000

26. I will hear Counsel as to the terms of the Order appropriate to be made.