

THE HIGH COURT**2009 1326 JR****BETWEEN****JAMES McNULTY****APPLICANT****AND****THE COUNTY COUNCIL OF CLARE COUNTY COUNCIL****RESPONDENT****AND****DOONBEG PROPERTY COMPANY LIMITED, IMELDA SHANAHAN,****JAMES GRIFFIN, NOEL McMAHON, PAT HANRAHAN,****FLAN QUILLIGAN, TONY PENDER, HARRY KELLEHER,****MURT McINERNEY, MICHAEL FRAWLEY, TOM PRENDERVILLE,****DAVID McNAMARA, MICHAEL CARRICK, ANN CARRICK,****LINDA DOWNES, PATRICK DOWNES, SINEAD CARROLL,****MADELINE TAYLOR QUINN AND P.J. KELLY****NOTICE PARTIES****JUDGMENT of Mr. Justice Charleton delivered the 28th day of July, 2011**

1. The State is the owner of the foreshore throughout Ireland. Many people like to wander along the coast or to swim off beaches. In Ireland, there have often been problems accessing the sea. Private lands often separate public roads from the coast. Sometimes people follow a path across private land. They often do not question as to whether they are using a public right of way in going to the seashore. In some places it used to be that in the summer time, when the weather was good, the owners of lands that linked the foreshore with public roads would make modest amounts of money by arranging for the parking of cars. In recent years, arrangements for accessing the seashore have tended to become formalised. Over the last twenty-five years or so, in addition, the game of golf has become much more popular. Many more people now play it, and in consequence golf courses have proliferated. Links courses, built on land linking farmland with the coast, and involving an exciting array of challenges, are especially prized by golfers.

2. Doonbeg is a very beautiful village on the coast of County Clare. There is a ruined castle near to the seashore and a beach which is a big attraction. It used to be the case that to get to the beach, people would drive their cars from the public road to a gateway, along what appeared to be a public right of way, park their cars along the roadside, cross over the gate and then walk along a path through an area of sand dunes to the seashore. Then, some years ago, Doonbeg Property Company Ltd., which runs Doonbeg golf course, bought the coastal land of a number of farmers, which included this apparent public right of way, and constructed a top class golf course. The way to the beach then traversed through areas where golf balls would be flying at speed. Clare County Council took notice of this. The Council seems to have wanted to formalise the situation of access to the beach and to provide for proper car parking. In addition, according to the papers which I have read, those agencies involved in search and rescue and life saving activities became disturbed at the difficulty in an emergency of accessing the beach with an appropriate vehicle such as an ambulance. Cars would be parked on either side of the public road and the apparent public right of way and, on days when the weather was particularly beautiful, access for emergency services became close to impossible.

3. This appears to have been at least the background, if not the actual motivation, for Clare County Council to formalise access to Doonbeg beach. The manner in which this was achieved has been criticised in this judicial review proceeding. To implement its plan, Clare County Council issued a proposal, sought submissions from the community and had a public hearing. This judicial review focuses mainly on the fairness of that public hearing. The complaint is that Clare County Council were proposing the new plan of access to the beach while, at the same time, influencing the public hearing. The chairman of that hearing was an independent planning official from Tipperary. It is argued by the applicant, James McNulty, that although Clare County Council brought in an inspector from outside to conduct the public hearing, and to report to it, thus giving at least the appearance of independent adjudication, Clare County Council's solicitor, John Shaw, advised the inspector on legal procedures during the course of the hearing. Since Clare County Council was proposing the change, the advisor to the chairman of the public hearing is said to have tainted the entire process by objective bias. This is argued to be a severe taint to the fairness of the proceeding. The applicant also complains that the proposal whereby a portion of the apparent public right of way was extinguished, but a new scheme was put in place by virtue of a private arrangement between the golf course and Clare County Council for a public path to the beach, is ultra vires the relevant statutory provisions and is void. It is further posited that the proposal for the extinguishment of the alleged public right of way and its replacement by a private alternative, the issue upon which the public hearing took place, was replaced after the hearing had concluded with a materially different proposal which was then voted on positively by Clare County Council. It is argued in addition that the proposal was in itself bad because of uncertainties as to the implementation of the proposal, particularly with regard to its proposed implementation date. Other grounds were also argued, but these are the most important ones. I intend to concentrate on these.

4. The passions which have been engendered by this proposal have led to several sets of litigation. Some of these have involved contiguous landowners, who have asserted rights of way of a private nature across the track in question. Another set of proceedings have involved the Attorney General in the assertion of an alleged public right of way in respect of which this applicant as an individual

private plaintiff has claimed a particular interest. People like to feel that a change to apparently public amenities will be made fairly. No matter how change is effected, it may be that some will remain displeased and that many will dislike any change to an apparent right of access which may seem to have been exercised over generations. I am not entitled to have any view on the merits of any proposal. I am only concerned with the process. In making this decision I am bound by precedent and I am attempting to apply the law.

Time Line

5. The sequence of events can be stated concisely. On the 25th July 2008, Clare County Council made a proposal, by way of a notice published widely, to extinguish a public right of way at Carrowmore, Doonbeg, County Clare, pursuant to s. 73 of the Roads Acts 1993. Clare County Council intended to extinguish a portion of the public right of way on the public road for a distance of 105 metres. Appended to this notice was a map which showed the portion of the right of way which was to be extinguished. This was a right of way which, in essence, was a spur that led from an obviously public road to a gateway. This did not change throughout the entire of the process. Another map showed a piece of land that was to be transferred from the golf course to Clare County Council for the provision of car parking for 75 vehicles. Another map showed a new pedestrian right of way as between Clare County Council and the golf course which was to be dedicated for public use. This ran from the gate to the beach. Another map elucidated how emergency vehicles would gain access to the shoreline. A final map gave details of the new car park beside the public road. Appended to the proposal were draft agreements specifying certain works that the golf course had to carry out and a draft deed of the right of way to be granted by the golf course to Clare County Council. The net effect of all of this would have been that the public right of way which had ended, apparently, at the gateway would now end at the main public road. The spur from the road would thus be redesignated. Many argued that the public right of way included the right to traverse from the main public road, along this spur, and through the entire track from the public road to the gate, to the beach across the golf course, whether on foot or by using vehicles. Theoretically, people might drive onto the beach. As public land, cars on a beach can always be banned, but that does not seem to be the point. Under the Council's proposal, people would have to walk from a new car park, carrying their belongings and then settle themselves on the beach. They would have to park their cars at the new facility for parking cars. The private right of way arrangement between Clare County Council and the golf course encompassed such pedestrian access, but also allowed for people whose mobility was restricted, but only these, to drive to the beach, and for emergency vehicles to access the beach as well. Over the course of time, the proposed route changed. The complaint is therefore made that the proposal voted on by the county councillors was materially different to that proposal of which notice was given. It is true that there is a difference; instead of proceeding in a straight, but slightly kinked, path, a definite dog-leg was introduced at the mid point into this new private right of way arranged between Clare County Council and the golf club for the benefit of the public. One assumes, though there is no affidavit evidence on this, that this slight change was for safety reasons in relation to teeing off and the likely path of golf balls through the fairways and, one might suppose as well, on random slice shots. The changes are utterly immaterial.

6. All the way through, the solicitor for Clare County Council was John Shaw. Clare County Council, it is clear, considered that to be objective it should bring in an official from another county to report to it and to chair the public hearing. When the time for submissions ended on the 12th September 2008, a public hearing next took place under the chairmanship of Marcus O'Connor, the inspector from Tipperary County Council, on the 1st and 2nd October 2008. During the course of this hearing, the ostensible function of the solicitor for Clare County Council was to advise the chairman on matters of procedure. After the hearing, on the 14th September 2009, a report was prepared for the County Council. This report was later pressayed for the purposes of being put before Clare County Council by Michael McNamara, the senior executive officer to the Council. On the 21st September 2009, the County Council voted on the matter. The resolution to extinguish the public right of way and replace the route to the beach with the private arrangement I have outlined was passed. On the 21st December 2009, by order of the High Court (Peart J.), leave was given to institute these judicial review proceedings. These have come on for hearing nineteen months later.

7. In addition, I might mention that relator proceedings, involving the Attorney General, were commenced in 2006. Apart from a notice of continuance, no step has been taken in these proceedings up to today's date. I regard it as highly undesirable that two sets of proceedings in relation to the same subject matter should be before the courts at any one time. It is even more undesirable for one set of proceedings to be held in abeyance while another set of proceedings test the potential outcome to the same subject matter. The relator proceedings claim a right of way to the public with vehicles or on foot over the entire of the track in question, in effect, from in or about the place of the proposed car park to the beach. That issue, however, is not for decision before me today.

8. I am not deciding in these proceedings whether there was ever a public right of way across this track. At an earlier stage, well prior to this proposal, Clare County Council had intervened in a planning issue and given a declaration under s. 5 of the Planning and Development Act 2000 that work by the golf club which obstructed this apparent public right of way was not an exempted development. The rationale behind this declaration was that the golf club was dealing with a public right of way. This declaration by Clare County Council was appealed by the golf club to An Bord Pleanála, which affirmed the decision of the Council. Clare County Council, despite correspondence asserting that there was a public right of way over the entire of the track, has no competence to make a declaration as to what is or is not a public right of way. No statutory power in that regard has been granted to local authorities.

The Hearing

9. The public hearing was fraught with difficulty. One particular incident stands out. Those objecting to the proposals were represented by counsel. During the course of the hearing, the objectors apparently became more and more disquieted by the fact that when objections of a legal kind were raised by them to the conduct of the proceedings, the chairman, Marcus O'Connor, was advised by John Shaw, the Council's solicitor who was sitting close to him. After what is claimed to be whispered advice, Mr. O'Connor would then rule on the issue. During the course of lengthy affidavits, which perhaps reflect in their emotional content some of the heat of the ensuing exchanges, it is said that Mr. O'Connor at all times agreed with Mr. Shaw. How anyone could know that, given the allegation of whispered advice, is more than curious. I make no finding in relation to any of this. It is best to retreat into the formal language in the inspector's report. Towards the end of the first day of hearing, this is what is recorded concerning then counsel for the applicant and one other objector:-

"[Counsel] stated that he was concerned about the fairness of the hearing. In particular, he argued that it was most unusual for the Council's legal advisor to be also advising the oral hearing's inspector. [Counsel] advised the hearing that he was withdrawing from the hearing on the instructions of his clients."

10. It is clear that a hiatus had been reached. It is also clear that in stark terms which were graphically depicted in the withdrawal of counsel, a point had been reached where the applicant in these judicial review proceedings had unambiguously asserted that he had

lost faith in the independence and objectivity of the hearing. In that regard, he had instructed his legal representative to make that point in the strongest possible way by withdrawing from the hearing in protest. It was another year and two months thereafter before leave was sought to commence judicial review proceedings.

11. It is argued that it was incumbent on the applicant to await the conclusion of the process. I do not agree. Had counsel remained at the hearing, on the instructions of the applicant, remembering that counsel had no choice in the matter but to withdraw when so instructed by his client, an argument might have been made in these proceedings by the Council that there had been acquiescence. I make no comment on the validity of any such plea. What is not debatable, however, is that the applicant had an issue with the conduct of the oral hearing which, with appropriate candour, he had advertised through submissions of counsel to the chairman and emphasised by requiring his legal representation to leave.

12. The point now made is that the public hearing held by Clare County Council, which was proposing the change in access to the beach, was tainted by bias in circumstances where the Council's solicitor, John Shaw, also acted as legal advisor to the independent chairman of the hearing. This is said to establish objective bias. I do not propose to comment on that or on the eloquent argument of counsel for the County Council in response; which is that bias cases have heretofore been confined to decision-makers, and that all that the chairman of a public hearing in this context does is to make a report to the county council. Under O. 84, r. 21 of the Rules of the Superior Courts, any application for judicial review must be made promptly. A time limit of six months is set out for certiorari, the relief herein sought, unless an extension is granted by the court. There must be good reason for extending the period within which the application is made. No good reason is shown here. It cannot have been the case that the serious issue of objective bias had passed the applicant by unaware. There is nothing in the affidavits to indicate why this point was not taken earlier. An attractive argument was presented as to the importance in not moving before the conclusion of the process. Undermining that argument, it seems to me, is the point that when a serious issue as to the conduct of a decision-making tribunal arises, it should be confronted immediately. Otherwise, the tribunal will continue in ignorance of an issue that might have been corrected, had notice been given. Notice was given here by the withdrawal of counsel for the applicant. Furthermore, what the Court is concerned with in this instance is the exercise of a public duty by the County Council. Since Clare County Council proceeded with dispatch, and since the change is a matter of public importance, it is wrong for persons to complain in a dilatory fashion about the nature of the process. Finally, it is not right that a party which so fundamentally mistrusts the composition of an administrative tribunal or enquiry that it withdraws from participation, should await the outcome of the process. In that circumstance, the accusation might possibly be advanced against an applicant that the delay was for the purpose of seeing whether the eventual outcome of the process suited a particular viewpoint. I do not so decide. However, to allow such conduct would be to undermine the proper supervision by the High Court of judicial and administrative tribunals. The obligation of the High Court to focus on process, and not on the merits of a decision, would potentially be shifted.

13. The delay in commencing the case as to allegations of objective bias in the hearing is not excusable. There is no good reason given for extending the period within which the application for judicial review should have been made. In the circumstances the application is dismissed.

14. Out of courtesy to the remaining arguments of counsel, and the attractive manner of their presentation, I propose to offer some views on the substance of the challenge proffered to the decision of the County Council adopting the new arrangement for access to Doonbeg beach by resolution of the 21st September 2009.

Road Acts 1993

15. Section 73 of the Roads Act 1993 provides:-

"(1) Where a local authority proposes to extinguish a public right of way it shall —

(a) publish in one or more newspapers circulating in the area where the public right of way proposed to be extinguished is located a notice indicating the times at which, the period (which shall be not less than one month) during which and the place where a map showing such public right of way may be inspected and stating that objections or representations may be made in writing to the local authority in relation to such proposal before a specified date (which shall be not less than two weeks after the end of the period for inspection) and stating that persons making such objections or representations may make a request in writing to state their case at an oral hearing conducted by a person appointed by the local authority for that purpose,

(b) affix a copy of such notice in a prominent position at each end of the public right of way proposed to be extinguished and leave it in place for a period or periods which shall in aggregate be not less than fourteen days,

(c) consider any objections or representations made to it under paragraph (a) and not withdrawn,

(d) if it considers it appropriate, afford an opportunity to persons making objections or representations and who so request in writing to state their case at an oral hearing conducted by a person appointed by the local authority and consider the report and any recommendation of the person so appointed.

(2) (a) A local authority may make an order extinguishing the right of way specified in the notice published under subsection (1) (a), or part thereof.

(b) A local authority shall not make an order under paragraph (a) until it has complied with subsection (1).

(3) (a) An order under subsection (2) relating to a national road or a regional road shall have no effect unless and until the Minister [for the Environment] approves the order.

(b) The Minister may, by order, approve the order with or without modifications (or conditions) or he may refuse to approve the order.

(c) The Minister shall consult with the [National Roads] Authority before making an order under this subsection relating to a national road.

(4) (a) An order made under subsection (2) may —

(i) specify a date on which the extinguishment shall come into effect,

(ii) specify conditions (including conditions relating to the recovery of the costs referred to in subsection (12)) which shall be complied with before the extinguishment comes into effect.

(b) Where an order extinguishing a public right of way made by a local authority or an order approved by the Minister with or without modifications or conditions does not specify when the extinguishment shall come into effect, the extinguishment shall come into effect —

(i) in the case of a local road, from the date on which the order is made by the local authority,

(ii) in the case of a national road or a regional road, from the date on which the order approving the extinguishment, with or without modifications or conditions, is made by the Minister.

(5) Notwithstanding any other enactment, where a public right of way over a public road or a part thereof is extinguished under this section, the road authority shall no longer be responsible for the maintenance of such road or part thereof with effect from the date on which the extinguishment of the public right of way comes into effect in accordance with subsection (4).

(6) A local authority shall, without prejudice to any existing private right of way, ensure the carrying out of any works necessary

(a) to effect the extinguishment of a public right of way under this section,

(b) for the safety of road users arising from the extinguishment of a public right of way,

(c) to ensure as far as reasonably practicable that the land over which a public right of way has been extinguished does not become an eyesore.

(7) A local authority shall, as soon as may be after the date on which a public right of way has been extinguished, publish notice of the extinguishment in the newspaper or newspapers in which notice of the proposed extinguishment was published under subsection (1) (a) and shall notify in writing any person who made written objections or representations to it in relation to such extinguishment.

(8) The consideration of objections or representations and the report and any recommendation of a person appointed under subsection (1) and the making of an order under subsection (2) shall be reserved functions.

(9) A person who, without lawful authority, removes, or damages or defaces a notice erected in accordance with subsection (1) (b) shall be guilty of an offence.

(10) A person who obstructs, impedes or otherwise interferes with a public right of way or who destroys or damages a public right of way save as is provided for in law shall be guilty of an offence.

(11) It shall be a function of a local authority to protect the right of the public to use public rights of way in its administrative area.

(12) Where a local authority extinguishes a public right of way solely or partly to facilitate the development of land, the authority —

(a) shall be entitled to recover from the person developing, or proposing to develop, the land all or a reasonable portion of the costs incurred by it in extinguishing such right of way,

(b) may, by notice in writing, require the person developing, or proposing to develop, the land to carry out such works as it considers necessary to give effect to subsection (6),

(c) may, where a person fails to comply with a notice under paragraph (b), carry out the works specified in the notice or such other works as it considers necessary to give effect to subsection (6) and shall be entitled to recover any reasonable costs incurred by it in carrying out such works from the person on whom the notice was served as a simple contract debt in any court of competent jurisdiction.

(13) In this section a "local authority" means—

(a) where the public right of way to be extinguished is over a public road, a road authority,

(b) in any other case, a planning authority.

(14) This section shall not apply where the extinguishment of a public right of way is authorised by a scheme under Part IV or under any enactment for which the Minister for the Environment is not the appropriate Minister or under any enactment relating to the compulsory acquisition of land.

(15) Where, before the repeal under section 4 of the enactments referred to hereunder, an application has been made to the Minister—

(a) under section 84 (4) (a) (i) of the [Local Government Act 1946], for his consent to the extinguishment of a public right of way over a road, or

(b) under section 76 of the [Local Government (Planning and Development) Act 1963], as amended by section 43 of the [Local Government (Planning and Development) Act 1976], for his approval to an order extinguishing a public right of way,

and such application has not been determined by the Minister or withdrawn, the enactment which applied before such repeal shall continue to so apply."

16. It may be commented in answer to the objections raised to the alleged imperfection of the process described to implement the proposal of the County Council, that the purpose of the Council remained constant throughout. There was nothing wrong with the

Council, in proposing to extinguish a public right of way, making that contingent on having an alternative means of access from the public road to Doonbeg beach. The proposal was advertised by being described in straightforward terms. This is the correct approach. It addressed the public in a commonsense way, showing them that the public right of way across at least some of this route which was to be extinguished was to be replaced with an alternative means of access. It also indicated the provision of a facility for car parking. The route between the former proposed path to the beach and the new public car park changed slightly. This change was well within the de minimis rule applicable to the tolerance which the courts give to changes between plans for development in planning cases and how they are implemented on the ground. There is no reason to apply a different principle here. By this private arrangement between Clare County Council and the golf course, what had previously been an almost straight route took on a dog-leg aspect. This slight change was part of the merits as to whether the County Council should proceed with the extinguishment under s. 73 of the Act. It was perfectly reasonable that on the 21st September 2009, when the members of Clare County Council were making their decision as to whether to proceed with the extinguishment, the decision-makers should also have been satisfied that the alternative arrangement met public needs. That is what is germane, not slight changes. It is notable that the area, the length and the direction of the right of way in favour of the public which was proposed to be extinguished remained constant throughout; map 1 remains a fixed point of reference from the date of the proposal through to the notice of the 22nd July 2008.

17. There is no merit in the argument that the resolution of Clare County Council was passed by reason of a defect. Under s. 73(4) of the Act of 1993, the County Council had to set a date on which the extinguishment was going to have effect. It was not wrong for the County Council to wait until the golf club had carried out the technical procedure of a transfer of rights through an appropriate conveyance. Nor was it wrong of the County Council to wait until this judicial review had been ruled on by the High Court.

18. Where an oral hearing is set up under a s. 73(1)(b) of the Act, representations outside the hearing are not necessarily rendered unlawful. Under 73(8) objections and representations can be considered up to the point of the making of the decision, which is a function reserved to the elected members of the local authority. Simply because the local authority must receive the report and recommendations of the person conducting the public hearing, does not mean that, in the absence of a public hearing, or where a public hearing has taken place, objections and representations are unlawful. They are not. A time limit can be set, however, for the end of representations. The only update in the situation before the elected members of the County Council on the date of their decision was what, on any sensible view, was a slight alteration in the route under the private contract. In this context, there was nothing unlawful about such an agreement. The Court is satisfied that this private contract was designed so as to preserve a public amenity for the general good of the people of Clare, and the wider community. There was no material difference between the proposal as advertised and that voted on by the County Council which would have required further procedures. The Court is satisfied that s. 73(7) of the Act is no more than directory. In due course, on the ending of this litigation, a public notice can appear in a newspaper that the public right of way has been extinguished. This does not need to be in all-encompassing legal language, like a statute. It is enough to say that the old right of way is gone and that it is replaced by a new arrangement. An invitation might be made, for instance, to the public to inspect, if they so wish, a relevant map in the County Council offices. Nothing was done during this entire process which in any way undermined the validity of the decision of the County Council. Apart from statute, it might be said that there was a legitimate public expectation that s.73 would be followed in the process of extinguishing a public right of way. I am satisfied that it was so followed. The County Council is not entitled, however, to extend its statutory remit by reference to the doctrine of a legitimate expectation. I am satisfied, in any event, that it did not.

19. All of the points that were required to be ventilated were canvassed at the public hearing, and then properly reported on. The senior executive officer of Clare County Council, Michael McNamara, made a report to the County Council. This was fair. All of the relevant points were made in an admirably concise form. This Court should respect democratic decisions. In particular, it should be slow to interfere with any democratic process stipulated under statute; *Malahide Community Council Limited v. Fingal County Council* [1997] 3 I.R. 383 at 397 to 399, per Lynch J.

20. The decision of the County Council has been attacked as being irrational. There is no information to suggest that. Nor will the Court know why any individual counsellor voted the way she or he did. This decision was arrived at in the exercise of a democratic function pertinent to the local and wider community. In any event, a local authority cannot be fettered as to its discretion by an estoppel; *Graves v An Bord Pleanála* [1997] 3 I.R. 540. The fact that the County Council declared in correspondence prior to this process that there was a right of way across the entire track does not fetter the discretion of the Council to extinguish part of the route as a public right of way.

21. Finally, I have doubts as to whether the remedy sought would in any way assist the applicant. Before this process, he was able to get to the beach, and when this process eventually goes through, he will still be able to get to the beach. The difference is that, as an able-bodied person, he will be expected to walk about 200 metres. In making this decision I am not dismissing the eloquent arguments as to a right of way advanced on behalf of the applicant. These are matters which do not alter my view of this case. The applicant might make similar arguments in his relator proceedings, I do not know; see the High Court Record Number 2006/963P between *The Attorney General (At the relation of James McNulty) v. Doonbeg Golf Club*. As to whether those relator proceedings are now determined by this decision, are to be dismissed because of delay, or are otherwise invalid as a multiplicity of proceedings, is not a matter for me.

Result

22. I dismiss this application for judicial review.