

THE HIGH COURT

2005 No. 569 SP

BETWEEN

JOHN V. LENNON

APPLICANT

AND
LIMERICK CITY COUNCIL

RESPONDENT

Judgment of Miss Justice Laffoy delivered on 3rd April, 2006**Factual background**

1. The undisputed facts which have given rise to these proceedings are as follows:

· On 23rd July, 2004 the respondent, as planning authority, issued an Enforcement Notice pursuant to s. 154 of the Planning and Development Act, 2000 (the Act of 2000) to Domanska, t/a The Locke Bar and Restaurant and Richard Costello, requiring them to remove an unauthorised development comprising of an unauthorised canopy at No. 3 George's Quay, Limerick City. The Enforcement Notice was not complied with. An application was made to the District Court for enforcement thereof and on 18th March, 2005 Domanska Limited was fined the sum of €500, together with €400 costs and €150 expenses. The District Court also made an order pursuant to s. 15(a) of the Act of 2000 directing that the works referred to in the Enforcement Notice be carried out. The decision of the District Court has been appealed to the Circuit Court and the appeal is still pending.

· Following the service of the Enforcement Notice, on 31st August, 2004 the applicant, acting as engineer on behalf of Richard Costello, submitted a planning application to the respondent for retention of the canopy. On 24th September, 2004 the respondent returned the planning application, in accordance with the Planning and Development Regulations, 2001 (the Regulations), as it did not constitute a valid planning application, stipulating seven separate deficiencies. Correspondence ensued between the applicant and the respondent, the applicant taking issue with the respondent in relation to the alleged deficiencies. However, the respondent stood over and still stands over the invalidity of the planning application.

The proceedings

2. Against that background, these proceedings were initiated by way of special summons which issued on 11th November, 2005. In the special endorsement of claim, the applicant, who issued the special summons in person and appeared at the hearing in person, claimed:

"A declaration that Richard Costello made a valid application on the 31st day of August, 2004 for permission to retain the existing canopy at No. 3, George's Quay, Limerick City."

3. He also claimed expenses. The special summons was grounded on the affidavit of the applicant, who averred that he is a member of John Paul Lennon and Company, Consulting Engineers, "which is acting on a contingency (*Pro Bono*) basis" for Richard Costello in his planning application made on 31st August, 2004, that the respondent purported to invalidate Mr. Costello's application for permission by letter dated 24th September, 2004 and that there had been voluminous correspondence subsequently between the respondent and the firm of John Paul Lennon and Company, and its subsidiary, Brunel Management Company, which was exhibited. The applicant stated his belief that a dispute existed between the parties which could only be resolved by a declaration of the court and he sought such declaration. A replying affidavit sworn by Kieran Reeves, a Senior Executive Planner in the planning department of the respondent, was filed on 26th January, 2006. In the affidavit, it was intimated that, as the respondent had been advised that the proceedings are unsustainable, it was intended to bring an application under O. 19, r. 28 of the Rules of the Superior Courts, 1986 (the Rules) and the court's inherent jurisdiction.

The application

4. The application now before the court is the respondent's application for an order pursuant to O. 19, r. 28 of the Rules and/or for an order within the inherent jurisdiction of the court striking out the proceedings as being unsustainable, frivolous and vexatious and an abuse of the process of the courts. Essentially, the respondent advances two grounds on which it is contended that the proceedings are unsustainable:

(a) that, being neither the owner nor the occupier nor having any interest in the premises at No. 3 George's Quay, the applicant has no locus standi to institute the proceedings; and

(b) the proceedings cannot be maintained procedurally because any challenge to the decision of the respondent returning the planning application on the ground of invalidity should have been brought within the time limit and in the mode prescribed in s. 50 of the Act of 2000.

5. In a replying affidavit sworn by him in response to this application, the applicant set out what I presume to be the real purpose behind these proceedings in asserting that Richard Costello had made a valid application on 31st August, 2004, that the respondent had failed to make a lawful decision in respect of the application within the appropriate time allowed by the Act of 2000 and, therefore, a decision to grant permission for the retention of the canopy is regarded as having been given by the respondent on 27th October, 2004.

Locus standi

6. The applicant contends that, although he has no beneficial interest in the lands the subject of the planning application, he has a potentially beneficial interest in the application for permission, because the contract which he, through John Paul Lennon & Co., has made with Mr. Costello is that no fee or expense will be paid unless retention permission for the canopy is granted by the respondent. He says that his interest is one of the "*res incorporales*" well known to the Roman Law of Property. That is not a concept with which I am familiar.

7. In *Frascati Estates v. Walker* [1975] I.R. 177 the Supreme Court set out the circumstances in which a person can make a valid

application for planning permission. In his judgment, with which the other four judges of the Supreme Court agreed, Henchy J. stated as follows:

"... I consider that an application for development permission, to be valid, must be made either by or with the approval of a person who is able to assert sufficient legal estate or interest to enable him to carry out the proposed development, or so much of the proposed development as relates to the property in question. There will thus be sufficient privity between the applicant (if he is not a person entitled) and the person entitled to enable the applicant to be treated, for practical purposes, as the person entitled."

8. The applicant has no estate or interest in No. 3 George's Quay, and, accordingly, he could not make a valid planning application in relation to that property. In any event, the application to which the proceedings relate was not made by him, it was made by Richard Costello. As the applicant could not make a valid planning application in relation to No. 3 George's Quay, and, in fact, did not make the application the subject of these proceedings, it follows that he has no standing to bring proceedings in this Court seeking a declaration as to the validity of the application.

The procedural point

9. Section 50(2) of the Act of 2000 provides as follows:

"A person shall not question the validity of –

(a) a decision of a planning authority –

(i) on an application for a permission under this Part ...

otherwise than by way of an application for judicial review under Order 84 of the Rules ..."

10. Sub-section (4)(b) of the same section provides that an application for leave to apply for judicial review shall be made by motion on notice to the planning authority and that 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. The time limit for bringing such an application is eight weeks, commencing on the date of the decision of the planning authority.

11. The decision of the respondent which the applicant seeks to have declared invalid in these proceedings is a decision of a planning authority on an application for permission to which Part III of the Act of 2000 applies. Therefore, it cannot be challenged in these proceedings.

Jurisprudence on Order 19, rule 28/inherent jurisdiction to strike out

12. The circumstances in which the court is entitled to strike out proceedings as being unsustainable, frivolous, vexatious or an abuse of process are well settled. They were reiterated recently by the Supreme Court in the authority cited by counsel for the respondent: *Fay v. Tegral Pipes Limited* [2005] 2 I.R. 261. The fundamental test is whether it is clear that the applicant's claim must fail.

13. In my view, in this case it is absolutely clear that the applicant's claim must fail on both grounds alleged by the respondent.

Precedent cited by the plaintiff

14. In one of the affidavits sworn by him, the applicant has averred that in the case of *John V. Lennon v. The Lord Mayor, Aldermen and Burgesses of the City of Cork* (The High Court, 1999 No. 475 SP), in which he was the plaintiff, and which he has averred was identical, in the matter of *locus standi*, to these proceedings, Herbert J. held that he had proper locus standi to take the proceedings and that the case was ultimately decided in his favour by Barr J.

15. In order to clarify the situation, I have read the court file in relation to those proceedings. They were initiated by way of special summons, in which the plaintiff claimed a declaration in the following terms:

"A declaration that the period of two weeks referred to in Article 14(1)(a) of the Local Government (Planning and Development) Regulations, 1994 does not include the day upon which the application is made."

16. The order made by Barr J. on 6th October, 2000 was an order declaring that the period of two weeks referred to in Article 14(1)(a) does not include the day upon which the application was made. In other words, the plaintiff succeeded on an issue of the proper construction of a provision in a statutory instrument. In that case, the applicant did not seek, and the court did not grant a declaration concerning the validity or otherwise of a planning application made by a third party in respect of property owned by the third party.

17. It is clear on the evidence in the instant proceedings that two of the matters stipulated by the respondent in its letter of 24th September, 2004 as supporting the invalidity of the application of 31st August, 2004 involved regulatory time limits. As I understand the applicant's position, it is that the respondent is simply wrong in its interpretation of the Regulations. Even if the plaintiff's interpretation is correct, as a matter of law, he cannot pursue the relief he seeks in these proceedings.

Order

18. There will be an order striking out the proceedings.