Neutral Citation Number: [2008] IEHC 48

THE HIGH COURT

[2004 No. 9719 P]

BETWEEN

TÍR NA nÓG PROJECTS IRELAND LIMITED

PLAINTIFFS

AND

THE COUNTY COUNCIL OF THE COUNTY OF KERRY

DEFENDANT

Judgment of Mr. Justice Clarke delivered on the 28th day of February, 2008

1. Introduction

1.1 In these proceedings the plaintiffs ("Tír na nÓg") seek a declaration that the defendant ("Kerry Council") has been deemed to grant a planning permission for a development of thirty three holiday homes and a leisure centre at Cappanacush, Blackwater, Killarney. Tír na nÓg made a planning application in respect of that development which was given record No. 288/02. It is said that no decision was made by Kerry Council within the time specified in the Planning and Development Act, 2000 ("the 2000 Act"). What is sought is, therefore, a so called default planning permission which arises in circumstances where the planning authority concerned does not make a decision within the time limits specified.

1.2 It is also important to note that the jurisprudence of the courts in relation to default permissions establishes that a default permission is not available in circumstances where the application which was not determined on time, involved a material contravention of the development plan then in force. Thus it is open to a defendant local authority to seek to persuade the court that an application, in respect of which a default permission is alleged to arise, was in material contravention of the relevant development plan, and if that be established, any claim for a declaration that a permission has been deemed to have been granted will fail.

1.3 It is also important to note that Kerry Council has, in its defence in these proceedings, raised an objection in which Kerry Council maintains that the case as brought by Tír na nÓg is procedurally flawed, to a fatal extent, by reason of a number of matters. The relevant objections include a contention that, by reason of the fact that Tír na nÓg has brought these proceedings as plenary proceedings, it has sought to circumvent the time limits for the bringing of judicial review proceedings to challenge a decision of a local authority in a planning matter, as imposed by the Rules of the Superior Courts, and the provisions of the 2000 Act. In particular Kerry Council relies, in that context, on a decision of the 30th of October, 2002 whereby Kerry Council refused planning permission for the development now sought to be the subject of a default permission. That decision would appear to have been made well after the expiry of the period within which a decision on the planning application should have been made by virtue of the time limits specified in the 2000 Act. It is said that the attempt to seek a declaration as to the existence of a default permission amounts to a challenge to that refusal decision which, it is argued, brings the case within the ambit of s. 50 of the 2000 Act, which in turn would require that any such challenge must be brought within a two month timescale, and only by means of judicial review.

1.4 I note these matters because they are of relevance to the limited issue which I now have to decide which concerns an application for discovery in respect of a single document. In the context of discovery the issues which may be likely to arise in the proceedings are, of course, always of central importance. For that reason it is important to note that, by reason of the pleadings to which I have referred, the issues which are likely to arise at trial would seem to be the following:-

> A. Whether Kerry Council was in default in making a decision within the timescale required under the 2000 Act. On the basis of the evidence currently available there does not seem to be any dispute but that Kerry Council was so in default;
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> B. Whether the application for planning permission which is the subject matter of these proceedings involved a material contravention of the relevant development plan; and
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> C. Whether the proceedings are procedurally flawed to a fatal extent. In that context the question of the belated decision by Kerry Council to refuse planning permission is potentially relevant.

1.5 Against the background of that general analysis of the litigation as a whole, it is now necessary to turn to the specific discovery issue which arises between the parties.

2. The Discovery Issue

2.1 The issue which arises is somewhat unusual. Firstly, discovery is sought only of one document. That document undoubtedly exists and involves the giving of legal advice. There clearly are significant issues as to whether the document concerned may be privileged. It will be necessary to turn to the question of privilege in due course.

2.2 In addition, it is clear that a professional advisor of Tír na nÓg has seen the document in question in circumstances where it was openly available on the public planning file maintained by Kerry Council. While the professional advisor concerned has not made a copy, in the photostat sense, of the document, he did, it is said, record in handwriting the text of the document. Tír na nÓg is, therefore, aware of the contents of the document concerned.

2.3 However, it is now said on behalf of Kerry Council that the document was placed in error on the public file, has now been withdrawn, and cannot now be the subject of an order for discovery by virtue of legal professional privilege and/or litigation privilege.

2.4 While it is, of course, ordinarily the case that, in the context of discovery, the proper way to deal with questions of privilege is to require an affidavit of discovery to be sworn, in which such privilege as may be claimed can be asserted, leaving over any issue as to the validity or otherwise of any privilege so claimed to a further application challenging the privilege, there are some circumstances where it is appropriate for the court to consider privilege at the stage of deciding whether to make an order for discovery in the first place. This will likely to be so, in particular, where it is clear that all documents (or, in an appropriate case, all documents within a relevant class sought) would be privileged. In those circumstances there will often be little point in directing discovery (or further and better discovery) where the only consequence of so directing would be that privilege would be properly be claimed in respect of all of the documents concerned. I should emphasise that such an approach is only appropriate where it is clear that any privilege which is asserted would undoubtedly be sustained. Where there may be doubts as to that question, it may well be more appropriate to require an affidavit of discovery to be sworn, which maintains the claim of privilege and thus requires the listing of all of the relevant documents, but leave over a determination of the validity of any privilege claimed to a later date. For example, the dates and nature

of documents in respect of which litigation privilege is claimed may well be relevant to a consideration of whether those documents are, in fact, privileged. In those circumstances it will normally be the case that the better course of action is to direct discovery, thus requiring a listing of all of the relevant documents, which in turn will allow the merits or otherwise of the privilege claimed to be considered in a more comprehensive way.

2.5 However, it seems to me that this case is clearly one where it is appropriate to deal with privilege at this stage. There is only one document involved. Both sides know its timing and contents. Nothing would be gained by directing that an affidavit be sworn which listed that single document, and claimed privilege in respect of it, other than to duplicate the court process. On that basis it is entirely appropriate that the validity of the privilege asserted be assessed at this stage, for if the document be truly privileged then there is nothing, on the facts of this case, to be gained by directing that it be discovered.

2.6 However, the starting point for any question of discovery has to be a determination as to whether the document is relevant to the proceedings. Kerry Council argues that the document is not relevant. I now turn to that issue.

3. Relevance
3.1 It is clear from the evidence before me that the document concerned involves the giving of advice by Kerry Council's solicitor (and the recording of advice tendered to that solicitor by senior counsel) concerning the question of the course of action to be taken in the light of what appeared to be a failure on the part of Kerry Council to make a decision within the statutory timescale. It is clear that that advice favoured the making of a decision refusing permission. It is also clear that the question of whether the application, which was the subject of the failure to make a decision, might to be said to be in material breach of the development plan was addressed together with a consideration of the extent to which such a situation might afford a defence to proceedings designed to establish a default permission.

3.2 For the reasons which I have sought to analyse earlier, there is an issue in this case as to whether these proceedings are fatally flawed from a procedural prospective. One of the issues that arises under that heading concerns the extent to which the existence of the decision to refuse may be said to preclude any assertion of an entitlement to a default permission other than by way of a challenge to that decision to refuse which would, of course, by virtue of s. 50 of the 2000 Act, require to be brought within two months and by judicial review only. There will, doubtless, be a number of legal issues that will arise under that heading. As I understand it, Tír na nÓg will seek to argue that a default permission arises by operation of law, and that it is entitled to seek a declaration to that effect for the purposes of insuring that there can be no dispute but that it has the benefit of such a default permission. On that basis it is argued on behalf of Tír na nÓg that the refusal is legally immaterial. However, it is possible that the court may be persuaded by Kerry Council that some regard will have to be had to the refusal, and in that context it is possible that the circumstances in which the refusal came to be made may become an issue, of itself, of relevance in the proceedings.

3.3 In addition, although this is less clear, it may be that the advice given may touch upon the general question which will undoubtedly arise in the proceedings as to whether the planning application involved a material contravention of the development plan.

3.4 However, on the basis of the clear possibility that the circumstances in which the decision to refuse was made (being some considerable time after the time period for making such a decision had elapsed) may become an issue in the proceedings, I am satisfied that the document in question is potentially relevant to the issues which might arise on the pleadings. In that context it is necessary to turn to the question of privilege.

4. Privilege
4.1 I am satisfied that the document in question involves the giving of legal advice. It is, therefore, in my view, prima facie entitled to the benefit of legal professional privilege. In those circumstances it is unnecessary to consider whether it would also have the benefit of litigation privilege.

4.2 However, it is also clear that the document was on the public planning file for a considerable period of time, such that a person acting on behalf of Tír na nÓg had ready access to it. In those circumstances the real question which arises concerns whether any privilege which attached to the document has been waived.

4.3 I had occasion to consider the law in this area in *Byrne & Anor v. Shannon Foynes Port Co. & Anor* [2007] IEHC 315. That case involved potentially privileged documents which were included in an affidavit of discovery but where, it was said, due to inadvertence, privilege was not claimed. Having reviewed recent authority (including the judgment of Smyth J. in *Shell E & P Ltd v. McGrath and Others* [2006] IEHC 409), I concluded that the test to be applied was a two stage test in the following terms, (at para. 5.1of the judgment):-

> "First the court must consider whether the solicitor seeing the document or documents concerned, realised that a mistake had been made. Secondly, and perhaps more importantly on the basis of the authorities, the court must put itself in the position of a reasonable solicitor and consider whether, on the balance of probabilities, such solicitor would have taken the disclosure to have been as a result of a mistake."

4.4 While it is true that the disclosure in this case did not occur in the context of the exchange of documents as part of court proceedings, it does not seem to me that the underlying principle is affected by that fact. Where a document which might be the subject of a proper claim of privilege comes to the attention of the other side in litigation, whether as a result of its formal disclosure in the discovery process, by it being inadvertently handed over, as would appear to have happened in Shell E & P, or by virtue of it being placed on a public file or otherwise made publicly available, as in the circumstances of this case, does not affect the principle. The underlying test which the court must apply is as to whether a reasonable person would objectively view any privilege that might have attached to the document as having being waived in the light of the circumstances in which the document had come to the other sides attention. Those circumstances are, therefore, material in that they may affect the proper judgment as to whether, objectively speaking, a party might legitimately take the privilege to have been waived. The circumstances do not, however, affect the test.

4.5 I am satisfied, therefore, that the question of whether privilege can be said to have been waived in relation to the document in dispute in this application turns on whether, objectively speaking, Tír na nÓg and its advisors should have realised that the disclosure of the document concerned was by mistake.

4.6 I am not satisfied that that test is met. The document was available on a public file. While it is stated in affidavit evidence on behalf of Kerry Council that its being placed on that file was due to inadvertence, no real explanation is given as to how any mistake might have occurred. There are many reasons why a public body charged with statutory duties may choose to disclose legal advice

which it has obtained. It may wish to make clear that the actions which it proposes taking are in accordance with legal advice. There is no reason in principle, or in practice, why a local authority might not wish to place upon the public planning record, an account of advice which it received, and which might colour the view of any interested member of the public as to its actions.

4.7 In those circumstances I am not satisfied that it would have been clear to Tír na nÓg and its professional advisors that the placing of the document in question on the public planning file was due to an error on the part of Kerry Council. In those circumstances it seems to me that Kerry Council must be taken to have waived any privilege in respect of the document, and in those circumstances it seems to me that it is appropriate to direct discovery of it at this stage.

4.8 In those circumstances it does not seem to me to be necessary to deal with a potentially alternative line of argument which derives from the jurisprudence of the courts concerning documents which have become public knowledge. I base this decision on the failure of Kerry Council to satisfy me that the objective test, which I analysed in *Byrne v. Shannon Foynes*, has been met.

5. Conclusion

5.1 For those reasons I propose directing that Kerry Council discover the document in question and further rule that any privilege attaching to that document has been waived by Kerry Council so that privilege can no longer be asserted in respect of it.